No. 18-459

In The Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud or other forms of unlawful conduct in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014). These activities include registering local securities offerings; licensing and examining broker-dealers and investment advisers who sell securities or provide investment advice; and initiating enforcement actions to combat fraud and other violations of state securities laws. One of NASAA's goals is to foster greater uniformity across state and federal securities laws, though the overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud or other unlawful conduct in the securities markets.

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[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analysis and policy perspective to state and federal courts as amicus curiae in cases involving the interpretation of state and federal securities laws.

NASAA and its members have a strong interest in this case, which raises important questions of investor protection and the ability of shareholders to initiate remedial actions—a crucial component of the securities enforcement framework—and thereby deter and recover for harm caused by false or misleading statements that influenced their decisions about tendering shares. Eliminating the long-established private enforcement mechanism would reopen the significant regulatory gap Congress sought to close between takeovers-by-proxy and takeovers-by-tender-offer, to the detriment of the investing public.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than five decades, it has been settled in the lower courts, acknowledged by scholars, implicitly accepted by this Court, and condoned by Congress that Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), confers a private remedy on shareholders injured by those who violate its prohibitions. Affirming this private right of action under Section 14(e) also accords with the private right of action permitting similarly-wronged investors to recover money damages for false or misleading statements made in the context of proxy solicitations under Section 14(a), a right that was recognized by this Court in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), four years before the Williams Act's passage. Section 14(e) reflects Congress's intent that the regulation of tender offers be in parity with that governing proxies. And the text of Section 14(e)'s first clause unambiguously imposes the same culpability standard as under Section 14(a): negligence. The Ninth Circuit's close reading of the plain meaning of the statute's first clause did not create or extend a private right of action; it just recognized the unambiguous scope of the private right that Congress intended more than 50 years ago.

I. Addressing what was effectively a question of first impression in the courts of appeals, the Ninth Circuit correctly ruled that the first operative clause of Section 14(e)—echoing language that this Court has interpreted to require only negligence in other securities law statutes—was devoid of any language requiring knowing misconduct. Standing in contrast to the second clause, which uses the phrase "fraudulent, deceptive, or manipulative acts or practices," the first clause prohibits "any untrue statement of a material fact" or material omission, terms that sound in negligence only. No other court of appeals has staked out a considered opposing position. Rather, previous appellate rulings interpreted Section 14(e) to require scienter before guiding precedents from this Court read identical language elsewhere to cover negligence; addressed second-clause cases based on allegations of only knowing misconduct; did not carefully unpack the disjunctive operative clauses in Section 14(e); or all of the above.

When Section 14(e)'s grammatical structure is parsed, the first clause facially prohibits negligent untruthful statements or material omissions. The plain text of Section 14(e) imposes no "uniform culpability requirement" for its disparate clauses. *See Aaron v. SEC*, 446 U.S. 680, 697 (1980). And the negligence standard not only conforms to the dictates of Congress's word choice and grammar, it mirrors the negligence standard that courts have been applying for decades under Section 14(a) in the proxy context. There is no obvious reason for adopting a different liability standard under Section 14(e), and every reason not to.

II. As to the already-settled question whether a private right exists, this Court should decline to address a question that was expressly disclaimed in the courts below. Raising an issue for the first time on one page of a rehearing petition is too little too late to preserve a question for this Court's review. But if the Court does strain to reach the issue, now is the time to affirm explicitly what has long been accepted without need for elaboration: Congress intended there to be a remedy under Section 14(e) for target-company shareholders deprived of the full disclosures and accurate information for tender offers promised by the Williams Act. Affirming a negligence standard for the statute's first clause, as the text demands, does nothing to alter this private right analysis and honors Congress's demonstrated intent in the Williams Act.

The will of the enacting Congress is what matters when discerning legislative intent. And Congress would have expected the text that it enacted in 1968, a mere four years after this Court's decision in *Borak*, to confer a private right of action. Legislative history for the Williams Act's 1970 amendments confirms as much, showing that Congress was favorably aware that courts were already permitting private rights of action under Section 14(e). The Williams Act's history also confirms that Congress intended proxy contests and tender battles to proceed under similar regimes.

In the proxy sphere, private enforcement of Section 14(a)—where failure to provide mandatory disclosures is protected by a negligence standard—provides a necessary and welcome complement to public enforcement. The same holds true of Section 14(e) in the tender context. Both are narrowly-tailored prohibitions on disclosure failures in particularized contexts where Congress intended shareholders to have complete and accurate information so markets could function properly and investors would be adequately protected.

Far from being a disruptive force, private securities actions instead further Congress's statutory purpose to foster regulatory compliance and well-functioning markets. As this Court, federal regulators, and NASAA's state regulator members all agree, such private actions are "crucial to the integrity of the domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 n.4 (2007).

ARGUMENT

I. All Tools Of Statutory Construction Confirm That Section 14(e)'s First Clause Sounds In Negligence.

The Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), aimed to "insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8–11 (1985) (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)). By doing so it closed "a rather large gap in the securities statutes," *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 27 (1977) (citation omitted), mandating full disclosure of all material facts when takeovers were attempted by tender offer, as was already required for takeovers attempted by proxy solicitation.

The Ninth Circuit's holding that Section 14(e)'s first clause can be satisfied through a negligence standard—the first of any court of appeals to carefully parse the statute—is dictated by Section 14(e)'s text. This Court has recognized as much in similar contexts, and the Solicitor General agrees. *See* SG Br. 13–26. The plain meaning of Section 14(e) thus resolves the matter.

But there is more. The Williams Act's legislative history shows Congress intended to prohibit negligent failures to fully disclose material information during tender offers, in service of the Act's promise that complete and accurate information be provided to investors. And the settled history of the parallel standards in the proxy solicitation context confirm as much.

A. The Ninth Circuit's Close Reading of Section 14(e)'s First Clause Is Correct.

The starting point in any dispute about the proper interpretation of a statute is the text itself. If the words and logic yield an interpretation that is unambiguous, the Court's inquiry ends. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Legislative history and public policy considerations can also be relevant if a statute has more than one valid interpretation. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). Here, as the United States agrees, all statutory construction tools point to one answer: the first clause of Section 14(e) sounds in negligence.

Section 14(e)'s first sentence contains two separate operative prohibitions, divided by the disjunctive "or." Its first substantive clause makes it "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." 15 U.S.C. § 78n(e). The second clause, in turn, "makes it unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices." *Id.* Both govern conduct "in connection with any tender offer . . . ." *Id.*

Section 14(e)'s second sentence, added in 1970, provides the Securities and Exchange Commission ("SEC") with explicit rulemaking authority to define the fraudulent, deceptive or manipulative practices described in Section 14(e)'s second clause. *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497 (1970). This additional rulemaking authority, applicable only to the second clause, is further confirmation of Congress's intent to treat the two types of prohibitions separately. *See* SG Br. 20–21; Resp. Br. 16–17.

By its terms, the first clause does not suggest scienter is required. And the words "fraudulent, deceptive, or manipulative" appear only in the second clause. 15 U.S.C. § 78n(e). If the second clause had not been included, there would be no reason to infer scienter from Section 14(e)'s prohibitive commands. Basic rules of grammar thus dictate that the inclusion of the second clause, separated by a disjunctive, does not change the meaning of the first clause. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not.").

What is more, Section 14(e) is "nearly identical" to Section 17(a)(2) of the Securities Act of 1933, which this Court has interpreted as not requiring scienter. Pet. App. 12a–13a; *see Aaron*, 446 U.S. at 696–97. As in Section 17(a), the powerful disjunctive "or" removes any "uniform culpability requirement" for the provision. *Id.* at 697. And contrary to Petitioners' hyper-formalistic insistence, Pet. Br. 37, the plain meaning of the text controls, not the presence or absence of numbers to separate grammatically distinct clauses. It is the statute's "operative text" that shows Congress's intent, not its packaging. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 47 (2008) (subchapter headings cannot "substitute for the operative text of the statute"). The separate numbering of Section 17(a) thus merely "reaffirm[ed] conclusions drawn from the words themselves," *United States v. Naftalin*, 441 U.S. 768, 774 & n.5 (1979), and the absence of numbering in Section 14(e) cannot defeat the meaning of the words Congress chose. *See also* Resp. Br. 15.

The plain meaning of Section 14(e) is also corroborated by a comparison to Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, as interpreted by this Court in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The texts of the relevant subpart of Rule 10b-5 and of Section 14(e) are substantially similar, and—as this Court recognized in *Hochfelder*, 425 U.S. at 212—sound in negligence. To be sure, Rule 10b-5's otherwise natural negligence reading is displaced by the scienter constraint imposed by its authorizing statute, which governs only manipulative or deceptive devices. *Id.* at 213–14. But "[n]o such constraint applies to the interpretation of Section 14(e)." SG Br. 19 (citing *Aaron*, 446 U.S. at 696).[2]

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[2] Petitioners argue that *Hochfelder* also turned on procedural limits available for express private rights sounding in negligence that were not obviously available for implied private actions. Pet. Br. 31-34. But *Hochfelder*'s discussion on this point was brief and provided only additional support for a conclusion the Court acknowledged was "compelled by" text. *See Hochfelder*,

Seemingly opposing results reached by previous appellate courts, *see* Pet. Br. 2–3, do not dispel the force of the Ninth Circuit's careful reading of the statute. To the extent other courts have analyzed the actual text of Section 14(e) at all, their focus was on the language in its second clause, *i.e.*, "fraudulent, deceptive, or manipulative acts or practices." Until the ruling below, no appellate court separately interpreted the meaning of Section 14(e)'s first clause; they either ignored it entirely (because the facts alleged only second-clause misconduct) or disregarded the disjunctive "or" in Section 14(e) and subsumed the first clause within the second. *See SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (concluding Section 14(e) requires scienter without analyzing the statutory text when scienter was alleged); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (same); *Adams v. Standard Knitting Mills*, *Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) (holding Section 14(e) requires scienter because "Congress used the words 'fraudulent,' 'deceptive,' and 'manipulative'" in the statute but without parsing the first clause);

425 U.S. at 214. And the text of the Williams Act requires a different result. Moreover, the sky has not fallen under 14(a), another private right sounding in negligence which Congress intended 14(e) to parallel, *see* Part I.C. This Court's decisions in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), and *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), recognize that negligence is a workable liability standard for mandatory disclosure violations, while other substantive and procedural limits exist to curtail abuse. *See also* Resp. Br. 17–18. Finally, Congress retains the power to eliminate or procedurally curtail the private right if it so chooses.

Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605–06 (5th Cir. 1974) (holding Section 14(e) requires scienter because the statute uses similar language to SEC Rule 10b-5 with no further textual analysis); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973) (same).

Most of these decisions predated this Court's rulings in *Aaron* (1980) and *Hochfelder* (1976) instructing that "nearly identical" language to Section 14(e) sounded in negligence. Pet. App. 12a. And to the extent these prior decisions elided over the disjunctive "or" in Section 14(e), they erred. *See*, *e.g.*, *Husky Int'l Elecs. v. Ritz*, 136 S. Ct. 1581 (2016) (reversing an appellate court decision that had failed to give effect to a disjunctive "or" when interpreting a statute).

As for this Court, none of its previous encounters with Section 14(e) grappled with or even commented on the meaning of the statute's first clause. *See United States v. O'Hagan*, 521 U.S. 642, 666–78 (1997) (interpreting the scope of SEC authority to define fraudulent acts under Section 14(e)'s second clause); *Schreiber,* 472 U.S. at 12 (interpreting the meaning of "manipulative" within Section 14(e)); *Piper*, 430 U.S. at 22–37 (interpreting and applying Section 14(e) holistically without distinguishing between its first or second clauses and ultimately declining to reach the culpability question). The Ninth Circuit was thus the first appellate court to squarely confront, and carefully read, Section 14(e)'s first clause, and its analysis is the only reading that comports with the statute's plain text.

B. The Legislative History and Purpose of the Williams Act Support a Negligence Standard for Section 14(e)'s First Clause.

Legislative history and the undisputed purpose animating the Williams Act support what the text of Section 14(e)'s first clause makes plain: negligent acts or omissions suffice.

First, the history of amendments to the Williams Act demonstrates that Congress intended the disjunctive in Section 14(e) to separate two distinct prohibitions. Where Congress did *not* want to convey that meaning, it removed the word "or." Specifically, the path to passage of a neighboring provision, Securities Exchange Act Section 13(e)(1), 15 U.S.C. § 78m(e)(1) (regarding issuers' ability to buy-up their own shares), shows that Congress was well-aware of the force of the disjunctive "or." That provision's initial draft read as follows (emphasis added):

> It shall be unlawful for an issuer, 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 ***or*** in order to prevent such acts and practices as are fraudulent, deceptive or manipulative, to purchase any equity security which it has issued . . . .

See Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Sec. of the S. Comm. on Banking & Currency, 90th Cong. 8–9 (1967) (emphasis added) (hereinafter "S. 510 Hearings"). During hearings on the Williams Act and in a written statement, the Chairman of the SEC noted that he interpreted this language as providing SEC rulemaking authority to reach conduct other than potentially fraudulent, deceptive or manipulative practices. *See id.* at 27, 38 (statements of SEC Chairman Manuel F. Cohen). That interpretation necessarily read the disjunctive "or" to mean that each rulemaking clause had separate operative force.

After this was pointed out, though, Congress removed the disjunctive that would have expanded the scope of Section 13(e)(1). The legislative history does not show precisely when this provision was changed.[3] But the upshot was that the SEC's rulemaking authority under Section 13(e)(1) was limited to potential issuer fraud. The final text of Section 13(e)(1) was unambiguous on this point, limiting the Commission's rulemaking authority to prevention of fraudulent acts:

> It shall be unlawful for an issuer . . . to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means

[3] This change first appears in a draft of the Williams Act from July 1968. *See* H.R. REP. No. 90-1711, at 5–6 (1968).

> reasonably designed to prevent such acts and practices. . . . .

15 U.S.C. § 78m(e)(1). Had Congress wanted to limit Section 14(e) to fraud, it could have at the very least deleted the disjunctive in Section 14(e), if not rewritten the provision entirely as it did with Section 13(e)(1).

Second, a Senate Report on the Williams Act described Section 14(e) as prohibiting two types of misconduct: "subsection (e) would prohibit *any misstatement or omission of a material fact*, ***or*** *any fraudulent or manipulative acts or practices*, in connection with any tender offer . . . ." S. REP. No. 90-550, at 10 (1967) (emphasis added). The Senate Report, like the underlying text, thus clearly differentiated bare misrepresentations from knowing fraudulent conduct.

Third, congressional amendments two years after enactment of the Williams Act confirm that Congress meant what it said when it included two distinct prohibitions in Section 14(e), one addressed to fraud (clause two) and the other not (clause one). In 1970, Congress added a second sentence to Section 14(e): "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." *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497–98 (1970).

Congress thus granted the SEC explicit rulemaking authority for the second clause in Section 14(e) but not for the first clause. The SEC did not even ask for rulemaking authority as to Section 14(e)'s first clause. *See Additional Consumer Protection in Corp. Takeovers and Increasing the Sec. Act Exemptions for Small Businessmen: Hearing on S. 336 and S. 3431 Before the Subcomm. on Sec. of the S. Comm. on Banking & Currency*, 91st Cong. 10–12 (1970) (statements of SEC Chairman Hamer H. Budge) (hereinafter "S. 3431 Hearings"). There was no reason to do so, because the SEC's broad authority to regulate disclosures under the Williams Act was clear, having been expressed no fewer than twelve times in the Act. *See generally* Pub. L. No. 90-439, 82 Stat. 454 (1968); *see also* Resp. Br. 16–17. In contrast, the Williams Act was silent as to the SEC's rulemaking authority to implement the specific antifraud language in the second clause of Section 14(e). This omission evidently concerned the Commission, and so the SEC went back to Congress with a request to close this potential gap. *See* S. 3431 Hearings, at 10–12. For the first clause, however, no additional rulemaking authorization was required to define its scope or make it actionable. *See* SG Br. 20–21. Congress's disparate treatment of the rulemaking provisions for each clause confirms that each clause operates distinctly.

C. A Negligence Standard for Section 14(e) Maintains Parity Between Standards Governing Tender Offers and Proxy Solicitations.

It was important to Congress that proxy contests and tender offer battles—two different ways of achieving takeovers—be governed by similar rules, or, as the Solicitor General puts it, to "harmonize" these two areas. SG Br. 11–12. A negligence standard for Section 14(e)'s first clause is consistent with the standard for mandatory proxy disclosures under Section 14(a), 15 U.S.C. § 78n(a).

The Williams Act was not created in a vacuum. Congress patterned it off the preexisting proxy standards developed by the SEC under Section 14(a), including Rule 14a-9, because Congress sought a level playing field between proxy contests and tender offer battles. *See Transcript of Proceedings, S. Comm. on Banking & Currency* at 3 (Aug. 10, 1967) (Senator Williams describing his eponymous bill as a "disclosure bill" that will make "equivalent" the standards between proxy contests and tender offer fights); *Transcript of Proceedings, S. Comm. on Banking & Currency* at 10 (Aug. 1, 1967) (Senator Williams explaining that the bill will "conform the tender offer to the 1964 act amendments as to proxy statements"). Congress did not want to favor either tender offers or proxy battles as vehicles for corporate takeover fights; rather, Congress wanted to maintain a regulatory equivalence between the two regimes.

Negligent failures to comply with mandatory disclosure requirements have long been subject to private enforcement in the proxy context. On the way to holding that Section 14(a) conferred a private right of action, this Court explained that the "purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *Borak*, 377 U.S. at 431. *Borak* did not address the state of mind required for a Section 14(a) violation, but courts easily concluded that negligence was the proper standard for a provision that, like the first clause of Section 14(e), does not reference scienter requirements. A decision by Judge Friendly, *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973), was the first appellate court to rule negligence was the appropriate standard under Section 14(a). A majority of appellate courts have come to agree. *See DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 409 & n.95 (2d Cir. 2016) (collecting cases).[4]

A negligence standard under Section 14(e) maintains Congress's intended equivalence between takeovers-by-proxy and takeovers-by-tender. In both contexts, a negligence standard "reinforce[s] the high duty of care owed by a controlling corporation" to provide complete and accurate information to shareholders, empowering them to make critical decisions in deciding between competing offers for control. *Gerstle*, 478 F.2d at 1300.[5] To read the first

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[4] The Sixth Circuit acknowledged the need for parity in the proxy and tender contexts, in a decades-old case involving third-party liability for accountants (not proxy bidders or tender offerors or controlling corporate officers) that announced a scienter requirement. *See Standard Knitting Mills*, 623 F.2d at 422. In ruling that scienter was required, the Sixth Circuit relied on *Hochfelder*. But the court failed to recognize that *Hochfelder*'s holding was "compelled by" statutory constraints not present in either Section 14(a) or Section 14(e), and also did not separately examine Section 14(e)'s first clause. *Id.* at 428–30.

[5] Upholding a negligence standard under the first clause of Section 14(e) would also be consistent with the standards this Court applies not only to claims by the SEC under Sections 17(a)(2) and 17(a)(3) of the Securities Act, *Aaron*, 446 U.S. at 702, but also to private claims under Section 11 of that Act, 15 U.S.C.

clause of Section 14(e)—countertextually—to require scienter would be to reopen a regulatory gap that Congress thought it definitively closed when it put tender offers on par with proxy solicitations fifty years ago.

II. This Court Should Not Overturn Settled Precedents Upholding An Implied Private Right Of Action Under Section 14(e).

This Court should decline to reach the separate question of whether a private right of action should be implied under Section 14(e) at all. It was not seriously litigated below and mere mention in a rehearing petition is not enough to preserve an issue for this Court's review.

Agreeing to reach an issue expressly conceded below (and therefore never tested by the adversarial process) would encourage future litigants to game the system. But if this Court does choose to engage, it should answer that unnecessary question with the obvious "yes" it deserves. Even today's profound distaste for implying private rights does not justify jettisoning existing ones. And there is more to defend the private right here than consistent judicial practice and congressional acquiescence. Because even if examined anew, the text, structure, history, and

§ 77k. Section 11 provides a make-whole remedy for shareholders who purchase securities pursuant to a materially false or misleading registration statement and liability can be satisfied through negligence. *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85, 130 (2d Cir. 2017).

purpose of the Williams Act also support finding that a private right should lie for Section 14(e).

A. This Court Should Decline To Reach a Question Expressly Disclaimed, and Not Passed Upon, Below.

The Ninth Circuit never reached the question of the existence of an implied right of action under Section 14(e), likely because it was considered settled law, and even more likely because Petitioners conceded the question when pressing their case. *See* BIO 28; Resp. Br. 26–27.

A glancing reference on one page of a rehearing petition, *see* Pet. Br. 43 n.12, does not undo a party's prior concession, and should not suffice to satisfy this Court's "pressed or passed upon" rule. *Youakim v. Miller*, 425 U.S. 231, 235 (1976). Engaging with this late-arriving question would create perverse incentives for parties to save their best for last, allowing them to raise new arguments only after their appeal of right has concluded.

If unsuccessful litigants can disclaim an issue during the course of litigation, yet resurrect it by simply tossing a paragraph into a rehearing petition, then neither the opposing party nor the appellate courts have the opportunity promised by the rules for the full and fair airing of issues before this Court's "review, not . . . first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Spending this Court's scarce resources to decide an issue that was not passed on because it was so barely "pressed" below condones gamesmanship.

Nor is it necessary to resolve the private action question in order to determine the scope of Section 14(e)'s prohibition on false statements. The two issues are analytically distinct. Whether or not Congress intended the prohibition to be privately enforceable (and it did), the prohibition's scope necessarily remains the same. And the meaning of Section 14(e)'s first clause cannot be held hostage to the separate private right question on the theory that the Ninth Circuit's culpability ruling somehow "extended" a long-established private right. A court does not "extend" anything when it re-states what is already express in the statute, even when that court, like the Ninth Circuit here, is the first to closely read the specific text at issue.

Contrary to Petitioners' arguments, Pet. Br. 43–45, there are not distinct analyses for private rights of action that remedy negligence and those that remedy fraud; there is only one question—did Congress intend to confer a remedy, the answer to which does not depend upon the substantive scope of the prohibition. And the inverse is true—one can determine whether Section 14(e) covers negligently untrue statements without regard to the manner of enforcement. *See* Resp. Br. 11. The proof is in the Court's prior decisions, which saw no reason to intermingle the two questions. The Court never questioned the existence of a private right in *Schreiber*, 472 U.S. 1, when determining the scope of "manipulative" for Section 14(e)'s second clause. And there is equally no reason to question its existence here in deciding the negligence standard for the first clause.[6]

B. Based on this Court's Precedent, Congress Reasonably Would Have Expected Its Enactment of Section 14(e) to Confer a Private Remedy.

If this Court nonetheless reaches out to catch the question neglected below, it should conclude that shareholders of companies targeted by a tender offer do have a private right of action under Section 14(e). The text, structure, history and purpose of the Williams Act prove as much, especially when the "circumstances of its enactment," *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), are duly considered.

1. When deciding whether to imply a private right in a federal statute, this Court's mission is to infer what Congress intended when it enacted the statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982). So the "initial focus must be on the state of the law at the time the legislation was enacted." *Id.*

When the Williams Act was passed, the default rule was that provisions benefiting particular classes

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[6] If the Court determines, however, that the culpability standard of Section 14(e)'s first clause is inextricably intertwined with the existence of a private right, it should dismiss the petition as improvidently granted given Petitioners' express concession that a private right of action exists under Section 14(e) and the resulting absence of any judicial ruling on this point to inform this Court's review.

of private actors would be enforceable by implied private actions absent express congressional foreclosure. *Id*. at 374–77. And the Court had made it clear—just four years earlier—that proxy fights under Section 14(a) were proper fodder for private litigation. Specifically, in *Borak* the Court held that Section 14(a)'s investor-protection purpose "implies the availability of judicial relief where necessary," and private enforcement "provides a necessary supplement to Commission action." 377 U.S. at 432. The proxy solicitation regime—complete with private right of action—was the very context that Congress was seeking to mirror with respect to tender offers in the Williams Act. Congress thus reasonably expected that its enactment of Section 14(e) conferred a similar private remedy in the tender-offer context when it used words in Section 14(e) that were virtually indistinguishable from those of Rule 14a-9, which *Borak* had just declared privately enforceable. *See* Resp. Br. 30 n.14.

Evolution in judicial (un)willingness to infer private rights cannot displace the enacting Congress's manifest intent. Where, as here, the statute is intended to parallel a preexisting implied right that this Court had already recognized, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979).

2. To be sure, such historical "context shorn of text" is not dispositive. *Alexander v. Sandoval*, 532

U.S. 275, 288 (2001). But here the textual prohibition of specified conduct in a circumscribed realm, directed to protect a defined class, combined with the fact that the period of the 1960s and early 1970s was one in which "this Court had consistently found implied remedies," suffices to carry the day. *Cannon*, 441 U.S. at 698.

The broad language of Section 14(e) contains the affirmative textual support needed to create a private right of action. A comparison with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), is illuminative. There, the Court held that Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q(a), did not create a private right because it "proscribes no conduct as unlawful," 442 U.S. at 576, and "[b]y its terms," was "forward-looking, not retrospective," seeking to promote good conduct and "forestall insolvency, not to provide recompense after it has occurred." *Id.* at 570–71. In contrast, Section 14(e)'s text—like that of Section 14(a) and Rule 14a-9, which provide the private right for the proxy context—plainly proscribes conduct as unlawful and looks backward in doing so (assessing violations after the fact) indicating an intention to compensate for injury.

Nor does Section 14(e)—or anything else in the Williams Act—evince any congressional intent to limit the rights-creating language to a specific equitable remedy. That happened in *Transamerica*, where the Court read two provisions *in pari materia* to limit the implied right under the Investment Advisers Act of 1940 to the "specific and limited relief" of equitable rescission of the contracts involved. 444 U.S. at 18. But Section 14(e), like the private right in Section 14(a) confirmed in *Borak*, and in contrast to the provision construed in *Transamerica*, has no neighboring provisions that circumscribe its scope of relief.

3. Beyond Section 14(e)'s conduct-proscribing text that aims to protect a targeted class of actors, and the absence of any indicia that Congress intended to circumscribe a private remedy in the wider statutory structure, the Williams Act's legislative history shows that Congress was aware, and welcomed, judicial enforcement of a private right to protect the statute's full-disclosure promise. *Borak* and its implications for implied private rights were mentioned twice in written statements to Congress. *See* S. 510 Hearings, at 67 (written statement of Professor Carlos L. Israels) ("Presumably we may assume that the Commission will be able to enforce the provisions of this Bill, if it is enacted, and of its rules thereunder by proceedings for injunction in the Federal courts; and that under *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) a private litigant could seek similar relief before or after the significant fact such as the acceptance of his tender of securities."); *id.* at 140 (written statement of Professor William H. Painter) (discussing the Williams Act's use of the term "unlawful" and stating, "such language is being judicially construed to allow not only injunctive relief by the Commission and criminal penalties for willful violations but also private remedies to injured investors (*J. I. Case Co. v. Borak*, 377 U.S. 426 (1964))").

Congress's subsequent amendments to the Williams Act, moreover, reflected acquiescence in judicial interpretations of the Act as conferring a private right of action. When Congress amended the

Williams Act in 1970, it was aware that private lawsuits had already been brought under the Act— yet did not seek to foreclose them. *See infra* Part II.C. The Act's sponsor, Senator Williams, described how the Act had "worked well in lifting the veil of secrecy that had previously surrounded tender offers." S. 3431 Hearings, at 1.[7]

4. This Court has also recognized Congress's purpose to protect shareholders. In *Piper*, 430 U.S. at 31–33, the Court declined to extend the private right of action under Section 14(e) to tender *offerors*. But the Court did not cast doubt on the accepted notion that a private remedy was available for shareholders, the class Congress plainly intended to protect. After a thorough discussion of the legislative history and purpose of the Williams Act, the majority concluded that the Williams Act's "sole purpose . . . was the protection of investors." *Id.* at 35. The plaintiff-offeror there had no implied right of action for damages under 14(e), not because there was no such action, but because the plaintiff "did not sue in the capacity of an injured Piper shareholder, but as a defeated tender offeror." *Id*. at 39, 42. The dissent made explicit what was implicit within the majority's reasoning, "Section 14(e) was patterned after § 14(a), which regulates proxy contests. It is clear that a shareholder may recover in a suit under § 14(a) even though he was not

[7] Congress amended the Williams Act a second time in 1977, and again did not tamp down on the implied private rights. *See Fla. Commercial Banks v. Culverhouse*, 772 F.2d 1513, 1517–18 (11th Cir. 1985).

himself deceived by the misrepresentations." *Id.* at 57-–58 (footnotes omitted).

So, while *Piper* concluded that tender offerors lacked standing, it has been subsequently interpreted to stand for the general proposition that *shareholders and tender offer targets* do have an implied private right. If this settled precedent is to be disturbed, it is for Congress, not this Court to do so, especially given the thin ice on which this unnecessary question presented currently stands. *See* Resp. Br. 27–28.

C. The Existence of an Implied Private Right in Section 14(e) Is Entrenched and this Court Should Not Now Overturn It.

Even *Sandoval* itself, although declining to infer a private right from a regulation that surpassed the scope of the authorizing statute, confirmed the existence of a private right for Section 601 of Title VI of the Civil Rights Act of 1964. The Court accepted that private right as "given" because it had "already been construed as creating a private remedy," and courts and Congress had long acquiesced. 532 U.S. at 280 (discussing and quoting *Cannon*, 441 U.S. at 696). The same holds true here.

Where an implied private right of action has previously been recognized and become established precedent, the Court has been unwilling to lightly set it aside. *See Virginia Bankshares, Inc.*, 501 U.S. at 1114 (Kennedy, J., concurring in part and dissenting in part). Although this Court may refuse to expand the scope of implied private rights, it has proved loath to scrap an implied private right once it has been judicially accepted. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 192–93 (2005).[8] This is especially true in the securities context where courts, Congress, and regulators have viewed private remedies as an essential component of the menu of enforcement options since the 1940s. *E.g.*, *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (recognizing implied action under Section 10(b) of the Securities Exchange Act of 1934).

The first Section 14(e) case, filed a few weeks after the Williams Act was signed into law, never even discussed whether Section 14(e) conferred a private right. This issue was simply assumed to be true—by everyone. The district court and appellate court decisions focused instead on the secondary issue of whether the plaintiffs—nontendering shareholders and the targeted company—had standing. *See Elec. Specialty Co. v. Int'l Controls Corp.*, 296 F. Supp. 462 (S.D.N.Y. 1968), *aff'd in part* 409 F.2d 937 (2d Cir. 1969).

The understanding that an implied private right of action exists under Section 14(e) quickly became

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[8] Giving the text of Section 14(e) its plain meaning to reach negligent material misstatements as well as fraud would not be, as Petitioners argue, "expanding" the long-recognized private right of action under Section 14(e). *See* Pet. Br. 22–42. To the contrary, to engraft a scienter standard throughout Section 14(e) would curtail an existing private right of action, limiting the statute to its second clause. In all events there is no reason to throw the baby out with the bath water and eliminate the private right of action that has long existed for scienter-based frauds and deception under the second clause of Section 14(e).

entrenched in the Second Circuit, *see Butler Aviation Int'l v. Comprehensive Designers*, *Inc.*, 425 F.2d 842 (2d Cir. 1970), and accepted in other circuits as well. *See Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir. 1970); *Susquehanna Corp. v. Pan Am. Sulphur Co.*, 423 F.2d 1075 (5th Cir. 1970). In *none* of these early Section 14(e) cases was the existence of a private right of action ever questioned.

This understanding of Section 14(e) was widely shared by law professors and practitioners. Review of legal scholarship in the late 1960s and early 1970s indicates unanimous recognition of the right. For example, Professor Loss's securities law treatise, updated in 1969, devoted a dozen pages to the Williams Act. The treatise discussed potential remedies for private litigants under the Williams Act but never evinced any doubt that implied private rights existed thereunder. *See generally* VI LOUIS LOSS, SECURITIES REGULATION 3658–69 (2d ed. Supp. 1969).

Law journal articles also did not question the point. When the Williams Act was pending in Congress, several articles were published about it. None expressed doubt that the Williams Act would create private rights of action, including in Section 14(e). *E.g.*, Victor Brudney, *A Note on Chilling Tender Solicitations*, 21 RUTGERS L. REV. 609, 624 (1967) (stating the Williams Act "will create a happy hunting ground for plaintiffs"); Joseph D. Reid, *Senate Bill 510 and the Cash Tender Offer*, 14 WAYNE L. REV. 568, 587 (1968) (stating acquirers will "hold themselves open to the possibility of litigation from disapproving minority shareholders, sellers of shares during the takeover and the SEC"). In 1969, a law review article noted that, "[a]s most observers predicted, the federal courts have now accepted jurisdiction under Section 14(e) of suits by offeree companies," and suits brought by offerors and shareholders were likely. W. McNeil Kennedy, *Defensive Take-Over Procedures Since the Williams Act*, 19 CATH. U. L. REV. 158, 162 (1969).[9]

The courts and Congress's acquiescence in the private right has extended well beyond the years immediately after its passage. Although sometimes sloppy with respect to parsing the differing culpability standards, courts of appeals have continued to unquestioningly allow private enforcement. *See*, *e.g.*, *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 352 (2d Cir. 1990) (upholding a private right of action on behalf of tender offer shareholders under Section 14(e)); *Plaine v. McCabe*, 797 F.2d 713, 717–18 (9th Cir. 1986) (same); *Fla. Commercial Banks*, 772 F.2d at 1516–19 (upholding a private right of action for an issuer under Section 14(e)); *Gearhart Indus.*, *Inc. v. Smith Int'l Inc.*, 741 F.2d 707, 714–16 (5th Cir. 1984) (same).

And while this Court has never explicitly pronounced that Section 14(e) confers a private right, it has done everything but. *Piper* denied the private right only to tender offerors, and both the majority and

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[9] It was not until the late 1970s that some scholarship began to question the existence of implied private rights under the Williams Act. *See*, *e.g.*, Harvey L. Pitt, *Standing to Sue Under the Williams Act After* Chris-Craft*: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117 (1978). And that scholarship failed to gain any traction in the appellate courts.

dissent recognized that shareholders were indisputably the protected class under Section 14(e), presuming their right to private enforcement. *See* 430 U.S. at 39, 42, 57–58. *Schreiber* similarly took as given the existence of the private right when defining its elements. 472 U.S. at 2. *Rondeau*, 422 U.S. at 60 & n.10, acknowledged the existence of "an adequate remedy by way of an action for damages," when ruling on the Williams Act's requirements for injunctive relief. And *O'Hagan*, 521 U.S. at 667, 671, twice-referred to Section 14(e) as a "self-operating" provision. Such a long-settled understanding of courts, litigants, and Congress should not be disrupted, especially given the historical embrace of private rights in the securities law context.[10]

D. Allowing a Negligence-Based Private Right Under Section 14(e) Furthers the Statute's Purpose and Is Sound Public Policy.

In enacting the Exchange Act and its follow-on statutes, "Congress sought to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring) (quoting *SEC v. Zandford,* 535 U.S. 813, 819 (2002)). That is why the statute "should be construed not technically and

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[10] As Respondents explain, Congress has made no attempt to change this status quo, despite repeated opportunities to do so when amending the securities laws; if anything Congress has endorsed the existence of a private right under Section 14(e). *See* Resp. Br. 41–43.

restrictively, but flexibly to effectuate its remedial purposes." *Id*.

To achieve these remedial purposes, the Court has long recognized the importance of private securities litigation as a supplement to government regulation. *E.g.*, *Tellabs, Inc.*, 551 U.S. at 320 n.4 (2007) ("Nothing in the PSLRA . . . casts doubt on the conclusion 'that private securities litigation is an indispensable tool with which defrauded investors can recover their losses'—a matter crucial to the integrity of domestic capital markets." (quoting *Merrill Lynch*, *Pierce*, *Fenner & Smith*, *Inc. v. Dabit*, 547 U.S. 71, 81 (2006))); *Lampf*, *Pleva*, *Lipkind*, *Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (1991) (private lawsuits are "an essential tool for enforcement of the 1934 Act's requirements" and "a necessary supplement to Commission action" (first quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988); then quoting *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985))).

NASAA's state regulators agree. Private securities actions help maintain robust capital markets by deterring fraud and other corporate malfeasance and by convincing investors that if they are harmed by incomplete or untrue disclosures, they have fair opportunities to recover their losses. Federal regulators, too, are on record as supporting private actions. *See* SG Br. 30–31 (agreeing that private rights recognized by the Court are an "important adjunct to government enforcement").

In a 2018 speech, SEC Commissioner Robert J. Jackson acknowledged that "world-class [SEC] enforcement attorneys cannot do it all alone, [and] [t]hat's why the Supreme Court has said for years that policing corporate wrongdoing is a team effort." Robert J. Jackson Jr., Comm'r, SEC, Address at CECP CEO Investor Forum: *Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration* (Feb. 26, 2018).[11]

The SEC's Investor Advocate likewise recently described the "very good reasons why shareholders have been given private causes of action." Rick Fleming, Investor Advocate, SEC, Address at PLI's The SEC Speaks in 2018: *Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders* (Feb. 24, 2018).[12] He explained the government's "traditionally . . . limited role in policing our markets, as evidenced by the fact that only 4,600 SEC employees oversee approximately $72 trillion in securities trading each year, as well as the disclosures of more than 8,100 public companies and the activities of more than 26,000 registered entities." *Id.* And he recounted his experiences as a state regulator, where he "frequently cautioned investors that they should retain private counsel, because even though the interests of victims were generally aligned with the interests of [state securities regulators], those interests could diverge." *Id.* Thus, "it might be in the best interest of the state to take away a license," but that could "decrease the likelihood that a victim would

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[11] *Available at* https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618.

[12] *Available at* https://www.sec.gov/news/speech/fleming-sec-speaks-mandatory-arbitration.

be repaid." *Id.* "[I]nvestors [also] have remedies that may not be available to regulators, the most important of which is the ability to seek full restitution of their losses instead of merely disgorging the bad actor's ill-gotten gains." *Id.* NASAA could not agree more: private actions are necessary complements to, not substitutes for, state and federal enforcement. And these observations by federal enforcers belie the Solicitor General's suggestion that state or federal enforcement actions and private state claims alone are an adequate substitute for federal private actions. SG Br. 32 n.4.

Even Congress, in legislation designed to curtail the scope of private securities litigation through the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 757, and the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, retained the core principle that private rights of action should remain: "The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. REP. No. 104-98, at 8 (1995).

Finally, private securities litigation such as the implied right that has long existed under Section 14(e) serves a significant role in maintaining investor confidence by enforcing disclosure standards set forth in the securities laws. As this Court has recognized, the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Dabit*, 547 U.S. at 78. Nor is it a problem that implied private actions may overlap with express private actions or government enforcement. As this Court has recognized, a belts-and-suspenders approach to securities enforcement is welcome: given the broad goals of the securities laws to achieve honest and efficient markets based on fair and full access to information, the "fact that there may well be some overlap is neither unusual nor unfortunate." *Naftalin*, 441 U.S. at 778 (quoting *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 468 (1969)).

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision or dismiss the petition as improvidently granted.

Respectfully submitted.

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