



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   EMULEX CORPORATION, ET AL.,                    )  
4                                    Petitioners,                    )  
5                                    v.                                    ) No. 18-459  
6   GARY VARJABEDIAN, ET AL.,                    )  
7                                    Respondents.                    )  
8   - - - - -

9  
10                                   Washington, D.C.  
11                                   Monday, April 15, 2019

12  
13           The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:04 a.m.

16  
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23           in support of neither party.  
24   DANIEL L. GEYSER, ESQ., Dallas, Texas;  
25           on behalf of the Respondents.

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1 through the trial court, court of appeals, not  
2 a word -- everybody accepted there was a  
3 private right of action. And you are now  
4 making the non-existence of a private right  
5 your principal argument.

6 But, as you -- as you well know, this  
7 is a court of review, not of first view. If  
8 we're going to take up that question, it  
9 shouldn't start here.

10 MR. GARRE: Sure. Justice Ginsburg, I  
11 would point you first to this Court's decision  
12 in Central Bank of Denver, which -- in which  
13 case this Court present -- confronted the exact  
14 same situation, except we're actually in a much  
15 stronger position here.

16 There, the petition for cert was on  
17 the question of whether or not the standard for  
18 an implied private right of action for aiding  
19 and abetting under Section 10 and Rule 10b-5  
20 was recklessness or scienter. The cert  
21 petition didn't raise any question about  
22 whether there was an underlying implied private  
23 right for aiding and abetting. This Court  
24 itself raised and added that question. It  
25 granted certiorari, and it resolved the case on

1 that ground.

2 Now we are in a much stronger position  
3 than Central Bank because, first of all, it's  
4 undisputed that we raised this at the cert  
5 stage. The broader issue -- argument is fairly  
6 included within -- within the question  
7 presented.

8 Next, we did flag the argument below  
9 in our petition for rehearing. We specifically  
10 said, on page 14 of our petition for rehearing,  
11 if Section 14(e)'s implied right of action to  
12 -- had to sweep in negligence, that would be  
13 grounds for eliminating it, not expanding it.

14 JUSTICE KAGAN: But --

15 MR. GARRE: And we cited the Ninth  
16 Circuit's decision explaining why there could  
17 be no private of right of action under Section  
18 17(a). I'm sorry, Justice Kagan.

19 JUSTICE KAGAN: I mean, Mr. Garre,  
20 that is the single sentence, right? And you  
21 don't ask the Ninth Circuit to overrule its  
22 decisions about private rights of action; it's  
23 really more just part of your argument about  
24 the negligence standard, isn't it?

25 MR. GARRE: No, I -- I would disagree

1 with that. It -- it's a separate point,  
2 flagging -- we do make it on the next page as  
3 well. So there's two references.

4 And I -- I agree it -- it's not a  
5 free-standing argument, but the point of this  
6 statement in our brief is, if you really could  
7 read Section 14(e) to encompass negligence,  
8 then you couldn't possibly have any private  
9 right of action. Everything comes crumbling  
10 down. And we --

11 JUSTICE BREYER: You're saying that,  
12 but, I mean, I just want to add to what --

13 MR. GARRE: Right.

14 JUSTICE BREYER: -- Justice Kagan  
15 said. You told the Ninth Circuit, I take it,  
16 quote, that your client did not dispute that  
17 Section 14(e) provides for a private right of  
18 action.

19 MR. GARRE: That's correct. And we  
20 did that --

21 JUSTICE BREYER: End quote. And then  
22 later, you add this sentence that says, well,  
23 if we're wrong about negligence, then there  
24 wouldn't be a private right of action at all.  
25 I agree, that's what the sentence basically

1 says, but go along with --

2 MR. GARRE: But to your --

3 JUSTICE BREYER: It's the same  
4 question.

5 MR. GARRE: If I could address Justice  
6 Breyer's point just quickly, we did say at the  
7 panel stage that we did not dispute the  
8 existence of the private right because, of  
9 course, we couldn't; Ninth Circuit precedent  
10 had recognized that right.

11 We did not, I think it's important to  
12 add, concede the existence of a private right.  
13 I think there's a difference between saying we  
14 don't dispute it and we agree with it.

15 Now, I'm sorry, Justice Kagan.

16 JUSTICE KAGAN: Well, I think you --  
17 it's the same question.

18 MR. GARRE: Right. Right. And --  
19 and, of course, more broadly, under this  
20 Court's precedents, we would say clearly this  
21 Court has discretion to reach the broader  
22 issue. I mean, Central Bank really couldn't be  
23 more on point --

24 JUSTICE SOTOMAYOR: You answered --  
25 you answered discretion, but you don't answer



1 why. Aren't we rewarding you -- rewarding you  
2 for not raising it adequately below, rewarding  
3 you for mentioning it in two sentences in your  
4 cert petition and not asking us to take it as a  
5 separate question presented?

6 Where should we draw the line as to  
7 when we stop rewarding counsel for changing or  
8 moving the ball on cert grounds?

9 MR. GARRE: Well, there was no  
10 strategic gamesmanship here, Justice Sotomayor.  
11 We -- the -- the broader argument, as even my  
12 friend concedes, is fairly included within the  
13 question presented. You look at page 20 of our  
14 cert petition, it was very explicitly raised --

15 JUSTICE SOTOMAYOR: You're not dealing  
16 with what I just asked, which is --

17 MR. GARRE: The -- the broader issue  
18 is this Court should --

19 JUSTICE SOTOMAYOR: -- you could write  
20 almost any question and throw the kitchen sink  
21 if you choose. The question is -- you didn't  
22 raise it as a separate part of your cert  
23 petition; you didn't raise it below -- why  
24 should we reward you?

25 MR. GARRE: Okay. First of all, we

1 did argue it in our cert petition. But -- but,  
2 as to your broader question, Justice Sotomayor,  
3 you should do just as you did in the Central  
4 Bank case in order to provide for the  
5 intelligent resolution of this question.

6 Whether or not --

7 JUSTICE SOTOMAYOR: I wasn't here. I  
8 might have taken a different position. Why --

9 MR. GARRE: Well, and -- and the  
10 dissenters obviously did.

11 JUSTICE SOTOMAYOR: -- why should we  
12 reward --

13 MR. GARRE: And the reason is, is  
14 because this is an issue that is interdependent  
15 with the question of whether or not there could  
16 be inferred private right of action for  
17 negligence.

18 It would be silly for this Court to  
19 say there can be inferred right for negligence,  
20 but -- but the -- but everybody would  
21 recognize, I think, that there is no --

22 JUSTICE SOTOMAYOR: That -- that's  
23 what the SE -- that's what the government says,  
24 that there is.

25 MR. GARRE: Well, the government says

1 there's no private right of action at all. The  
2 courts below agree with that.

3 JUSTICE SOTOMAYOR: No, no, no, no,  
4 they say that the statute involves negligence.  
5 So we can find that it involves negligence and  
6 leave for another day whether there's a private  
7 cause of action or the right only belongs to  
8 the SE -- to the SEC.

9 MR. GARRE: I -- I think where I would  
10 take issue with that, Justice Sotomayor, is --  
11 is the government, in the first part of the  
12 government's brief, I understand addressed the  
13 question of what would be the standard in an  
14 express action brought by the SEC.

15 I don't really understand the  
16 government to be saying they think that in an  
17 implied private right of action, if it exists,  
18 you could have claims for negligence. They  
19 sort of artfully dodged that question and  
20 ultimately ground their brief on the broader  
21 position, which we very much agree with --

22 JUSTICE SOTOMAYOR: They'll let us  
23 know.

24 MR. GARRE: -- that there's simply no  
25 private right of action at all. And so I -- so

1 I think, you know, again, to answer your  
2 question, we would take issue with the notion  
3 that there was gamesmanship here. We -- we  
4 were not required to raise it at the panel  
5 stage when we were bound by the Ninth Circuit's  
6 precedent. We did flag it in our petition for  
7 rehearing. We very much --

8 JUSTICE GINSBURG: If you had -- if  
9 you had made it an explicit question, there's  
10 no circuit split on the question, is there?

11 MR. GARRE: There's not, and nor was  
12 there in the Central Bank case. In that case,  
13 as Justice Stevens pointed out in his dissent,  
14 there were hundreds of judicial and  
15 administrative decisions recognizing an implied  
16 private right of action for aiding and abetting  
17 under Rule 10b-5. But this Court applied its  
18 precedents, including its more modern  
19 precedents, looked to the language of Section  
20 10(b), Rule 10b-5, and held that there could be  
21 no private right of action implied for aiding  
22 and abetting.

23 And the same analysis here,  
24 indisputably, I think, leads to the conclusion  
25 that there is no implied private right of

1 action under Section (e).

2 My -- my -- my friends over here -- I  
3 -- I take page 44 of their brief as to not --  
4 as to concede that they cannot point to any  
5 rights-creating language in Section 14(e). And  
6 that's because it's framed explicitly as a  
7 prohibition on conduct, not like Title IX, for  
8 example, something that is designed to -- to  
9 address the benefited class.

10 JUSTICE GINSBURG: That's true --  
11 that's true of 14(a) also.

12 MR. GARRE: It is.

13 JUSTICE GINSBURG: And -- and under  
14 14(a), there is a private right of action.

15 MR. GARRE: Thanks to Borak. And  
16 Borak, as this Court pointed out in the  
17 Sandoval case emphatically, was a product of a  
18 different era that this Court has disavowed.

19 JUSTICE GINSBURG: But even so,  
20 it's -- it's alive for -- under 14(a). And is  
21 it rational to distinguish 14(a) from 14(e) for  
22 private right purposes? If you have 14(a), the  
23 context of that is proxy statements?

24 MR. GARRE: Yes, Your Honor.

25 JUSTICE GINSBURG: So proxy statements

1 go one way. Tender offers go the other?

2 MR. GARRE: So we do think it's  
3 rational, Your Honor. First of all, 14(e) has  
4 language that could scarcely be more different  
5 than 14(a). So you wouldn't look at the  
6 language of 14(e) and say, oh, they must have  
7 meant what Congress said in 14(a). It's  
8 different.

9 Second of all, the whole argument that  
10 because we've got an implied private right of  
11 action under 14(a), we need to have one under  
12 14(e) is exactly the argument that this Court  
13 rejected in Sandoval as to Borak. The Court --  
14 there's a duty upon the courts to effectuate  
15 congressional purpose.

16 Congress saw a gap with respect to  
17 statements in connection with tender offers in  
18 1968; it filled that gap by adding additional  
19 disclosure requirements under Section 14(e) for  
20 tender offers. If you want to look at the  
21 legislative history, Congress had in mind  
22 public enforcement of that provision.

23 There's no basis for this Court to  
24 essentially do the deed again as it did in  
25 Borak, to do it again here, simply because

1 Borak reached that result on a completely  
2 different regime than this Court applies today.

3 JUSTICE KAGAN: But Sandoval, I think,  
4 makes clear, Mr. Garre, that we're not -- I  
5 mean, the first question is, is there  
6 rights-creating language?

7 MR. GARRE: Right.

8 JUSTICE KAGAN: But that beyond that,  
9 even if there's not rights-creating language,  
10 if there's legal context that indicates that  
11 Congress meant to create private rights of  
12 action, then we should take that legal context  
13 into account.

14 And -- and, here, it seems that there  
15 are at least two features of the legal context.  
16 One is the one that Justice Ginsburg said,  
17 which is this was meant to create a gap as to  
18 treating tender offers the same way as using  
19 proxy statements with respect to mergers, and  
20 Congress gave no indication that it wanted to  
21 treat those differently. Quite the opposite,  
22 that it was gap-filling and a way to unify the  
23 field.

24 And the second is that Congress uses  
25 the 10b-5 language after every court has

1 decided that 10b-5 creates a private right of  
2 action.

3 And I think given those two things,  
4 Sandoval doesn't say, throw out the statutory  
5 interpretation toolbox and just look to whether  
6 there's rights-creating language. It says, be  
7 a sensible statutory interpreter.

8 And a sensible statutory interpreter  
9 would consider both of those two things,  
10 wouldn't they?

11 MR. GARRE: Not here, Your Honor. And  
12 I think what's missing from that summary, which  
13 I would -- I would agree with in some respects  
14 is that Congress -- or -- or this Court in  
15 Sandoval said context was relevant only insofar  
16 as it shed light on text.

17 And so, here, I think the most  
18 important point as to that question is that the  
19 text of 14(e) is --

20 JUSTICE KAVANAUGH: What about the --

21 JUSTICE SOTOMAYOR: I'm sorry, don't  
22 -- aren't we looking to the text for what  
23 congressional intent is? And to the extent  
24 that that's the issue, what did Congress intend  
25 with this language?



1 MR. GARRE: Well --

2 JUSTICE SOTOMAYOR: Is -- aren't all  
3 the facts that Justice Kagan put forth more  
4 meaningful in terms of Congress's intent?  
5 Because, if Congress didn't agree with this, it  
6 had a whole lot of years to change things  
7 around. But it hasn't.

8 MR. GARRE: Well, if -- if that's  
9 where you're coming from, Justice Sotomayor,  
10 then you should agree with us that there's no  
11 implied private right of action for negligence  
12 because the status quo was courts had an  
13 implied right of action under Section 14(e) for  
14 scienter.

15 So, if that's where you're coming  
16 from, then you should decide the case on the  
17 narrower ground and --

18 JUSTICE SOTOMAYOR: They had it under  
19 14(a) or --

20 MR. GARRE: -- and hold that 14 -- any  
21 implied right of action requires scienter.

22 JUSTICE KAVANAUGH: Are --

23 MR. GARRE: But, as -- as to Borak and  
24 the -- I'm sorry, Justice Kavanaugh.

25 JUSTICE KAVANAUGH: Keep going.

1           MR. GARRE: As to Borak and the  
2 timing, again, this is the same argument that  
3 was rejected in Sandoval. In Sandoval, the  
4 argument was, well, wait a second. When  
5 Congress was debating Title VI, this Court  
6 decided Borak. So, clearly, Congress had in  
7 mind Borak when it was passing Title VI, and  
8 that context has to inform our construction of  
9 Title VI and the regulations thereunder. And  
10 this Court emphatically rejected that in  
11 Sandoval. This is the same --

12           JUSTICE KAGAN: But Sandoval accepted  
13 the Cannon principle, right, which is that if  
14 Congress specifically takes language that's  
15 been held to create a private right of action  
16 and replicates that language, then that counts  
17 as a pretty strong indicator that Congress has  
18 meant for the same result to obtain.

19           MR. GARRE: It mentioned that in the  
20 context of Cannon, but here's why that doesn't  
21 work here. And you referred to the text of  
22 Rule 10(b). And I agree with you. Congress  
23 transplanted the text from Rule 10(b) into  
24 Section 14(e).

25           But the implied right of action to

1 enforce Rule 10b-5 comes from Section 10(b) of  
2 the Securities and Exchange Act because, as  
3 this Court said in Sandoval, regulations can't  
4 create implied rights of action, statutes do.

5           When you look at Section 10(b), it's  
6 completely different than Section 14(e). So  
7 there's no basis to say, well, because  
8 Section --

9           JUSTICE KAGAN: But 10(b) makes clear  
10 that it's -- even the statutory language in  
11 10(b) makes clear that it's going to take its  
12 content from the rules and regulations that are  
13 designed to implement it.

14           And then 10b-5 comes along and  
15 essentially gives 10(b) its content, and all of  
16 these courts go the exact same way, whether it  
17 was right or wrong, and say private right of  
18 action follows from that. And then Congress  
19 replicates that language.

20           MR. GARRE: Well, this Court in 1971,  
21 which was after the time that Congress passed  
22 the Williams Act in Section 14(e), finally  
23 acquiesced in recognizing an implied private  
24 right under Section 10(b) for Rule 10b-5  
25 violations. And no one is disputing that here.

1           But I -- but I think the question is  
2 whether this Court --

3           JUSTICE KAGAN: But that was the  
4 framework in the same way that that was the  
5 Cannon framework, is that Congress is looking  
6 at something, a particular set of words that  
7 has been found uniformly to create a private  
8 right of action, and then Congress writes those  
9 same words.

10           MR. GARRE: Again, I would disagree  
11 with you because the words that matter for  
12 purposes of an implied right of action under  
13 10(b) are 10(b). There -- and those words are  
14 completely different than the words that  
15 Congress used in Section 14(e).

16           JUSTICE KAGAN: I mean, that just  
17 seems incredibly artificial, Mr. Garre, because  
18 10b-5 had been created and everybody understood  
19 that 10b-5 was the governing standard and that  
20 private rights of action went along with that  
21 governing standard.

22           MR. GARRE: Under -- if that's true,  
23 it's under the Borak-type framework that courts  
24 would supply remedies when Congress didn't, but  
25 this Court was very clear about this in

1 Sandoval, and I believe other cases, where it  
2 said that regulations can't create implied  
3 private rights. Statutes do.

4 And this Court in Ernst & Ernst said  
5 that Section 10(b) was the source of the  
6 implied private right.

7 JUSTICE KAVANAUGH: So -- so, on  
8 Justice Kagan's questions, to pick up on those,  
9 in Sandoval, in distinguishing the prior cases,  
10 it said two of those involved Congress's  
11 enactment or reenactment of the verbatim  
12 statutory text that courts had previously  
13 interpreted to create a private right of  
14 action.

15 MR. GARRE: Yes.

16 JUSTICE KAVANAUGH: Now it sounds like  
17 the way you respond to that is to say statutory  
18 text as compared to regulatory text. That's  
19 the sole distinction?

20 MR. GARRE: Right. Because, I mean,  
21 in Title IX, I mean, the Court referred to --  
22 in Sandoval to Cannon. By the way, I -- I -- I  
23 understand Sandoval to be explaining Cannon,  
24 not necessarily to be, you know, expanding it.

25 JUSTICE KAVANAUGH: Well, that's a --

1 that's a question of how we interpret that  
2 sentence in Sandoval.

3 MR. GARRE: Right. Right. And so --

4 JUSTICE KAVANAUGH: But, if we  
5 interpret that sentence in Sandoval as setting  
6 a principle, which I take your point on that, I  
7 understand that, but if we do, then your  
8 distinction of it is statutory text versus  
9 regulatory text?

10 MR. GARRE: Right. This case would be  
11 an expansion of what the Court said in Sandoval  
12 because --

13 JUSTICE KAGAN: But even though Rule  
14 10(b)'s substantive scope is defined in terms  
15 of regulations, by the terms of 10(b) itself.

16 MR. GARRE: I would say it's a  
17 different statute. And this is important  
18 because, if you look at 14(a) and 14(e), 14(a)  
19 gives the SEC authority to pass rules. The SEC  
20 has been very judicious in -- in -- in  
21 describing situations where the violation is  
22 very limited and so they've -- they've  
23 established kind of a break on the sorts of  
24 things that can be violations.

25 JUSTICE KAVANAUGH: Can I --

1 MR. GARRE: For -- yes.

2 JUSTICE KAVANAUGH: Go on. Sorry.

3 MR. GARRE: No, no, please.

4 JUSTICE KAVANAUGH: Can I get your  
5 broader argument --

6 MR. GARRE: Sure.

7 JUSTICE KAVANAUGH: -- about why this  
8 sentence in Sandoval you said --

9 MR. GARRE: Because Sandoval, if you  
10 continue down to the end of that paragraph on  
11 Cannon, said context is relevant, but it's only  
12 relevant as it informs text. And there's  
13 nothing about the context of Borak or 14(a)  
14 that informs 14(e) because 14(e) is written  
15 completely different than 14(a). That --

16 JUSTICE KAGAN: But -- but I guess  
17 don't you think that the point of Sandoval and  
18 -- and -- and it should be the point of all our  
19 decisions is, yes, we want to know what  
20 Congress was intending to do here, but we're  
21 not going to throw out the whole statutory  
22 interpretation toolbox, except for the text,  
23 because sometimes context matters a great deal  
24 in understanding text.

25 And what we really want to know is,

1 what did those words mean when people enacted  
2 those words at that time? And for us to be  
3 able to answer that question, the statutory  
4 context is extremely important, isn't it?

5 MR. GARRE: I think Sandoval answers  
6 that by saying statutory context informs -- is  
7 relevant as it informs text. But I think the  
8 broader point here is that this Court has  
9 been -- made very clear that when it comes to  
10 recognizing implied private rights, this is a  
11 very special, perilous endeavor, and so there  
12 are very explicit limits on when the Court is  
13 going to do it.

14 And it's not going to look at this  
15 question as it might any other routine  
16 statutory interpretation question. It's going  
17 to look first, are -- are there rights-creating  
18 language? Here, everybody agrees, not there.

19 Second, is there any indication to  
20 believe that Congress intended a private  
21 remedy? And if you look at that question here,  
22 same answer, no. Congress clearly, in the  
23 securities laws, intended public enforcement.

24 And so what are we left with? We're  
25 left -- left with Borak, which is the heyday of



1 this Court saying courts have -- not only can  
2 but have a duty to alert themselves to filling  
3 Congress's purposes after you agree to open  
4 the --

5 JUSTICE KAGAN: So tell me if I'm --  
6 if I'm misinterpreting what you're saying, but  
7 I had thought that the -- that the line that  
8 Sandoval drew was, look, before now, what  
9 Congress did -- excuse me, what the courts did  
10 was they just basically said: Oh, look, if a  
11 -- if a -- if a private right of action kind of  
12 fits with the purpose of a statute as broadly  
13 defined, then we should have a private right of  
14 action.

15 And this Court said: Absolutely not,  
16 to that endeavor. But -- and said it has to be  
17 a question of statutory interpretation, what  
18 did Congress intend when it was passing that  
19 act?

20 But you're suggesting something more.  
21 You're suggesting that the usual tools of  
22 statutory interpretation that we use sort of go  
23 out the window when there's a -- a -- less  
24 context, you know, all of a sudden context  
25 doesn't matter; we just look mechanically at

1 the words because this is such a fraught  
2 inquiry.

3 Am I -- am I reading you right?

4 MR. GARRE: No. I mean, tools of  
5 statutory construction are pertinent in  
6 answering the questions under this Court's  
7 decision in Sandoval. Is there rights-creating  
8 language? Here, everybody agrees that there's  
9 not. Is there a reason to believe that  
10 Congress otherwise intended a private remedy?  
11 No.

12 And -- and I would say here what's  
13 unprecedented about this case is that we're not  
14 aware of a single instance in which this Court  
15 has ever implied or recognized an implied right  
16 of action that the enforcement agency itself  
17 didn't recognize.

18 And if you think of this in a Steel  
19 Seizure type framework, to the extent that this  
20 Court has authority to recognize implied  
21 private rights at all, then surely that  
22 authority is at its lowest ebb --

23 JUSTICE GINSBURG: Mister --

24 MR. GARRE: -- where the government  
25 itself isn't arguing for that.

1 I'm sorry, Justice Ginsburg.

2 JUSTICE GINSBURG: Before -- your  
3 white light is on, I appreciate that, but you  
4 presented one question clearly, and that was  
5 scienter versus negligence.

6 MR. GARRE: Yes.

7 JUSTICE GINSBURG: So I'd like you to  
8 tell me, do I understand you right to say not  
9 even the SEC would have a right to sue for  
10 negligence under 14(e), not even the SEC?

11 MR. GARRE: That's right. And we  
12 would point you to the Court's decision in  
13 Ernst & Ernst, where the Court dealt with this  
14 question in the context of an implied private  
15 right and said that there's no basis for  
16 interpreting the similar language of Rule 10b-5  
17 to confer negligence.

18 And to your point, Justice Kagan, if  
19 you approach this case from the standpoint that  
20 Congress meant to lock in Rule 10b-5 when it  
21 used -- when it transplanted language from  
22 10b-5 in Section 14(e), then you should at  
23 least reach the conclusion that the Ninth  
24 Circuit had no basis for inferring a private  
25 right of action for negligence.

1 JUSTICE BREYER: Why? Because, I mean  
2 -- sorry, because your time is -- do you want  
3 to answer this when you get back up? I mean,  
4 look, the language of 14(e) that we're talking  
5 about is the same as the language of 10b-5, and  
6 10b-5 copied its language from -- what is it --

7 MR. GARRE: Section 17(a).

8 JUSTICE BREYER: Yes, 17(a). Okay?  
9 So -- now we use this language to get at proxy  
10 statements, don't we? And proxy statements can  
11 be ways of taking over a company.

12 MR. GARRE: Well, proxy statements --

13 JUSTICE BREYER: So why would you want  
14 to have one set of language meaning negligence,  
15 where they try to take you over by proxy  
16 statements, but a different set -- but exactly  
17 the same words, not negligence, when they try  
18 to take you over by a tender offer?

19 MR. GARRE: Well, in here we're  
20 talking about the difference between Rule 10b-5  
21 and Section 14(e), and both, we would say,  
22 require scienter.

23 But what I would say is that when it  
24 comes into policies of negligence versus  
25 scienter, there should be a real concern on the

1 part of this Court that interpreting Section  
2 14(e) to go all the way to negligence, which  
3 would be unprecedented in the 50-year history  
4 here, would result in the dumping of  
5 information, would be -- ultimately be  
6 counterproductive.

7 And I would ask this Court to reserve  
8 the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Ms. Ratner.

12 ORAL ARGUMENT OF MORGAN L. RATNER  
13 FOR THE UNITED STATES, AS AMICUS CURIAE,  
14 IN SUPPORT OF NEITHER PARTY

15 MS. RATNER: Mr. Chief Justice, and  
16 may it please the Court:

17 Section 14(e) does cover negligent  
18 misrepresentations, but it does not authorize  
19 private enforcement.

20 JUSTICE SOTOMAYOR: Even if we find a  
21 private cause of action, Mr. Garre says that  
22 you didn't answer that question in your brief.  
23 So assume we were to find an implied cause of  
24 action. Would you still say it covers  
25 negligence?

1           MS. RATNER: We think that the text is  
2 sufficiently clear that it covers negligent  
3 misrepresentations. The Court could, for  
4 policy-based reasons, restrict private rights  
5 of action. That's something the Commission has  
6 previously offered.

7           JUSTICE SOTOMAYOR: Could you answer  
8 Justice Breyer's point, which is -- I -- I took  
9 his point to be that since 14(e) borrows the  
10 language of 10-5, and we have all along  
11 interpreted 10b-5 to require scienter, why  
12 shouldn't we require the same standard here?

13           MS. RATNER: Well --

14           JUSTICE SOTOMAYOR: I think that was  
15 his question of Mr. Garre, so that's my  
16 question to you. You're talking about it as  
17 policy. I'm talking about if we're going along  
18 the road of saying what does Congress intend,  
19 and you look at context and history, wouldn't  
20 you think they intended to take language that  
21 had already been interpreted in one way to mean  
22 just that in a different context?

23           MS. RATNER: No, Justice Sotomayor.  
24 So the language, first of all, of 10b-5 had not  
25 already been interpreted that way. The Court's

1 decision in Ernst & Ernst, which interpreted  
2 10b-5, came after 14(e) was enacted. So we  
3 don't have that settled meaning at the time.

4 And I think beyond that, just looking  
5 to the Ernst & Ernst decision, the Court could  
6 not have been clearer that the language of Rule  
7 10b-5 itself would be appropriate to have a  
8 negligence standard, but there was a separate  
9 constraint of the language of Section 10(b).  
10 That separate constraint doesn't apply here.  
11 And that's why we think the better analogue is  
12 Section 17(a), which the Court considered in  
13 Aaron and said negligence.

14 Now I do want to address the question  
15 whether there is a private right of action.

16 JUSTICE GORSUCH: But before we get to  
17 that, just one more question on -- on the mens  
18 rea element.

19 I understand that Ernst came later,  
20 but normally we do read the same language to  
21 mean the same thing, so I'd like you to address  
22 that problem.

23 MS. RATNER: Well --

24 JUSTICE GORSUCH: And then, second --  
25 second problem is I understand the point about

1 negligence being what we normally assume  
2 Congress to use when -- when it's a civil  
3 matter.

4 But the penalties here are pretty  
5 significant and -- available under this  
6 section, and maybe equivalent to and worse than  
7 a lot of criminal offenses. I'm sure a lot of  
8 people would rather be found guilty of a  
9 misdemeanor than -- than this particular  
10 offense.

11 So why wouldn't we use a higher mens  
12 rea, given that?

13 MS. RATNER: So, on your first  
14 question, the language can't always mean the  
15 same thing because we already have it meaning  
16 different things in 17(a) and Rule 10b-5. And  
17 the answer is why did it come out differently  
18 for those different provisions, Section 10(b)'s  
19 separate language. So which is this more like?  
20 This is more like 17(a).

21 On your second point, Congress already  
22 accounted for the potential different mens rea  
23 standards in the tiered system of penalties  
24 here. So there are very low fines that the  
25 Commission may seek for negligence. And those



1 are increased as there is scienter found. So I  
2 do think Congress already considered this in  
3 the enforcement section.

4 Turning to the private right of action  
5 issue, I want to address the question, Justice  
6 Kagan, Justice Kavanaugh, that you were  
7 discussing. We don't think that the fact that  
8 there was a private right of action under Rule  
9 10b-5 is enough here, and there are really  
10 three reasons.

11 The first is that the private right is  
12 located in Section 10(b), not Rule 10b-5. And  
13 that's not just a formality in this case; it's  
14 only Section 10(b), like Section 14(a), that  
15 actually has a textual hook for a private right  
16 of action. It's Section 10(b) that discusses  
17 for the protection of investors, and that's  
18 something that this Court noted in Borak was  
19 actually a reason for finding a private right  
20 there.

21 JUSTICE KAGAN: I mean, I guess I  
22 understand the distinction as a distinction but  
23 not why it matters, because what we're trying  
24 to find out is what Congress was doing.

25 And it seems to me that when you have

1 10(b) and it says the content of this is going  
2 to be done by rules, and Congress enacts -- and  
3 the agency enacts 10b-5, and everybody knows  
4 that's the substantive standard, and then all  
5 these courts say that, as to that substantive  
6 standard, 10(b) gives a private right of  
7 action, and then Congress comes back and  
8 recites the substantive standard, doesn't  
9 Congress think that the private right of action  
10 go with it?

11 You would to have be like a  
12 super-duper, super lawyer to say, oh, well,  
13 it's a little bit different because the  
14 substantive standard is split up from the  
15 private right of action. There's just no  
16 reason why Congress would have thought that.

17 MS. RATNER: Well, Justice Kagan,  
18 again, the question is not just what Congress  
19 expected as a matter of contemporary legal  
20 context; it's what it said. And it didn't pick  
21 up the words "for the protection of investors"  
22 that this Court had identified in Borak as a  
23 reason for a private right of action. That's  
24 point number one.

25 Point number two, what it did use here

1 is common disclosure language that appears  
2 throughout the securities laws. It's not a  
3 case like Cannon, where there actually was  
4 language directed to the victims. In that  
5 case, the statute was no person shall be  
6 discriminated against on the basis of sex.

7 And that statute had been then  
8 interpreted to have a private right of action.  
9 It made more sense to say that that meaning was  
10 encompassed in those victim-focused words.

11 And then the third point is that this  
12 type of provision that involves  
13 misrepresentations and omissions of material  
14 fact appears, as I mentioned, at a number of  
15 places, and we know it often does not create a  
16 private right of action.

17 It doesn't create a private right of  
18 action in Section 17(a) of the Securities Act.  
19 It doesn't create a private right of action in  
20 Section 206 of the Investment Advisors Act.  
21 That was this Court's decision in Transamerica.

22 So it's not like Congress picked up  
23 some sort of clear code word and incorporated  
24 it into Section 14(e). Absent that, the  
25 Commission feels that the result is effectively

1 dictated.

2 JUSTICE KAVANAUGH: Those decisions  
3 came after 1968, though?

4 MS. RATNER: That's correct. But --

5 JUSTICE KAVANAUGH: That's the  
6 argument on the other side, right?

7 MS. RATNER: That's correct, that they  
8 may not have been decided at the time, but I do  
9 think they illustrate that this isn't some sort  
10 of code word or some sort of term of art that  
11 carries with it a private right of action.

12 Given --

13 JUSTICE ALITO: Could you explain why  
14 -- could you explain why you think it's  
15 appropriate for us to reach the question  
16 whether there's a private right of action?

17 If you were the Respondent here, would  
18 you think that that claim was properly before  
19 us? Is that the precedent you want us to set?

20 MS. RATNER: So we think as an  
21 ordinary mortar -- as an ordinary matter, this  
22 Court does not consider questions that have  
23 been neither pressed nor passed upon. The  
24 reason why we think in this case it would be  
25 proper to consider is really a combination of

1 three circumstances.

2 The first, at this point, it's now  
3 been fully briefed and aired. The second is  
4 this really is an antecedent question to the  
5 scope of Section 14(e). And then the third and  
6 most dispositive one is that, in Central Bank,  
7 in identical circumstances, the Court found  
8 that it was appropriate to consider this  
9 question.

10 So in light of the combination of  
11 those three circumstances --

12 JUSTICE KAVANAUGH: On your -- on your  
13 antecedent point, Schreiber did something  
14 similar, isn't that correct?

15 MS. RATNER: So Schreiber did go on to  
16 consider the scope of Section 14(e). We think,  
17 first, the question whether there was a private  
18 right wasn't presented there, so it wasn't  
19 necessarily antecedent in that respect.

20 And, second, the scope question in  
21 that case was about whether 14(e) more or less  
22 has substantive fairness provisions which  
23 wouldn't have been affected by the existence of  
24 a private right.

25 I think here it's particularly correct

1 to think of this as an antecedent question  
2 because most of Petitioner's arguments for why  
3 there has to be a scienter standard turn on the  
4 existence of a private right of action.

5 And so that's why we think that it's  
6 difficult in this case to go on and assess  
7 whether scienter or negligence is appropriate  
8 without addressing that antecedent question.

9 That said, if the Court thinks that  
10 this was both forfeited, and it doesn't want to  
11 exercise its discretion, it could decide that  
12 negligence is the appropriate standard here,  
13 but only if it thinks that that is sufficiently  
14 clear from the text without regard to whether a  
15 private right of action exists.

16 JUSTICE KAVANAUGH: The right of  
17 action's been recognized in lower courts for  
18 quite a while. Does the government think  
19 that's caused real-world problems, recognizing  
20 the private right of action?

21 MS. RATNER: We're not taking our  
22 position here as a basis of policy either for  
23 or against the private right of action.

24 JUSTICE KAVANAUGH: True, but -- but  
25 faced with a wall of lower court precedent,

1 that sometimes is considered as a factor in  
2 thinking about the state of the law.

3 MS. RATNER: Yeah, I -- I would note  
4 that --

5 JUSTICE KAVANAUGH: If there are no  
6 real-world problems, that is one thing. If  
7 there are some that the Commission sees, then  
8 it's good to hear those.

9 MS. RATNER: So, first, we think the  
10 most obvious real-world problem is the  
11 existence of a private right of action has led  
12 lower courts to create the scienter standard,  
13 which we don't think is the proper scope of the  
14 Commission's enforcement authority.

15 And I would just flag that, as a  
16 general matter in the private rights context,  
17 it is a pretty common situation in Central  
18 Bank, in Sandoval, in Transamerica, that the  
19 lower courts are uniform in finding a private  
20 right of action that this Court then says  
21 doesn't exist because they've been following  
22 their earlier precedent.

23 So I -- I -- I do recognize, given, I  
24 believe, Justice Ginsburg's question earlier  
25 that this does create an anomaly between 14(a)

1 and 14(e) in terms of their enforceability, but  
2 that's an anomaly as a result of Sandoval.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Geysler.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE RESPONDENTS

9 MR. GEYSER: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 Although we submit only one question  
12 is properly presented, this entire dispute can  
13 be resolved looking to this Court's usual tools  
14 of statutory construction and the text,  
15 context, purpose, and history of Section 14(e).

16 As for the culpability standard,  
17 scienter is not required under the plain words  
18 that Congress chose for this statute or this  
19 Court's decisions construing materially  
20 indistinguishable language in 17(a) in Aaron,  
21 and even in Ernst & Ernst itself, where it said  
22 that a standalone reading of Rule 10b-5 would,  
23 in fact, support a negligence standard.

24 As for the private right of action,  
25 this case presents the exceptionally rare



1 situation where Congress unmistakably intended  
2 this very statute to be privately enforceable,  
3 despite not including an express private  
4 remedy.

5 CHIEF JUSTICE ROBERTS: Well, we -- we  
6 now know that that was not the right approach,  
7 right, in Borak?

8 MR. GEYSER: Well, Borak was on --

9 CHIEF JUSTICE ROBERTS: Borak would  
10 not be decided the same way today.

11 MR. GEYSER: Borak may not be decided  
12 the same way today, but, again, our position is  
13 not rooted in Borak at all. We -- we agree  
14 that Sandoval rejected Borak's method, and  
15 we're not trying to revive it.

16 We're looking specifically at the  
17 usual tools of construction.

18 And my friend suggested today, he  
19 agrees that Congress -- this was, I believe, a  
20 direct quote -- Congress transplanted the text  
21 of Rule 10b-5 into Section 14(e). That's  
22 undisputed in this case.

23 And it's a traditional rule of  
24 construction that when Congress uses words that  
25 have a settled legal meaning --

1 CHIEF JUSTICE ROBERTS: Right. But, I  
2 mean, the -- the Borak basis, in other words,  
3 from today's perspective, what we did back then  
4 was a mistake. And it's one thing to say,  
5 well, it's -- it's done, you know, don't  
6 necessarily overrule it just because you view  
7 it differently now, but there's certainly -- a  
8 strong argument could be made that you  
9 shouldn't repeat the mistake, you shouldn't  
10 carry it. You shouldn't expand it, even if you  
11 would have made that same decision back under  
12 the -- I think as Justice Scalia called it --  
13 the ancien regime.

14 MR. GEYSER: Exactly, Your Honor. And  
15 if our position was that you should imply the  
16 exact Borak -- Borak methodology because this  
17 falls in Section 14(t), then I would agree with  
18 you and we should lose. That is not our  
19 position at all.

20 Our position is that, if you look at  
21 Congress's intent, and as Cannon confirmed, the  
22 question is not whether Congress was correct.  
23 It's how did they perceive the state of the law  
24 at the time?

25 JUSTICE KAVANAUGH: But it wasn't the

1 statute. It was the -- the rule language, and,  
2 you know, this type of provision is used in  
3 multiple places where it's not been recognized  
4 to create a private right of action.

5 So how do you respond to those  
6 arguments on the other side?

7 MR. GEYSER: So, for -- looking first  
8 to the fact that this came from a rule, I don't  
9 think that -- I think that is a distinction  
10 without a difference. I don't know why that  
11 would matter.

12 If the question is did that rule have  
13 a settled legal meaning at the time that  
14 Congress decided to use those exact words, and  
15 looking at this Court's decision in Herman and  
16 -- and MacLean, the Court said, by 1969, 10 of  
17 the 11 courts of appeals said that Section  
18 10(b) and Rule 10b-5 were privately  
19 enforceable.

20 So Congress, understanding the  
21 existing state of law in 1968, those were  
22 within one year of the Williams Act passage,  
23 would have understood well that the -- that  
24 Rule 10b-5 was considered to be privately  
25 enforced.

1 JUSTICE KAVANAUGH: Well, we usually  
2 look -- to pick up on the Chief Justice's  
3 point, we look at the text of the statute these  
4 days, and if it's not a private cause of  
5 action, we're not overruling ones that  
6 recognize private rights of action before, but  
7 we're not expanding it either.

8 Central Bank makes that clear and  
9 Sandoval and lots -- lots of other cases.

10 MR. GEYSER: We -- we fully agree,  
11 Justice Kavanaugh. The question is looking at  
12 the text of this statute, this is a traditional  
13 tool --

14 JUSTICE KAVANAUGH: There's no -- just  
15 to state the obvious, there's no private right  
16 of action in the text.

17 MR. GEYSER: Exactly. And if you look  
18 at United States versus Kwai Fun Wong, the  
19 Court was unanimous. There was no -- there was  
20 no statement anywhere whether that particular  
21 language is jurisdictional or not. But, as  
22 both Justice Alito's dissent and Justice  
23 Kagan's majority opinion confirmed, when  
24 Congress uses words that have been attributed  
25 as having jurisdictional significance, then

1 Congress is understood to import that same  
2 significance, have the same meaning and the  
3 same effect in the new provision.

4 CHIEF JUSTICE ROBERTS: But it's not  
5 just a question of Congress's words or even  
6 Congress's intent. It goes to the authority of  
7 the courts to engage in the sort of fundamental  
8 law-making enterprise that inferring a private  
9 cause of action involves.

10 In other words, the reason we do it  
11 differently is not because we have any  
12 different view on the tools of congressional  
13 intent. It's because we have a different view  
14 on the appropriate limits on our authority.

15 And I don't know why if we exceeded  
16 those limits, you know, back in the -- the bad  
17 old days, why -- why we should feel free to  
18 exceed those limits today?

19 MR. GEYSER: Mr. Chief Justice, I  
20 think exceeding the court's limit is doing  
21 something Congress did not intend. The  
22 ultimate lodestar for Sandoval was, what is the  
23 statutory intent?

24 And I don't think that Sandoval said  
25 that you throw out all tools of construction,

1 unless it's a one-way ratchet, and it says  
2 don't imply right of action. The question is,  
3 what did Congress intend when they used the  
4 specific language in 14(e)?

5 And I don't think that is then  
6 necessarily the Court stepping in and saying we  
7 think this is a good idea to advance the  
8 purpose of the statute even though it's not  
9 what Congress had in mind. Our contention is  
10 that given this highly unusual -- and this is  
11 basically a perfect storm of factors that come  
12 together that show that Congress in 1968  
13 expected 14(e) and understood that it would be  
14 privately enforceable.

15 CHIEF JUSTICE ROBERTS: And why -- why  
16 didn't they do it then?

17 MR. GEYSER: They -- I -- I think for  
18 the same reason there that they -- in 14(a)  
19 they didn't do it and in some other statutes,  
20 as the Court has said, can be privately  
21 enforceable by implication.

22 JUSTICE KAVANAUGH: But they did do it  
23 with a number of provisions. So it shows they  
24 knew how to do it and they did do it.

25 MR. GEYSER: Back in 1933 and 1934,

1 but -- but -- and I think that this --

2 JUSTICE GORSUCH: So they forgot by  
3 1968?

4 MR. GEYSER: No, Your Honor. It's  
5 actually -- I think -- I think, if this statute  
6 were passed with the original '33 and '34 Act,  
7 I would submit we'd probably lose this case.  
8 The reason that we win this case, I -- I hope,  
9 is that, by the time that Congress acted in  
10 1968, it was using words that were understood  
11 to have a -- a private right of action. That  
12 was the consequence of using that text.

13 And, again, this is cut from the same  
14 cloth that the Court uses for ordinary  
15 statutory interpretation all the time.

16 JUSTICE GORSUCH: To what extent  
17 should we be -- take cognizance of the  
18 possibility that a lot of lower courts, having  
19 created this private right of action -- I -- I  
20 don't mean to say that pejoratively, of course  
21 -- then, in order to counter what they perceive  
22 as abuses, ratchet up the mens rea to scienter?  
23 We have some indication before us that a lot of  
24 these cases are filed, class actions, and then  
25 immediately dropped as soon as maybe the

1 lawyers get their fees. And to maybe address  
2 that, some lower courts have heightened the  
3 scienter.

4 So, at the end of the day, are we  
5 really doing anybody any favor by creating a  
6 private right of action and then maybe  
7 increasing the scienter?

8 MR. GEYSER: Well, Justice Gorsuch, to  
9 be absolutely clear, the lower courts are not  
10 ratcheting up the mens rea to prevent abuse.  
11 But --

12 JUSTICE BREYER: How many proxy  
13 statements -- sorry, continue.

14 MR. GEYSER: I was just going to say,  
15 if you -- if you look at our brief in  
16 opposition, we went through the lower court  
17 cases and showed that these were cases that --  
18 that arose under the second clause of 14(e) and  
19 were premised not on negligence but on  
20 scienter-based allegations.

21 And in response, my very able friend,  
22 in his reply, didn't take issue empirically  
23 with our description of those cases. He  
24 asserted the view that Section 14(e) has a  
25 uniform culpability requirement, which, of



1 course, is exactly what Aaron rejected.

2 JUSTICE BREYER: Yeah, I wondered  
3 how many --

4 JUSTICE GINSBURG: But you -- you  
5 cited -- you cited Aaron. You rely on that for  
6 the -- the negligence standard. But -- but  
7 there is -- there is no private right of action  
8 under 17(a), is there?

9 MR. GEYSER: There -- there is not,  
10 Justice Ginsburg, but to be very clear, at the  
11 time of the Williams Act in 1968, courts said  
12 that 17(a) was privately enforceable. My  
13 friends haven't identified a single case until  
14 more than a decade after 1968, after 14(e) was  
15 enacted, where any court said it wasn't  
16 privately enforceable, which I think also goes  
17 back to your other question, Justice Kavanaugh.  
18 The -- it's undisputed in this --

19 JUSTICE KAVANAUGH: The -- the whole  
20 thing is kind of a time travel argument, oh,  
21 Congress would have thought in 1968 that courts  
22 create implied causes of action. That's  
23 rejected in Sandoval, and I think the  
24 "patterned after" argument, the precise -- is  
25 really just a different form of that same

1 argument, which is, well, Congress would have  
2 thought based on the state of the law. And  
3 that kind of general point was rejected in  
4 Sandoval --

5 MR. GEYSER: Yeah, well, I --

6 JUSTICE KAVANAUGH: -- at least as I  
7 see it.

8 MR. GEYSER: -- I -- I want to be  
9 extremely clear about this because I think it's  
10 very important. We are not making the time  
11 travel argument. We're not making the  
12 contemporary legal context argument. We think  
13 that --

14 JUSTICE KAVANAUGH: The "patterned  
15 after" argument is -- is that, isn't it?

16 MR. GEYSER: No. The "patterned" --  
17 the "patterned after" argument is very  
18 different. It -- it is very different to  
19 say --

20 JUSTICE KAVANAUGH: It's a -- it's a  
21 -- well, why isn't it -- tell me why it's not a  
22 subcategory of the --

23 MR. GEYSER: Sure.

24 JUSTICE KAVANAUGH: -- larger time  
25 travel argument?

1           MR. GEYSER: The -- the time travel  
2 argument says that we -- we have lots of  
3 statutes that were passed during, you know, the  
4 battled heyday of the implied rights  
5 jurisprudence, and so we assume that Congress  
6 knew that they could just say whatever they  
7 wanted, courts would take all of these statutes  
8 and somehow on their own differentiate between  
9 ones that really deserved a private right and  
10 ones that didn't.

11           That is not our argument. Our  
12 argument is that looking to the specifics of  
13 Section 14(e), the text that Congress uses, the  
14 context in which they used it, the entire point  
15 was to harmonize 14(e) with 14(a).

16           Now maybe Borak was wrongly decided.  
17 But, when Congress acted in 1968, they knew  
18 that 14(a) was privately enforceable. And we  
19 still haven't heard a single reason that any  
20 rational legislative body would expect 14(a)  
21 for proxy solicitations to be privately  
22 enforceable but 14(e) not.

23           JUSTICE KAGAN: So, in your perfect  
24 storm, Mr. Geyser, you have the 14(e), 14(a)  
25 analogy, you have the replication of 10b-5

1 language. Is there anything else that goes  
2 into creating this perfect storm?

3 MR. GEYSER: I -- I think there is,  
4 Justice Kagan. There -- and there's actually  
5 50 years of it. There's 50 years of unbroken  
6 precedent among the lower courts, including a  
7 decision in 1985 by this Court in Schreiber,  
8 where the Court adjudicated a private right of  
9 action in a dispute over the elements of that  
10 private right of action without so much as  
11 hinting that it wasn't privately enforceable.

12 I don't think the Court overlooked  
13 that. The Court cited Piper three times, where  
14 the issue had been previously reserved.

15 CHIEF JUSTICE ROBERTS: Well, but  
16 the --

17 JUSTICE KAVANAUGH: The --

18 CHIEF JUSTICE ROBERTS: -- the lower  
19 courts, it seems to me, is readily explainable  
20 by the fact that they were following what we  
21 had said and then were to so categorically  
22 reject later in the subsequent right-of-action  
23 cases.

24 MR. GEYSER: Well, Mr. Chief Justice,  
25 that didn't happen in the context of 17(a),

1 where courts used to say, employing the Borak  
2 methodology, that this is privately  
3 enforceable, and they said, uh-oh, under  
4 Sandoval, now it's not.

5 But 14(e) stands on entirely different  
6 footing because of the text used, and it's not  
7 just the 50-year history. Congress has amended  
8 the --

9 JUSTICE KAVANAUGH: This is all true  
10 in Central Bank as well. Every court of  
11 appeals, every single one, had rejected -- had  
12 allowed aiding and abetting liability. And the  
13 Court said, no, it's not in the text, and  
14 rejected the acquiescence argument as well.

15 MR. GEYSER: And -- and, Justice  
16 Kavanaugh, if that's all we had, we -- we'd  
17 probably lose this case. But -- but our point  
18 is that's not all we have. Central Bank did  
19 not have Congress importing the verbatim text  
20 from an earlier provision that was well  
21 understood at the time to be privately  
22 enforceable. And Central Bank didn't have what  
23 would be an incredible anomaly in the  
24 securities laws, where Congress is trying to  
25 harmonize 14(a) and 14(e) and would do that by

1 creating this stark discontinuity where one's  
2 privately enforceable and the other isn't.

3 That was the primary means of  
4 enforcing these provisions at that time. So it  
5 would make very little sense that Congress  
6 would do that with no indication.

7 But, to go back, Congress has since  
8 amended the securities laws three times since  
9 14(e)'s enactment, touching directly on this  
10 subject matter. It did it the first time in  
11 1970, where it added the second sentence of the  
12 statute. At that time, there were already two  
13 courts of appeals, including an opinion by the  
14 -- in the Second Circuit by Judge Friendly,  
15 saying it was privately enforceable. Congress  
16 did not repudiate those decisions.

17 JUSTICE KAVANAUGH: Well, the Judge  
18 Friendly dissent -- opinion was relied on by a  
19 dissent in a subsequent case in that --  
20 rejecting that approach --

21 MR. GEYSER: Well, but, again, though,  
22 if the question is what --

23 JUSTICE KAVANAUGH: -- by Justice  
24 Stevens' dissent.

25 MR. GEYSER: But, again, we're --

1 we're -- we're -- we're focusing on what  
2 Congress was thinking when they were looking  
3 at -- at how the courts had treated these  
4 statutes. In 1970, if Congress thought, wait a  
5 minute, we didn't want this to be privately  
6 enforceable, presumably, when you have an  
7 opinion as prominent as one by -- by Judge  
8 Friendly, they would have said something.

9 But, even without that, we have the  
10 1988 amendment where Congress added an express  
11 right of action --

12 JUSTICE KAVANAUGH: But in Piper --  
13 I'm just not going to let that go for --  
14 respectfully. Piper rejected that reasoning  
15 from the Judge Friendly opinion. Justice  
16 Stevens' dissent relied on it. So that was  
17 rejected --

18 MR. GEYSER: Well --

19 JUSTICE KAVANAUGH: -- that mode of  
20 analysis.

21 MR. GEYSER: -- to be very clear,  
22 though, there -- there were two issues in  
23 Piper. One was decided; one was reserved.

24 JUSTICE KAVANAUGH: Uh-huh.

25 MR. GEYSER: The issue that was

1 decided is whether a tender offeror has a  
2 private right of action. And the Court's logic  
3 was that they don't because they weren't the  
4 class that Congress had in mind and was trying  
5 to protect.

6 And in -- in reserving the question,  
7 they didn't reserve it in a way of we have  
8 doubts about this. They said the dissent is  
9 accusing the majority of undermining the  
10 statutory objective because this would leave  
11 the statute not capable of private enforcement  
12 by that protected class. And the majority  
13 batted it out of hand by saying we're not  
14 deciding that question. That only makes sense  
15 if the Court assumed that those shareholders  
16 would have a private right of action.

17 But, even without that, if you go to  
18 1988 when Congress added the express right of  
19 action for insider trading --

20 JUSTICE KAVANAUGH: Can I stop you  
21 right there? The Court left open the question,  
22 whereas you're saying they assumed the answer?

23 MR. GEYSER: I'm saying that their  
24 response to the dissent's accusation that they  
25 were undermining the practical enforcement of



1 the statute makes very little sense unless they  
2 thought that it would be privately enforceable.

3 But, again, we don't even need that.  
4 When you fast-forward to 1985 and Schreiber, at  
5 that point, this is apparently such a settled  
6 question the Court doesn't even flag for the  
7 lower courts don't misread our opinion and  
8 think that we're embracing this right of  
9 action. There's not a hint of that.

10 And it's presumably because, at that  
11 point, it was so well settled that this was  
12 privately enforceable, the Court didn't even  
13 think it was worth mentioning. But then, in  
14 1988, only three years after Schreiber, again,  
15 Congress created an express prohibition on  
16 insider trading, and in the -- in the key  
17 legislation -- Congressional report, they said  
18 that this insider trading prohibition overlaps  
19 with existing rights under the securities laws  
20 and the cases construing them, and it flagged  
21 Section 14(e) precisely.

22 And then Congress had an express  
23 reservation saying that this new express remedy  
24 is not meant to take out any implied private  
25 rights under the Act. So Congress understood

1 at the time that people were suing under  
2 Section 14(e), it was an implied right of  
3 action, and they preserved those -- those  
4 causes of action.

5 And then, if you fast-forward to the  
6 PSLRA in 1990 --

7 JUSTICE KAVANAUGH: They -- they said  
8 it wasn't supposed to be read in either  
9 direction, correct?

10 MR. GEYSER: No, that was the -- no --  
11 no, Justice Kavanaugh. In 1988, they said that  
12 we are preserving the implied rights. I -- I  
13 take that as a -- as a one-way --

14 JUSTICE KAVANAUGH: Yeah.

15 MR. GEYSER: -- in our favor.

16 Now, in the PSLRA in 1995, Congress  
17 went ahead and they didn't just add pleading  
18 standards; it's a very general thing to all the  
19 private rights. But if you look to the  
20 forward-looking statement safe harbor -- and I  
21 think this is really critical -- in the  
22 forward-looking statement safe harbor, they  
23 said that certain statements now, if they're  
24 forward-looking, will not be actionable in  
25 private rights under this chapter based on

1 untrue statements and material omissions.

2 And they excluded from that safe  
3 harbor statements made in connection with a  
4 tender offer. That is the exact subject matter  
5 of Section 14(e), and as far as I know, it is  
6 only the subject matter of 14(e).

7 So Congress not only said that these  
8 are private rights that are premised on untrue  
9 statements and material omissions in connection  
10 with a tender offer, but they said these get a  
11 leg up. These aren't even -- these won't even  
12 fall within the safe harbor for forward-looking  
13 statements. So, if you do a forward-looking  
14 statement in the context of 14(e), those  
15 actions are still preserved.

16 So I think we have 50 years of  
17 unbroken precedent and we have the Petitioners  
18 raising an issue that they expressly conceded  
19 below, which I do think distinguishes us from  
20 Central Bank.

21 CHIEF JUSTICE ROBERTS: Well, they had  
22 no choice in the Ninth Circuit, right?

23 MR. GEYSER: No, Mr. Chief Justice.  
24 I'm not aware of any Ninth Circuit decision  
25 that looked at whether this is privately

1 enforceable under the Court's modern scheme.

2 I submit if the Ninth Circuit had done  
3 that, they would be -- they would be making the  
4 points that we made today, and I believe they'd  
5 reach the same result.

6 But that is an issue that's open to my  
7 friends in the Ninth Circuit. And they did not  
8 say we're bound by circuit authority. They  
9 didn't drop a footnote saying we plan to  
10 challenge this for further review. They waited  
11 until rehearing, where they made a point that  
12 did not cite a single one of this Court's  
13 recent authorities, didn't say that it's been  
14 undercut, didn't suggest that the Ninth Circuit  
15 --

16 JUSTICE GORSUCH: Well, circuit --  
17 circuit authority is -- is binding until it's  
18 overturned, right?

19 MR. GEYSER: I'm sorry, Justice?

20 JUSTICE GORSUCH: Circuit authority is  
21 binding until it's overturned. Just because  
22 there's an intervening -- there are a lot of  
23 intervening decisions from this Court and lots  
24 of others, it doesn't render a circuit  
25 authority ineffectual.

1           MR. GEYSER: Well, no, actually, in --  
2           in the Ninth Circuit, and the Ninth Circuit has  
3           a very aggressive rule on this, is that if  
4           there is intervening Supreme Court authority  
5           that takes the legs out from under a case --

6           JUSTICE GORSUCH: Sure, but it has to  
7           be argued and it has to be so held. It doesn't  
8           happen deus ex machina.

9           MR. GEYSER: Well, but my very point  
10          that -- that's exactly my point, though. There  
11          is absolutely nothing to stop Petitioners from  
12          arguing that.

13          JUSTICE GORSUCH: They could have  
14          argued it, fair, I understand that point. But  
15          to say that there was no precedent on this  
16          point would be incorrect too.

17          MR. GEYSER: Oh, then I -- then I  
18          misspoke.

19          JUSTICE GORSUCH: Okay.

20          MR. GEYSER: There was precedent on  
21          this point.

22          JUSTICE GORSUCH: All right.

23          MR. GEYSER: My point is that there  
24          was nothing that prevented the Petitioners even  
25          at the panel stage from raising this argument.

1 JUSTICE KAVANAUGH: What about Central  
2 Bank? I mean, one response could be don't  
3 repeat that again, but do you have any other  
4 response to their -- their raising of Central  
5 Bank?

6 MR. GEYSER: Well, I -- I think  
7 that -- I think, though, the primary response  
8 you've already said is well -- is better than I  
9 could.

10 I don't think just the fact that the  
11 Court can do something means that it's a  
12 prudent exercise of its power, especially in a  
13 context where you have 50 years of unbroken  
14 authority and three amendments where Congress  
15 decided not to disturb that authority.

16 CHIEF JUSTICE ROBERTS: Well, in terms  
17 of the prudential approach, though, the  
18 consequence of this is going to be, with  
19 respect to the private right of action, setting  
20 the standard for that, a bit of a waste of  
21 time. We're sort of figuring out what's going  
22 to happen in an area where the argument's been  
23 made.

24 You don't -- you're not going to be  
25 able to -- that's not going to make a

1 difference because there's no private right of  
2 action in the first place.

3 MR. GEYSER: Well, I -- I do think,  
4 Mr. Chief Justice, just as in Schreiber, let's  
5 say you think this isn't privately enforceable,  
6 deciding that this is a negligence standard  
7 still has effect because the SEC can still  
8 bring those actions. But again --

9 CHIEF JUSTICE ROBERTS: Well, sure, I  
10 understand that. But, I mean, the authority of  
11 the SEC and private litigants are two  
12 different --

13 MR. GEYSER: No -- well, they are.  
14 And we pointed out in our brief in opposition  
15 that this wasn't a good vehicle to take if the  
16 Petitioners are really genuinely serious that  
17 this private right that's existed for half a  
18 century suddenly doesn't exist when they can't  
19 cite a single case that actually holds that.

20 And to -- and as a matter of simple  
21 prudence, I think it would make far more sense  
22 for the Court to flag that this is an open  
23 question or something at least courts might  
24 think about. Again, we don't even think it's  
25 open given this incredible perfect storm of

1 congressional indicia saying that this is  
2 privately enforceable.

3           And then at least there would be some  
4 percolation where litigants can see how do  
5 these arguments actually pan out. Instead,  
6 this Court would be the very first court to  
7 grapple with all of these arguments based on  
8 the borrowed text from -- from Rule 10b-5 based  
9 on the history of this provision, explaining is  
10 there really any basis for thinking that  
11 Congress wanted this puzzling anomaly in the  
12 securities scheme.

13           JUSTICE GINSBURG: Your answer to  
14 Central Bank is just that it was wrong and we  
15 shouldn't do it again? Is that it?

16           MR. GEYSER: Well, it's -- it's that,  
17 and I think we have one distinguishing feature,  
18 and -- and I hope I'm not misstating the lower  
19 proceedings in Central Bank. I don't believe  
20 that the litigants in Central Bank had actually  
21 conceded the point the way the Petitioners  
22 conceded the issue here.

23           And it wasn't just a concession here  
24 that we're bound by 14(e), it was a point  
25 saying that 14(e) is privately enforceable, so



1 the Ninth Circuit should hold that 14(d)(4) is  
2 not. So it was actually an affirmative point  
3 trying to gain an advantage on a different  
4 issue that was presented below and is not  
5 before this Court.

6 So I think, given, again, this -- this  
7 perfect storm, this is not the -- the camel's,  
8 you know, nose under the tent where we're  
9 trying to undo Sandoval. All we're saying is  
10 that don't read Sandoval the way that my friend  
11 is inviting the Court to, which is this  
12 mechanical after-the-fact magic words  
13 requirement. That's a caricature of what  
14 Sandoval actually held.

15 Sandoval is saying look to Congress's  
16 intent. Use the usual statutory toolbox and  
17 try to figure out what did Congress mean. And  
18 looking to borrow text that has settled  
19 meaning has --

20 CHIEF JUSTICE ROBERTS: Do you -- I'm  
21 sorry, but do you think that if the --  
22 Congress's usual tools of congressional intent  
23 were set forth today and we would say, well, if  
24 we apply those usual tools, we think Congress  
25 intended there to be a private action, but they

1 didn't say that, do you think we might even in  
2 that situation say, well, we think there's a  
3 private right of action because Congress wanted  
4 to leave it to us to make that decision?

5 MR. GEYSER: I -- I think that today  
6 this would be a far harder case for us and one  
7 we'd probably lose. But -- but, to be  
8 absolutely clear, we still would have pretty  
9 good arguments because Congress would still be  
10 modeling the new statute after an old statute  
11 in the model of Cannon and -- and a rule that I  
12 think Sandoval supported.

13 Sandoval did not say that Cannon was  
14 wrongly decided. It didn't repudiate its  
15 analysis. It would require over --

16 CHIEF JUSTICE ROBERTS: What do you do  
17 with Ms. Ratner's distinction of Cannon?

18 MR. GEYSER: The -- I -- I'm trying to  
19 remember exactly which -- which part of it.  
20 I'm sorry.

21 CHIEF JUSTICE ROBERTS: Well, the fact  
22 that it was more specific in terms of  
23 rights-creating obligation than the statute  
24 here. In other words, Cannon is not just an  
25 absolute rule, well, you look at the -- the

1     chronological context, but there were  
2     distinctions in Cannon that aren't present  
3     here.

4             MR. GEYSER:  I -- I don't think those  
5     distinctions drove the analysis in Cannon.  
6     Cannon did not say because there is this hint  
7     of right-creating language, therefore, it's  
8     privately enforceable.

9             It predominantly looked to say that  
10    Title IX was modeled after Title VI.  Congress  
11    knew that Title VI was privately enforceable;  
12    therefore, it would have understood the same  
13    language would have the same effect.

14            There's no reason to look at it any  
15    differently.  That's exactly what we have  
16    here --

17            JUSTICE KAGAN:  And that's the way  
18    Sandoval looked at Cannon, isn't that right?

19            MR. GEYSER:  Exactly, exactly.  And so  
20    Sandoval -- so I -- I appreciate my friend's  
21    attempt to -- to create some distinction, but I  
22    just don't see how that -- how that actually  
23    works in the government's favor.

24            I'd also like to point out that in  
25    terms of my friend's argument that if you are

1 to recognize a private right of action, it  
2 should be one only for scienter because that's  
3 what courts have been saying for 50 years.

4 I don't think that that is a faithful  
5 construction of the statutory text or the way  
6 that this Court deals with implied rights that  
7 are recognized.

8 The ultimate touchstone is still  
9 Congress's intent. And Congress's intent, if  
10 you look at the text of this statute, is  
11 incompatible with the scienter requirement but  
12 perfectly consistent with the negligence  
13 requirement.

14 And I think that Congress in 1968  
15 looking at this language would have known at  
16 the time that there was a circuit split over  
17 whether Rule 10b-5 was actionable under a  
18 negligence theory or a scienter theory and they  
19 would have looked at the language of the text  
20 and have seen there's absolutely no hint in  
21 this of a scienter requirement.

22 JUSTICE KAVANAUGH: In terms of  
23 proscribing the behavior that you're concerned  
24 about, do you think in -- how would you assess  
25 SEC enforcement alone of a negligence standard

1 versus SEC plus private enforcement of a higher  
2 mens rea standard or -- I realize that's  
3 speculation, but I'm just curious to your  
4 thoughts on that.

5 MR. GEYSER: I don't think the --  
6 well, I -- I have a few thoughts, Justice  
7 Kavanaugh.

8 One is I don't see a textual hook in  
9 the statute for saying that there's a different  
10 culpability standard, depending on whether it's  
11 the government as a plaintiff or a private --

12 JUSTICE KAVANAUGH: No, I was asking a  
13 different question.

14 In other words, the level for the  
15 people who are regulated, if they know they're  
16 on the hook at least to the SEC for negligence,  
17 okay, that's going to scare them into certain  
18 protections, versus if the -- if the standard's  
19 higher, so they're not going to be on the hook  
20 for just negligence, but they could be  
21 enforced -- again, it could be enforced by both  
22 the SEC and private, what -- which do you think  
23 has a greater enforcement effect?

24 And I realize it's speculation, but  
25 just your experience, I'm curious to your

1 thoughts.

2 MR. GEYSER: I think it is -- it is  
3 very difficult to predict other than knowing  
4 that the SEC with their limited resources, as  
5 they made -- as they made the point in the  
6 Piper amicus brief, and I realize some decades  
7 have gone by, but I don't think the SEC's --  
8 the constraints on their resources have changed  
9 much.

10 I think that someone looking, knowing  
11 that they only faced government enforcement, is  
12 very unlikely to be as concerned about honoring  
13 the full and fair disclosure.

14 JUSTICE KAVANAUGH: Do you -- are you  
15 sure about that? I mean, that seems --

16 MR. GEYSER: I -- I -- I'm not,  
17 because I don't -- I'm trying to predict the --

18 JUSTICE KAVANAUGH: It seems like  
19 someone faced with the SEC enforcing a  
20 negligence standard is going to be very  
21 concerned about their actions.

22 MR. GEYSER: If, in fact, the SEC has  
23 the resources available to go after them --

24 CHIEF JUSTICE ROBERTS: Well, they  
25 must think they do, right, because they say

1 there is no private right of action?

2 MR. GEYSER: Well, they do, Your  
3 Honor, but I -- I took their brief on that  
4 point to be -- to be fairly understated. They  
5 stressed the importance of the private right  
6 under 14(a), and the 14(a) context is  
7 absolutely indistinguishable from the 14(e)  
8 context from a practical standpoint.

9 And they simply said, our hand -- our  
10 hands are tied by Sandoval, based on what we  
11 say is a demonstrable misreading of Sandoval.  
12 So I --

13 JUSTICE KAGAN: This -- this Court,  
14 Mr. Geyser, has sometimes indicated real  
15 concern with abuse of private suits and  
16 particularly with the opportunity for strike  
17 litigation.

18 What -- what -- what's the -- what --  
19 do you have an answer to that?

20 MR. GEYSER: I -- I -- I do, Your  
21 Honor. May I?

22 CHIEF JUSTICE ROBERTS: Sure.

23 MR. GEYSER: Thank you. The answer is  
24 that Congress has calibrated specific remedies  
25 that are actually a linear response to the

1 abuse, as opposed to saying let's throw the  
2 baby out with the bath water and just either  
3 ratchet up a mens rea requirement that's  
4 profoundly atextual or say a private right of  
5 action doesn't exist.

6 The PSLRA cuts off discovery until a  
7 motion to dismiss has been resolved. There are  
8 heightened pleading standards. And it says  
9 that there's a mandatory sanctions regime if  
10 you file a baseless lawsuit.

11 There's absolutely no reason that any  
12 defendant faced with a frivolous lawsuit can't  
13 defend themselves just as ably as they can  
14 settle. And if they do defend themselves,  
15 they'll get attorney's fees, and they should,  
16 if the case is, in fact, baseless.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Three minutes, Mr. Garre.

20 REBUTTAL ARGUMENT OF GREGORY G. GARRE

21 ON BEHALF OF THE PETITIONERS

22 MR. GARRE: Thank you, Mr. Chief  
23 Justice.

24 Fundamentally, the threshold question  
25 in this case is about the role of federal



1 courts when it comes to creating implied  
2 private rights. This Court in Sandoval  
3 chartered a completely different course than  
4 the Court had previously taken, and there's  
5 absolutely no reason for this Court to abandon  
6 or backtrack in any way on that course.

7 I've heard no answer from my friend  
8 today as to how Section 14(e) actually  
9 satisfies the test set forth in Sandoval for  
10 creating implied private rights.

11 Instead, all we've heard is arguments  
12 for eroding Sandoval based on context, time  
13 travel, congressional silence. There's no  
14 reason for this Court to cut back on Sandoval  
15 and create new exceptions that are going to  
16 lead to grandfathering private rights  
17 recognized under the old regime.

18 If this Court does adopt the premise  
19 that because Congress adopted the regulatory  
20 language in Rule 10b-5 and 14(e), then that has  
21 to lead you to the conclusion that Congress  
22 intended Rule 10b-5's scienter requirement. So  
23 that doesn't help my friend either.

24 And, Justice Breyer, I would -- I  
25 would add with respect to 14(a), 14(a) -- this

1 Court has never recognized a negligence  
2 standard for 14(a). The lower courts are  
3 divided on that. The Adams case of the Sixth  
4 Circuit says it's a scienter standard. So our  
5 view is that should be a scienter standard as  
6 well.

7 Finally, with respect to the issue of  
8 waiver, Central Bank resolves that issue as a  
9 matter of precedent. We're in a much stronger  
10 position in Central Bank in that we  
11 indisputably briefed it at the cert stage. We  
12 raised it in our panel hearing. We didn't  
13 concede the issue below. We simply  
14 acknowledged circuit precedent and did not  
15 dispute it.

16 JUSTICE BREYER: I'm rather curious.  
17 You may know the answer to this. Where -- what  
18 do I look at? I'm curious how many proxy  
19 solicitations each year there are in the United  
20 States. I'm curious to know how many tender  
21 offers there are in the United States.

22 MR. GARRE: So I can tell --

23 JUSTICE BREYER: You can tell me?

24 MR. GARRE: I can tell you.

25 JUSTICE BREYER: Good.

1           MR. GARRE: From 2013 to 2015, there  
2 were 725 transactions involving U.S. public  
3 companies; 118 used tender offers; 507 used  
4 proxy solicitations.

5           And, of course, 14(a) isn't just  
6 limited to proxy solicitations used for  
7 acquiring companies.

8           JUSTICE BREYER: And how many --

9           MR. GARRE: It's proxy solicitations  
10 generally.

11           JUSTICE BREYER: Yeah. So how many of  
12 those do you think there are?

13           MR. GARRE: So our understanding is  
14 about --

15           JUSTICE BREYER: Millions or thousands  
16 or what?

17           MR. GARRE: Of just proxy  
18 solicitations?

19           JUSTICE BREYER: Yeah.

20           MR. GARRE: It's -- it's broader  
21 because -- I don't have a statistic on that.

22           JUSTICE BREYER: I know it's broader.  
23 Do you have a guess?

24           MR. GARRE: I don't, Your Honor.

25           JUSTICE BREYER: I won't hold you to

1 it.

2 (Laughter.)

3 MR. GARRE: I'm not -- I'm not going  
4 to guess. It's broader than --

5 JUSTICE BREYER: I mean, obviously,  
6 my --

7 MR. GARRE: It's more than 725.

8 JUSTICE BREYER: -- question is  
9 related to staff.

10 MR. GARRE: Yes.

11 JUSTICE BREYER: I mean, it's one  
12 thing if it's tens of thousands --

13 MR. GARRE: Right.

14 JUSTICE BREYER: -- which suddenly  
15 you're going to ask the SEC to go and look at,  
16 or whether you're talking about 50, in which  
17 case I guess they could do it.

18 MR. GARRE: No one is question --

19 JUSTICE BREYER: They say they can do  
20 it on this one if we keep it to tender offers.  
21 I don't know what happens if it expands to  
22 proxies and other things.

23 MR. GARRE: No one has questioned the  
24 existing regime under 14(a). The only question  
25 is whether this Court is going to create a new

1 regime under 14(e).

2 Thank you, Your Honors.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The case is submitted.

5 (Whereupon, 12:06 p.m., the case was  
6 submitted.)

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## Official - Subject to Final Review

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