No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL., PETITIONERS

v.

GARY VARJABEDIAN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), supports a private right of action based on allegations of a negligent misstatement or omission made in connection with a tender offer.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (Commission), administers and enforces the federal securities laws. The question presented in this case concerns the proper understanding of Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(e), and the extent to which private plaintiffs may obtain relief for alleged misrepresentations made in connection with a tender offer. Because the Court's decision may determine the standard of proof that applies to all civil claims brought under Section 14(e), including those brought by the Commission, the United States has a substantial interest in this case.

STATEMENT

1. a. In response to the 1929 stock market crash, Congress enacted the Securities Act of 1933 (Securities Act), ch. 38, tit. I, 48 Stat. 74 (15 U.S.C. 77a *et seq.*), to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof." *Ibid.* The following year, Congress passed the Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*). The Exchange Act "provide[d] for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails," and it reflected Congress's effort "to prevent inequitable and unfair practices on such exchanges and markets." *Ibid.* Like the Securities Act, the Exchange Act "substitute[d] a philosophy of disclosure for the philosophy of *caveat emptor*." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963).

To that end, both the Securities Act and the Exchange Act contain provisions that promote disclosure and prohibit fraud. Section 17(a) of the Securities Act makes it

> unlawful for any person in the offer or sale of any securities * * * by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make

> the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. 77q(a).

Section 10(b) of the Exchange Act makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 78j(b). In 1942, the Commission adopted Rule 10b-5 to implement Section 10(b). See 7 Fed. Reg. 3804 (May 22, 1942). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce * * *
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5. The language of Rule 10b-5 was "derived in significant part" from Section 17(a). *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213 n.32 (1976).

b. Section 14(a) of the Exchange Act authorizes the Commission to promulgate regulations that protect investors in connection with proxy solicitations conducted by a widely held company. 15 U.S.C. 78n(a). In a proxy solicitation, a company attempts to persuade shareholders to vote to approve a takeover or to install new management that may be more receptive to a takeover. See Aaron Rachelson, *Corporate Acquisitions, Mergers and Divestitures* § 1:151 (2018). Beginning in 1935, the Commission has adopted rules under Section 14(a) to govern the conduct of proxy solicitations. See, *e.g.*, Exchange Act Release No. 378, 1935 WL 29270 (Sept. 24, 1935) (addressing the solicitation of proxies, consents, and authorizations for securities listed on a national exchange). In 1966, it adopted Rule 14a-9, which prohibits false or misleading statements of material fact in the solicitation of proxies. 17 C.F.R. 240.14a-9.

For several decades, however, no similar regulation governed corporate takeovers that were effectuated by tender offer. A tender offer is a mechanism for acquiring control of a target corporation by publicly offering, for a limited time, to purchase a substantial amount of the target company's stock—*i.e.*, by requesting that shareholders of the target company "tender" their shares—at a specified price above the market price. Pet. App. 3a. Where tender offers involve exchanges of securities, the Securities Act may apply, but its requirements do not extend to cash transactions. See 15 U.S.C. 77e. As a result, tender-offer campaigns were often waged with little regard for the accuracy or completeness of the information that was provided to shareholders by tender offerors or the target company's management. See *Senate Comm. on Banking and Currency: Hearings Before the Subcomm. on Securities on S. 510*, 90th Cong., 1st Sess. 15-16 (1967) (Senate Hearings). A person seeking control of a company via a tender offer could operate in "almost complete secrecy," leaving shareholders "without adequate information * * * to decide rationally what is the best possible course of action." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 2 (1968) (House Report); S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) (Senate Report).

In 1968, Congress enacted the Williams Act, Pub. L. No. 90-439, 82 Stat. 454, to "preserve a neutral setting in which the contenders c[an] fully present their arguments" and "'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)). The Williams Act closed "a rather large gap in the securities statutes." *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 27 (1977) (citation omitted). It addressed the discrepancy between proxy solicitations and tender offers—both of which involve requests for shareholder action to effect corporate change—by establishing a regulatory scheme for tender offers comparable to that which already applied to proxy solicitations. See Senate Hearings 13, 19-20, 33; Senate Report 3.

The new regulatory scheme for tender offers required tender offerors and target companies to disclose certain information about a tender offer. 15 U.S.C. 78n(d)(1) and (4). It also added Section 14(e) of the Exchange Act, which both "requir[es] disclosure" and "contains a broad antifraud prohibition." *Piper*, 430 U.S. at 24. Section 14(e) 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, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. 78n(e).

Because Section 14(e) was "modeled on" Rule 10b-5, *Schreiber*, 472 U.S. at 10-11, and Rule 10b-5 was modeled on Section 17(a) of the Securities Act, see *Hochfelder*, 425 U.S. at 213 n.32, the three provisions share nearly identical language. Although the provisions apply in different circumstances, all three prohibit (with slight wording differences) the making or use of "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. 77q(a)(2); see 15 U.S.C. 78n(e); 17 C.F.R. 240.10b-5(b).

c. Two years after enacting the Williams Act, Congress amended Section 14(e) to impose a specific rulemaking requirement: "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." Act of Dec. 22, 1970, Pub. L. No. 91-567, § 5, 84 Stat. 1497-1498. That provision, which complements the Commission's general rulemaking authority, see 15 U.S.C. 78w, was designed "to allow the Commission to deal more effectively with the devices sometimes employed on both sides in contested tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 4 (1970).

2. This case arises out of a Section 14(e) suit that respondents commenced after petitioner Avago Technologies Wireless Manufacturing Inc. successfully used a tender offer to acquire petitioner Emulex Corporation. Pet. App. 1a-2a.

Emulex was a technology company that produced equipment such as storage adapters and network interface cards. Pet. App. 2a. In 2015, Emulex and Avago announced their intention to merge through a tender offer, under which Avago would pay Emulex's shareholders $8 per share. *Id.* at 2a-3a. That $8 price reflected a premium of 26.4% on Emulex's stock price the day before the announcement. *Id.* at 3a.

In accordance with Commission regulations, see 17 C.F.R. 240.14d-9, 240.14d-101, 240.14e-2, Emulex filed with the Commission a public recommendation statement about the tender offer, see Pet. App. 3a. The statement supported the tender offer and recommended that Emulex shareholders tender their shares. *Id*. at 4a. Among other things, it observed that Emulex shareholders would receive a premium on their stock. *Ibid.* The recommendation statement also included a summary of a "fairness opinion" conducted by Goldman Sachs, which had assessed the merger's effect on shareholders. *Id.* at 3a-4a. The summary conveyed Goldman Sachs's conclusion that the tender offer would be fair to shareholders, and it described several financial analyses that Goldman Sachs had conducted in reaching that conclusion. *Id.* at 4a.

Emulex's recommendation statement did not describe an additional one-page "Premium Analysis" that Goldman Sachs had conducted. Pet. App. 4a-5a; see J.A. 255. In that analysis, Goldman Sachs had concluded that the takeover premium here—a 26.4% premium over Emulex's previous closing price and a 4.8% premium over the stock's 52-week high—was below average, though within the normal range, for mergers involving similar companies. Pet. App. 5a, 39a. According to Goldman Sachs, shareholders of similar companies had received an average of 44.8% over the stock's closing price and 17.6% over the stock's 52-week high. J.A. 255.

The tender offer was completed, and enough Emulex shareholders tendered their shares to consummate the merger. Pet. App. 5a.

3. Respondents, representing a putative class of Emulex shareholders who had tendered their shares, sued petitioners. Pet. App. 5a. They alleged that petitioners had violated Section 14(e) of the Exchange Act by omitting Goldman Sachs's premium analysis from Emulex's recommendation statement. *Id.* at 5a-6a. In respondents' view, without the premium analysis, the recommendation statement "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." J.A. 181-182.

Petitioners moved to dismiss, arguing, among other things, that respondents had failed to plead that the alleged misrepresentations under Section 14(e) had been made with scienter. Pet. App. 33a-34a. The district court agreed. *Id.* at 33a-51a. It held that Section 14(e) requires scienter, *id.* at 33a-35a, and that respondents had not pleaded facts sufficient to raise "a strong inference of scienter," *id.* at 37a; see *id.* at 36a-51a. The court therefore dismissed respondents' suit. *Id.* at 57a.

4. a. The court of appeals reversed. Pet. App. 1a-20a. As relevant here, it held that the district court had erred in requiring "proof of scienter" rather than "mere negligence" under Section 14(e). *Id.* at 8a.

The court of appeals began with "[a] plain reading of Section 14(e)." Pet. App. 8a. The court explained that the first clause of Section 14(e)—which prohibits any person from "mak[ing] any untrue statement of a material fact or omit[ting] 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"—covers behavior distinct from that proscribed by the second clause, which prohibits "fraudulent, deceptive, or manipulative acts or practices." *Ibid.* (quoting 15 U.S.C. 78n(e)). The court described the first clause as "devoid of any suggestion that scienter is required." *Id.* at 16a. The court also observed that the first clause is "nearly identical" to Section 17(a)(2) of the Securities Act, which this Court has construed not to require proof of scienter. *Id.* at 12a-13a; see *Aaron* v. *SEC*, 446 U.S. 680, 696-697 (1980).

The court of appeals acknowledged that five other courts of appeals had previously interpreted Section 14(e) to require scienter. Pet. App. 9a. The court explained, however, that those decisions had "rest[ed] on the shared text found in both Rule 10b-5 and Section 14(e)," without adequate consideration of the "important distinctions * * * that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e)." *Ibid.* The court further explained that this Court had construed Rule 10b-5 to require scienter not based on the text of the Rule itself, but because of "the relationship between Rule 10b-5 and its authorizing legislation, Section 10(b)." *Id.* at 10a-11a (citing *Hochfelder*, 425 U.S. at 212). Observing that Section 14(e) does not include similarly constraining language, *id.* at 11a-12a, the court of appeals concluded that "the first clause of Section 14(e) requires a showing of only negligence, not scienter," *id.* at 16a. It remanded the case to the district court "to reconsider [petitioners'] motion to dismiss under a negligence standard." *Id.* at 20a.

b. Judge Christen concurred in full but wrote separately to emphasize her view that, under this Court's decisions in *Hochfelder* and *Aaron*, Section 14(e) does not require scienter. Pet. App. 20a-26a. She suggested that the several contrary court of appeals decisions had relied on reasoning that pre-dated *Hochfelder* and *Aaron*, *id.* at 21a-22a, 25a-26a, and she questioned "the continuing viability of the foundation for" those decisions, *id.* at 26a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), prohibits negligent misstatements and omissions of material fact. The scienter standard that petitioners urge has no basis in the text or purpose of the Williams Act.

Section 14(e) imposes two distinct prohibitions. That provision makes it unlawful for any person, in connection with a tender offer, (1) "to make any untrue statement of a material fact" or any misleading omission, or (2) "to engage in any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e). The first clause of Section 14(e) contains no express scienter requirement. Nor does it contain words like "fraudulent" or "manipulative," which appear in the second clause and are generally associated with deliberate wrongdoing. And because the second clause "is meant to cover additional kinds of illegalities—not to narrow the reach" of the first clause, *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979)—the inclusion of those words provides no sound basis for engrafting onto the first clause a requirement that does not appear there.

This Court's decision in *Aaron* v. *SEC*, 446 U.S. 680 (1980), reinforces the conclusion that Section 14(e) does not require scienter. In *Aaron*, the Court held that Section 17(a)(2) of the Securities Act, 15 U.S.C. 77q(a)(2), whose language is materially identical to Section 14(e)'s first clause, "is devoid of any suggestion whatsoever of a scienter requirement." *Aaron*, 446 U.S. at 696. Although Section 17(a)(1) requires scienter, as does the second clause of Section 14(e), the Court declined the parties' invitation "to adopt a uniform culpability requirement" for Section 17(a)'s subparagraphs. *Id.* at 697. The same analysis applies to Section 14(e)'s two distinct prohibitions. And while the Court has reached a different conclusion with respect to the similar text of Rule 10b-5, it did so because of limitations imposed by the statutory provision that Rule 10b-5 implements. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212-214 (1976). Those limitations were inapplicable in *Aaron*, and they are similarly inapplicable here.

A negligence standard is consistent with the history and purposes of the Williams Act. Congress crafted that legislation primarily to ensure the disclosure of adequate information to shareholders who are confronted with cash tender offers. Negligent misrepresentations or omissions of material fact undercut the Williams Act's goal of disclosure, just as willful fraud does. Construing Section 14(e) to cover negligent misconduct would also achieve Congress's goal of harmonizing the regulation of tender offers with the regulation of proxy solicitations under Section 14(a).

II. Although the court of appeals correctly held that Section 14(e) encompasses negligent misrepresentations, respondents' private suit nevertheless should be dismissed. In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 n.28 (1977), this Court reserved the question whether Section 14(e) creates a private damages remedy for shareholders subject to a tender offer. This Court's modern jurisprudence on private rights of action, as summarized in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), precludes inferring such a right under Section 14(e). Under *Sandoval*, the "determinative" question is whether the statutory text "displays an intent to create not just a private right but also a private remedy." *Id.* at 286. Section 14(e) is "entirely silent as to private remedies." *Piper*, 430 U.S. at 24-25. That ends the analysis for statutory provisions that the Court has not previously construed to authorize private enforcement, "no matter how desirable that [private enforcement] might be as a policy matter." *Sandoval*, 532 U.S. at 287.

The absence of any private right of action under Section 14(e) provides a further reason to reject petitioners' view that the provision requires scienter. If the provision is not privately enforceable, securities defendants can no longer invoke the need to cabin private damages actions as a ground for engrafting an atextual scienter requirement. And because shareholders will be less able to curtail abuses relating to tender offers, the Court should decline to erect additional barriers to the Commission's enforcement of Section 14(e).

ARGUMENT

I. SECTION 14(e) PROHIBITS NEGLIGENT MISSTATEMENTS AND OMISSIONS OF MATERIAL FACT

The court of appeals correctly construed the substantive scope of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e). The first clause of that provision does not contain any requirement that a person act with scienter—"*i.e.*, intent to defraud, reckless disregard for the truth, or knowing use of some practice to defraud." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Section 14(e)'s text, history, and purpose make clear that the provision bans negligent misstatements and omissions of material fact, in addition to fraudulent activity.

A. The Plain Text Of Section 14(e)'s First Clause Does Not Require Scienter

This Court has repeatedly stressed that the statutory text "controls the definition of conduct covered by" the federal securities laws. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 175 (1994); see *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 261 n.5 (2010). Thus, "the starting point" here, as "in every case involving construction of a statute[,] is the language itself." *Hochfelder*, 425 U.S. at 197 (brackets and citation omitted).

Section 14(e) makes it unlawful for any person, in connection with a tender offer, "to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* to engage in any fraudulent, deceptive, or manipulative acts or practices." 15 U.S.C. 78n(e) (emphasis added). The italicized "or" connects two distinct clauses that proscribe separate categories of misconduct. The first clause prohibits "mak[ing] any" misstatement or omission of a material fact, while the second prohibits "fraudulent, deceptive, or manipulative acts or practices." *Ibid.* Under both the plain statutory text and this Court's precedents construing nearly identical language, the second clause requires scienter but the first clause does not.

1. The first clause of Section 14(e), like the nearly identical language in Section 17(a)(2) of the Securities Act, "is devoid of any suggestion whatsoever of a scienter requirement." *Aaron* v. *SEC*, 446 U.S. 680, 696 (1980). It does not expressly require a particular mens rea—for example, by making it unlawful to *intentionally or knowingly* make any untrue statement or omission of material fact. Cf., *e.g.*, 15 U.S.C. 78r(a) (limiting liability for certain misrepresentations where defendant "acted in good faith and had no knowledge"). Nor does it contain terms, such as "device," "scheme," "artifice," or "contrivance," that generally connote knowing or intentional deception. See *Aaron*, 446 U.S. at 696 & n.13; *Hochfelder*, 425 U.S. at 199. Rather, the first clause prohibits "any untrue statement of a material fact" or misleading omission in connection with a tender offer. 15 U.S.C. 78n(e). An "untrue" statement is simply a statement that is "false" or "[c]ontrary to fact." *The American Heritage Dictionary of the English Language* 1405 (1970). And "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)).

Section 14(e)'s second clause, by contrast, prohibits "any fraudulent, deceptive, or manipulative acts or practices, in connection with" a tender offer. 15 U.S.C. 78n(e). Although the clause does not specify the requisite mens rea, the terms "fraudulent," "deceptive," and "manipulative" typically refer to knowing or intentional misconduct. See *Aaron*, 446 U.S. at 696; *Hochfelder*, 425 U.S. at 199. Congress's "[u]se of the word 'manipulative' is especially significant" because that word is "virtually a term of art when used in connection with securities markets," and it "connotes intentional or willful conduct designed to deceive or defraud investors." *Hochfelder*, 425 U.S. at 199.

Petitioners suggest (Br. 26-29) that, because Section 14(e)'s second clause requires scienter, Section 14(e)'s first clause should be construed to impose the same requirement. The court below correctly rejected that argument, explaining that "[t]he use of the word 'or' separating the two clauses" evinces a congressional intent to proscribe "two different offenses." Pet. App. 8a; see *United States* v. *Woods*, 571 U.S. 31, 45-46 (2013) (Because the word "or" is generally a disjunctive term, "the words it connects are to be given separate meanings.") (citation and internal quotation marks omitted). Thus, as this Court explained with respect to Section 17(a), "the use of an infinitive" combined with "the use of the conjunction 'or'" demonstrates that "[e]ach succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *United States* v. *Naftalin*, 441 U.S. 768, 774 (1979).

Petitioners' contrary argument rests in part (Br. 27-28) on the interpretive canon of *noscitur a sociis*, which "counsels that a word is given more precise content by the neighboring words with which it is associated."

Freeman v. *Quicken Loans, Inc.*, 566 U.S. 624, 634-635 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008)). But that canon is most instructive when it is applied to an ambiguous term that forms "part of a phrase" with other less ambiguous terms. *Id.* at 635; see, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1085-1086 (2015); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575-576 (1995); see generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012) ("For the associated-words canon to apply, the terms must be conjoined in such a way as to indicate that they have some quality in common."). For example, the terms "fraudulent" and "manipulative" in the second clause of Section 14(e) shed light on the meaning of the term "deceptive" in the same list. See *Hochfelder*, 425 U.S. at 198-199. But the *noscitur a sociis* canon does not justify importing a mens rea requirement from Section 14(e)'s second clause to "narrow the reach" of its first. *Naftalin*, 441 U.S. at 774; see *Aaron*, 446 U.S. at 697.

2. The Court in *Aaron* construed the materially identical language in Section 17(a)(2) as not requiring scienter. 446 U.S. at 695-696. The reasoning in *Aaron* controls here.

a. Section 17(a)(2) prohibits a seller of securities from "obtain[ing] money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. 77q(a)(2). That prohibition, which closely resembles Section 14(e)'s ban on material misstatements and omissions, immediately follows Section 17(a)(1)'s ban on "employ[ing] any device, scheme, or artifice to defraud." 15 U.S.C. 77q(a)(1).

In *Aaron*, the Court considered whether proof of scienter is a necessary element of a Section 17(a) violation. 446 U.S. at 695. Observing that Section 17(a)(1) incorporates terms ("device, scheme or artifice to defraud") that are traditionally associated with "knowing or intentional practices," *id.* at 695-696 & nn.13-14, the Court held that Section 17(a)(1) requires scienter, *id.* at 695-697. "By contrast," the Court explained, "the language of § 17(a)(2), which prohibits any person from obtaining money or property 'by means of any untrue statement of a material fact or any omission to state a material fact,' is devoid of any suggestion whatsoever of a scienter requirement." *Id.* at 696. The Court concluded on that basis that Section 17(a)(2) does not require scienter. *Id.* at 697.

That reasoning controls the interpretive inquiry under Section 14(e). Just as petitioners urge (Br. 29-30, 37-39) that Section 14(e) be construed to require a uniform scienter requirement, the parties in *Aaron* "urged the Court to adopt a uniform culpability requirement" for Section 17(a). 446 U.S. at 697. The Court rejected that contention, explaining that "the language of the section is simply not amenable to such an interpretation." *Ibid.* The two clauses of Section 14(e) correspond in every meaningful way to the first two subsections of Section 17(a). Compare 15 U.S.C. 78n(e), with 15 U.S.C. 77q(a)(1)-(2).[1] And the Court has already discounted

[1] The Court in *Aaron* cited a "well-known commentator" who had noted that "'there is nothing on the face of [Section 17(a)(2)] itself which smacks of *scienter* or intent to defraud.'" 446 U.S. at 696 (quoting 3 Louis Loss, *Securities Regulation* 1442 (2d ed. 1961))

the one potentially relevant textual distinction between Section 14(e) and Section 17(a)—that Section 17(a) uses numbered subsections while Section 14(e) does not. See *Naftalin*, 441 U.S. at 774 n.5 (noting that the separate numbering of Section 17(a) merely "reaffirm[s] conclusions drawn from the words themselves").[2]

b. Petitioners view (Br. 29-30, 37-38) Section 14(e) as analogous not to Section 17(a) but to Rule 10b-5, which this Court has held requires scienter. *Hochfelder*, 425 U.S. at 214. That argument is misconceived. Although Section 14(e) shares relevant text with Rule 10b-5, the specific justifications for construing that Rule to require scienter are inapplicable here.

The Court in *Hochfelder* addressed whether a showing of scienter, as opposed to mere negligence, was required to establish liability in a private action brought under Section 10(b) and Rule 10b-5. 425 U.S. at 187-188. The Commission had argued that the second subsection of Rule 10b-5, which bars material misstatements or omissions, 17 C.F.R. 240.10b-5(b), was "cast in

(brackets omitted). After *Aaron* was decided, the same treatise explained that this Court's conclusions about Section 17(a) naturally extend to the near-verbatim language in Section 14(e). See 5 Louis Loss & Joel Seligman, *Securities Regulation* 2255 (3d ed. 1990) ("[T]he Supreme Court's construction of § 17(a) should govern so as to conclude that scienter * * * is required by the 'fraudulent' and 'deceptive' clause of § 14(e), which more or less tracks § 17(a)(1) of the 1933 Act and § 10(b) of the 1934 Act, but not by the untrue statement clause, which *precisely* tracks § 17(a)(2).").

[2] Unlike Section 14(e), Section 17(a)(2) also requires a showing that the violator "obtain[ed] money or property by means of" the misrepresentation or omission. 15 U.S.C. 77q(a)(2). But as the court of appeals correctly recognized, that feature of Section 17(a)(2) was not material to the Court's holding in *Aaron*. Pet. App. 12a n.4; see *Aaron,* 446 U.S. at 695-696.

language which—if standing alone—could encompass both intentional and negligent behavior." *Hochfelder*, 425 U.S. at 212. The Court rejected that interpretation, holding that Rule 10b-5 is limited to securities violations committed with scienter. See *id.* at 212-214.

The *Hochfelder* Court did not base that conclusion, however, on the text of Rule 10b-5 standing alone. To the contrary, the Court agreed with the Commission that "[v]iewed in isolation the language of subsection (b) * * * could be read as proscribing * * * any type of material misstatement or omission * * * whether the wrongdoing was intentional or not." 425 U.S. at 212. Yet the Court explained that "Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b)," *id.* at 212-213, which makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe," 15 U.S.C. 78j(b). That *statutory* text, in which the "words 'manipulative or deceptive'" appear "in conjunction with 'device or contrivance[,]' strongly suggest[ed] that Section 10(b) was intended to proscribe knowing or intentional" misconduct. *Hochfelder*, 425 U.S. at 197. The Court held that, because the scope of Rule 10b-5 could not "exceed the power granted the Commission by Congress under § 10(b)," the conclusion that the Rule required scienter "was compelled by" the textual limits on the statutory grant of authority. *Id.* at 214. No such constraint applies to the interpretation of Section 14(e). See *Aaron*, 446 U.S. at 696.

Petitioners emphasize (Br. 31-36) that the Court's decision in *Hochfelder* also turned on the absence of various procedural limitations on "the judicially created private damages remedy under § 10(b)." 425 U.S. at 210. Without such limitations, the Court observed, implied private "actions premised on negligent wrongdoing" would "nullify the effectiveness of the carefully drawn procedural restrictions on" certain "express civil remedies in the 1933 Act allowing recovery for negligent conduct." *Id.* at 208, 210. As explained below, however, this Court's current approach to judicially created private rights of action forecloses the recognition of such a right under Section 14(e). See pp. 28-32, *infra*. Concerns about the potential disruptive effects of a negligence-based private damages action therefore should play no role in construing Section 14(e)'s substantive prohibition.

3. Section 14(e)'s second sentence underscores that scienter is not a necessary element of a claim based on material misstatements or omissions. That sentence states: "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." 15 U.S.C. 78n(e). Petitioners suggest (Br. 28 n.7) that Section 14(e)'s rulemaking delegation applies to both operative clauses in the first sentence, thereby indicating that both clauses are "focused on conduct that typically entails scienter." That argument is mistaken.

Congress has more generally authorized the Commission "to make such rules and regulations as may be necessary or appropriate to implement" the securities laws. 15 U.S.C. 78w(a). Congress has also vested the Commission with specific authority to prescribe appropriate rules relating to a recommendation to shareholders "to accept or reject a tender offer or request."

15 U.S.C. 78n(d)(4). The additional rulemaking authorization in Section 14(e) gives the Commission the further power to "define, and prescribe means *reasonably designed to prevent*," the "fraudulent, deceptive, or manipulative" acts that Section 14(e)'s second clause proscribes. 15 U.S.C. 78n(e) (emphasis added). Congress did not expect the Commission to flesh out the well-understood meaning of material misstatements and omissions, but rather to combat the more "sophisticated devices sometimes employed by both sides in contested tender offers." S. Rep. No. 1125, 91st Cong., 2d Sess. 6 (1970); see generally *United States* v. *O'Hagan*, 521 U.S. 642, 666-673 (1997). Consistent with that understanding, the Commission has exercised its additional authority under Section 14(e) by prohibiting a variety of potentially manipulative practices, as well as insider trading, in connection with tender offers.[3]

B. The History And Purpose Of The Williams Act Confirm That Section 14(e)'s First Clause Does Not Require Scienter

1. In enacting the Williams Act, "Congress sought to ensure that shareholders confronted by a cash tender offer for their stock [would] not be required to respond without adequate information." *O'Hagan*, 521 U.S. at 667 (citation and internal quotation marks omitted;

[3] See *e.g.*, 17 C.F.R. 240.14e-1 (prohibiting unlawful tender-offer practices); 17 C.F.R. 240.14e-2 (requiring target to disclose its position in response to tender offer); 17 C.F.R. 240.14e-3 (prohibiting insider trading on tender offers); 17 C.F.R. 240.14e-4 (prohibiting transactions in connection with partial tender offers); 17 C.F.R. 240.14e-5 (prohibiting certain purchases outside of tender offer); 17 C.F.R. 240.14e-7 (prohibiting unlawful tender-offer practices in connection with "roll-up" transactions); 17 C.F.R. 240.14e-8 (prohibiting misconduct in connection with pre-commencement communications).

brackets in original). Section 14(e) "supplements the more precise disclosure provisions found elsewhere in the Williams Act." *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 10-11 (1985). Tender offerors and target companies are required to disclose material information about a tender offer, including the offer's terms, the offeror's dealings with the target company, the offeror's plans for the target company, and the offer's funding, see 15 U.S.C. 78n(d); 17 C.F.R. 240.14d-100; as well as the target company's proposed response, its recommendation to shareholders, and the reasons for that recommendation, see 15 U.S.C. 78n(d); 17 C.F.R. 240.14d-9, 240.14d-101, 240.14e-2. Section 14(e) "affirm[s] that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make full disclosure of material information to those with whom they deal." *Schreiber*, 472 U.S. at 11 (quoting House Report 11).

Whether willful or merely negligent, material misrepresentations or omissions undermine the Williams Act's "consistent emphasis on disclosure," *Schreiber*, 472 U.S. at 12, and deny the participants in a tender offer access to complete and accurate information, see *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977) (explaining that "the legislation was designed solely to get needed information to the investor"). Even when distortion of information provided to shareholders results from negligence rather than from deliberate misconduct, such distortion undercuts Congress's "commit[ment] to a policy of neutrality in contests for control." *Id.* at 29.

2. The application of Section 14(e) to negligent misrepresentations or omissions also furthers the Williams

Act's purpose of harmonizing the regulation of tender offers with the regulation of proxy solicitations. Congress designed the Williams Act "[t]o remedy [a] gap in federal regulation" when corporate takeover attempts utilized cash tender offers rather than the proxy solicitations that were already regulated under Section 14(a). *Piper*, 430 U.S. at 22. The legislation was thus "patterned on the present law and the regulations which govern proxy contests" and provided "the same kind of disclosure requirements" that existed for proxies. 113 Cong. Rec. 24,665 (1967) (statement of Sen. Williams).

A negligence standard achieves that intended symmetry. Pursuant to its Section 14(a) authority, the Commission has promulgated Rule 14a-9, which prohibits material misstatements and misleading omissions in proxy statements using language nearly identical to the first clause of Section 14(e). See 17 C.F.R. 240.14a-9. In a number of decisions, including at least one issued before the Williams Act was enacted, lower courts have concluded—correctly, in the Commission's view—that scienter is not required to establish a violation of Rule 14a-9. See *Richland* v. *Crandall*, 262 F. Supp. 538, 552-553 & n.12 (S.D.N.Y. 1967); see also, *e.g.*, *Beck* v. *Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *Shidler* v. *All Am. Life & Fin. Corp.*, 775 F.2d 917, 926 (8th Cir. 1985); *Gould* v. *American-Hawaiian S.S. Co.*, 535 F.2d 761, 777 (3d Cir. 1976); *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1300-1301 (2d Cir. 1973) (Friendly, J.); cf. *Hochfelder*, 425 U.S. at 209 n.28 (observing that "some courts have concluded that proof of scienter is unnecessary" under Section 14(a)); but see *Adams* v. *Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir.) (applying scienter standard to outside accountants), cert. denied, 449 U.S. 1067 (1980). A determination that Section 14(e) covers negligent misstatements or omissions would thus harmonize the parallel prohibitions that apply to proxy solicitations and tender offers.

C. Negligence Is The Appropriate Floor For Liability Under Section 14(e)

Section 14(e)'s first clause prohibits "mak[ing] any untrue statement of a material fact or omit[ting] 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). That language could literally be read to encompass, and thus to impose liability for, even non-negligent misstatements of fact. Despite that literal breadth of coverage, however, Section 14(e) should not be construed to impose strict liability.

Similar broad wording appears in Section 17(a) and Rule 14a-9. See 15 U.S.C. 77q(a); 17 C.F.R. 240.14a-9. Yet lower courts, like the court of appeals here, Pet. App. 8a, have long held that enforcement actions under these provisions must be predicated on *some* degree of culpability. See, *e.g.*, *SEC* v. *Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001) ("requir[ing] a showing of negligence" under Section 17(a)(2)); *Shidler*, 775 F.2d at 927 (requiring a showing of negligence under Rule 14a-9). And while the Court in *Aaron* did not explicitly state that Section 17(a) requires negligence, neither did it hint at strict liability. See, *e.g.*, 446 U.S. at 685 (recounting court of appeals' conclusion that "proof of negligence alone will suffice") (citation omitted); *id.* at 690 (explaining *Hochfelder*'s holding that "allegations of simple negligence" were insufficient under Section 10(b)); *id.* at 703 (Burger, C.J., concurring) (asserting that, as a practical matter, "it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence"); *id.* at 715 (Blackmun, J., concurring in part and dissenting in part) (observing that, because of the different treatment of Section 10(b) and Section 17(a), "henceforth only the seller's negligent misrepresentations may be enjoined"); see also SEC Br. at 15, 18-20, 35, 38, 43, 67-69, 71-75, *Aaron*, *supra* (No. 79-66) (arguing that Section 17(a)(2) covers negligent misrepresentations).

Common-law principles support the prevailing assumption that material-misrepresentation provisions, including Section 14(e), require negligence. As a general matter, where Congress legislates in an area governed by the common law, this Court "favor[s] the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted); cf. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1330 (2015) (consulting "common law respecting the tort of misrepresentation" when construing provision of the Securities Act). At common law, negligence was required to establish tort liability if "a person supplie[d] false information to another with the intent to influence a transaction in which he has a pecuniary interest." *Gerstle*, 478 F.2d at 1300; see Restatement (Second) of Torts § 552(1) (1977) (explaining that a person may be liable for communicating false information about a transaction in which he has a pecuniary interest "if he fails to exercise reasonable care or competence in obtaining or communicating the information"). Although the federal securities laws do not uniformly track the common law, see, *e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162 (2008), here the common law "reinforces" the widely held view that provisions proscribing material misstatements require at least negligence, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

For two other reasons, imposition of strict liability under Section 14(e) would be anomalous. First, it is undisputed that Section 14(e)'s second clause requires scienter, cf. *Aaron*, 446 U.S. at 697, and scienter and strict liability would make unusual bedfellows in the same provision. Second, Section 14(e) sweeps broadly, literally encompassing any statement made by any person in connection with a tender offer—including, for example, a cable news commentator's discussion of such an offer. See 15 U.S.C. 78n(e). In that way, it differs from the strict-liability provisions in the federal securities laws, which require a narrow class of persons either to register with the Commission or to submit certain statements to the Commission. See, *e.g.*, 15 U.S.C. 77e (registration of securities offerings); 15 U.S.C. 78m(d) (statement of beneficial ownership); 15 U.S.C. 78*o* (registration of broker-dealers); 15 U.S.C. 78p(a)-(b) (statement of directors, officers, and beneficial owners); 15 U.S.C. 80b-3 (2012 & Supp. V 2017) (registration of investment advisors); cf. *Shidler*, 775 F.2d at 927 (describing strict liability as "too blunt a tool to ferret out the kind of deceptive practices Congress sought to prevent in enacting section 14(a)").

II. SECTION 14(e) DOES NOT CREATE A PRIVATE RIGHT OF ACTION

Although the court of appeals correctly held that Section 14(e) encompasses negligent misrepresentations, respondents' suit still should be dismissed. Under this Court's modern private-right-of-action jurisprudence, see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-289 (2001), private litigants like respondents may not sue for violations of Section 14(e).

In *Piper*, 430 U.S. at 24-42, this Court held that Section 14(e) does not create an implied private right of action for unsuccessful tender offerors. The Court declined to address whether a private damages remedy exists for shareholders subject to a tender offer. See *id.* at 42 n.28. Nevertheless, lower courts have long permitted private litigants to pursue claims under Section 14(e), on the theory that this Court has recognized private rights of action under Section 10(b), *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971), and Section 14(a), *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-432 (1964). See, *e.g.*, *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 595-596 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 361 (2d Cir.), cert. denied, 414 U.S. 910, and 414 U.S. 924 (1973).

In the courts below, petitioners did not dispute that Section 14(e) can be enforced through private suits. See Pet. App. 19a. Nevertheless, the question whether a private right of action exists under Section 14(e) is "fairly included" within the question on which this Court granted certiorari. Sup. Ct. R. 14.1(a); see Pet. i. And because many of petitioners' arguments for construing Section 14(e) to require scienter depend on the risks of overreaching that private enforcement of a negligence-based prohibition purportedly would entail, see Pet. Br. 31-42, the determination whether a private right exists is "predicate to an intelligent resolution of the question" whether Section 14(e) encompasses negligent misrepresentations. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (citation and internal quotation marks omitted).

A. This Court's Precedents Foreclose Inferring A Private Right Of Action Under Section 14(e)

1. The Commission has previously argued that this Court should infer a private right of action under Section 14(e). See SEC Amicus Br. at 8-18, 74-129, *Piper*, *supra* (No. 75-353). In making that argument, the Commission relied on the Court's then-operative interpretive principle that "it is not necessary to show [Congress's] intention to create a private cause of action" in the statute. *Id.* at 11, 90 (quoting *Cort* v. *Ash*, 422 U.S. 66, 82 (1975)) (emphasis omitted). "[A]s a routine matter," the Court at that time "would imply causes of action not explicit in the statutory text" when the Court deemed private enforcement "'necessary to make effective' a statute's purpose." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Borak*, 377 U.S. at 433). Thus, when the Commission filed its brief in *Piper*, the Court had already recognized an implied private right of action under Section 10(b), *Bankers Life*, 404 U.S. at 13 n.9, and Section 14(a), *Borak*, 377 U.S. at 430-432.

Beginning with *Piper*, however, where this Court rejected an implied private right of action for unsuccessful tender offerors, 430 U.S. at 24-42 & n.28, the Court has substantially altered its approach. It has declined to infer new causes of action unless the statute at issue demonstrates an intent to create both a right and a remedy. For example, the Court refused to infer a private right of action under Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a), because the statute "does not, by its terms, purport to create a private cause of action in favor of anyone." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568-570 (1979). The Court likewise refused to infer a private right of action under Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6, because that statute does not "mention an intended private action." *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-24 (1979) (citation omitted).

In a variety of contexts, the Court has since treated the absence of affirmative textual support as a bar to inferring new private rights of action. See *Johnson* v. *Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.) (collecting cases). And in 2001, the Court acknowledged that it had "abandoned" its previous approach. *Sandoval*, 532 U.S. at 286-289. The Court now requires that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 286. In the absence of apparent "[s]tatutory intent" to create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287. That remains true "even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak*." *Id.* at 287.

2. The Court's current approach to private rights of action forecloses inferring such a right under Section 14(e).

a. Under this Court's current jurisprudence, the "determinative" question is whether the statute "displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. That "analysis must begin with the language of the statute itself." *Touche Ross*, 442 U.S. at 568. The text of Section 14(e) does not "create or alter any civil liabilities," *Transamerica*, 444 U.S. at 19, but instead is "entirely silent as to private remedies," *Piper*, 430 U.S. at 24-25.

Section 14(e) also does not include any "'rights-creating' language," *Sandoval*, 532 U.S. at 288; see, *e.g.*, *Cannon* v. *University of Chi.*, 441 U.S. 677, 690 n.13 (1979), with respect to the "class of shareholder-offerees" that it ultimately "protect[s]," *Piper*, 430 U.S. at 38. Rather, it simply identifies the prohibited conduct and makes it "unlawful for any person" to engage in it. 15 U.S.C. 78n(e). "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (citation and internal quotation marks omitted); see, *e.g.*, *Transamerica*, 444 U.S. at 24; *Touche Ross*, 442 U.S. at 578.

b. The Court has identified two circumstances in which it will recognize an implied private right of action despite the absence of statutory language authorizing private suits. Neither of those circumstances is present here.

First, with respect to particular statutory provisions (including provisions of the federal securities laws) as to which the Court had previously recognized implied private rights of action, the Court has left its earlier decisions undisturbed. See *Central Bank*, 511 U.S. at 171 ("Private plaintiffs may sue * * * under private rights of action we have found to be implied by the terms of §§ 10(b) and 14(a) of the 1934 Act."); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983) ("The existence of this implied remedy [under Section 10(b) and Rule 10b-5] is simply beyond peradventure."); see also *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 142 (2011). The Commission has advocated for and continues to believe that such actions serve as an important adjunct to government enforcement suits. But because this Court has not previously recognized a private right of action under Section 14(e), see *Piper*, 430 U.S. at 42 n.28, the same reasoning does not apply here.

Second, the Court has left open the possibility that it might infer a private right of action where Congress enacts "the verbatim statutory text that courts had previously interpreted to create a private right of action." *Sandoval*, 532 U.S. at 288. As discussed above, Section 14(e) adopts language nearly verbatim from Rule 10b-5 and, before that, from Section 17(a). See pp. 2-4, 6, *supra*. Because a private right of action exists under Rule 10b-5 but not under Section 17(a), Section 14(e) does not incorporate text that has been uniformly construed to create a private right of action. Compare *Bankers Life*, 404 U.S. at 13 n.9, with *Finkel* v. *Stratton Corp.*, 962 F.2d 169, 174-175 (2d Cir. 1992) (collecting Section 17(a) cases). And it is unclear what weight Rule 10b-5 deserves in any event, since Section 14(e) does not incorporate the actual "statutory text" of Section 10(b). *Sandoval*, 532 U.S. at 288.

3. Even if this Court construes Section 14(e) not to create a private right of action, some conduct that violates Section 14(e) may also violate *other* securities-law provisions that *are* privately enforceable. Some tender-offer participants could potentially recover damages in private suits under Section 10(b) and Rule 10b-5 if they have purchased or sold securities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730-731 (1975), and if the defendant acted with scienter, see *Hochfelder*, 425 U.S. at 214. Tender offers involving an exchange of securities (rather than a cash payment)

may be regulated under the Securities Act, which provides a host of express private remedies. See 15 U.S.C. 11, 12, 15.[4] Under this Court's current interpretive methodology as reflected in *Sandoval*, however, private litigants would not have a cause of action to enforce Section 14(e) itself.

B. The Absence Of A Private Right Of Action Reinforces The Conclusion That Section 14(e) Does Not Require Scienter

1. Many of petitioners' arguments for imposing a scienter requirement (*e.g.*, Br. 31-36, 38-39) "assum[e] the existence of an inferred private right of action under Section 14(e)," *id.* at 23. Absent such a right, the need to add an atextual limitation on the substantive scope of Section 14(e) largely disappears. For example, it is not "significant" that the Williams Act lacks "procedural restrictions" that apply to express private suits "for negligent conduct," *Hochfelder*, 425 U.S. at 208-209; see Pet. Br. 32-34, since those restrictions do not apply to Commission enforcement actions. See, *e.g.*, 15 U.S.C. 77k(e). For the same reason, Section 14(e)'s negligence threshold does not encourage circumvention of the express private causes of actions defined elsewhere in the

[4] Tender-offer participants who tender or acquire shares to or from a person who traded based on inside information would also have an express private right of action under Section 20A of the Exchange Act, 15 U.S.C. 78t-1. And private parties may be able to bring state-law claims with respect to tender offers, including for breaches of fiduciary duties, to the extent that those claims are not preempted by the Williams Act, see, *e.g.*, *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 78-87 (1987), or precluded by the Securities Litigation Uniform Standards Act of 1998, see 15 U.S.C. 77p(d)(1)(B)(ii) (preserving state courts' jurisdiction over certain state-law claims involving tender offers).

securities laws. See Pet. Br. 34-36. Nor do the heightened pleading standards in the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 746-749, weigh in favor of a scienter requirement, as those requirements also do not apply to the Commission. 15 U.S.C. 78u-4(b); see Pet. Br. 41-42.

2. The Commission investigates and brings enforcement actions against tender-offer participants for violations of Section 14(e), as well as for violations of other Williams Act disclosure provisions and implementing agency regulations, seeking relief that includes injunctions and civil monetary penalties. See 15 U.S.C. 78u (2012 & Supp. V 2017), 78aa; see also *O'Hagan*, 521 U.S. at 667 & n.14 (describing other disclosure provisions).[5] For the reasons stated above, a decision holding that Section 14(e) is not privately enforceable would accord with this Court's precedents. The absence of a private remedy, however, would increase the need for vigorous enforcement by the Commission. If Section 14(e) is enforceable only by the government, it would be particularly inappropriate to engraft an atextual scienter requirement onto that provision.

[5] In some circumstances where the wrongdoer acts with scienter, conduct that violates Section 14(e) may also subject the offender to a Commission enforcement action under the antifraud provisions of Section 10(b) and Rule 10b-5. Cf. p. 18-19, 31, *supra*. A person who "willfully" violates the securities laws may also be subject to criminal prosecution by the Department of Justice, in which the potential penalties include fines and imprisonment. 15 U.S.C. 78ff(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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