No. 18-459

IN THE
Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN, ET AL.,

Respondents.

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

BRIEF OF FORMER COMMISSIONERS OF THE SECURITIES AND EXCHANGE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are former Commissioners of the Securities and Exchange Commission ("SEC"). Both in that role and outside of that role through writing, teaching, or otherwise, they have devoted substantial time and effort to the optimal operation of the nation's securities laws. *Amici* file this brief because they believe that the decision below, if allowed to stand, will cause substantial disruption to and distortion of the nation's securities markets.

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SUMMARY OF THE ARGUMENT

By implying a private right of action under Section 14(e) of the Securities Exchange Act of 1934 *and* making liability under that provision as expansive as possible short of strict liability, the decision below opens the floodgates to doubly vexatious litigation unmoored from the statutory text and purpose. First,

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

the Ninth Circuit's decision exposes corporations to private liability under Section 14(e) by finding an implied private right of action in the absence of even a hint that Congress intended that the statute be privately enforceable. In creating a new private right of action under the securities laws, the Ninth Circuit ventured where this Court has not gone in four decades. Second, the Ninth Circuit doubled down on its conspicuous departure from the text and intent of Section 14(e) by holding that mere negligence suffices to impose substantial liability for violations of that provision.

The result of the Ninth Circuit's freewheeling interpretive approach is a legal framework that portends suits in connection with virtually every merger. And corporations will face irresistible pressure to settle them, no matter how frivolous, in light of the permissiveness of a hindsight-driven negligence standard. For this reason, private enforcement of Section 14(e) under a negligence standard threatens to thwart socially beneficial mergers and cause unnecessary disruption of the mergers that are consummated despite the dangers.

Amici believe that the SEC is best equipped to enforce Section 14(e) consistent with the objectives of Congress's carefully calibrated securities regime. Conferring sole enforcement authority on the SEC hews to the statutory text and intent. It also ensures that the agency charged with protecting investors, maintaining fair and efficient markets, and facilitating capital formation can strike the right balance combating the ills of securities fraud without overdeterring beneficial economic activities. SEC enforcement of Section 14(e), without the specter of private suits working at cross-purposes, maximizes the efficiency of the nation's securities markets.

But even if the Court does not reach the question whether Section 14(e) creates an implied private right of action, reversal still is warranted to make clear that scienter, not simple negligence, is the proper fault standard under that provision. As far as *amici* are aware, the Court has not adopted a negligence standard for an implied private right of action since at least 1975. The Court should not break new ground here. Reading a negligence standard into Section 14(e), as the Ninth Circuit did, only amplifies the harms worked by private actions under the statute and marks an even more pronounced departure from Congress's intent.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THERE IS NO IMPLIED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e).

This Court never has decided, in the first instance, whether shareholders have an implied private right of action under Section 14(e). *See, e.g.*, *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977) (reserving question "[w]hether shareholder-offerees . . . have an implied cause of action under s 14(e)"). It should take this opportunity to hold that there is not.

A. Section 14(e) Displays No Intent to Create a Private Remedy.

As the Court recently reaffirmed, "a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387–88 (2015); *see also*, *e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (explaining that if Congress seeks to "create new rights enforceable under an implied private right of action," then "it must do so in clear and unambiguous terms").[2] "[W]hen deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). "[T]hat a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Rather, "[i]f the statute itself does not 'displa[y] an intent' to create 'a private remedy,' then 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Abbasi*, 137 S. Ct. at 1856 (second alteration in original); *see also id.* (stressing that the "judicial task" is "'limited solely to determining whether Congress intended to create the private right of action asserted'"). "'Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.'" *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

The Court's caution when determining whether a statute creates an implied private right of action—and its narrow focus on statutory text and intent—stands as a marked rejection of a previous era during which the Court "assumed it to be a proper judicial

[2] All citations and footnotes are omitted, and all alterations are in the original unless otherwise indicated.

function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Abbasi*, 137 S. Ct. at 1855. The Court "abandoned that understanding" in 1975 "and ha[s] not returned to it since." *Sandoval*, 532 U.S. at 287; *see also id.* ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."). Notably, consistent with its increasing skepticism about creating private causes of action by implication, the Court has not found a new implied private right of action under the securities laws since its decision in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979).

Applying the governing standard here, it is clear that Section 14(e) does not create an implied private right of action. Nothing in the "statute itself . . . 'display[s] an intent' to create 'a private remedy,'" *Abbasi*, 137 S. Ct. at 1856, much less does so "in clear and unambiguous terms," *Gonzaga Univ.*, 536 U.S. at 290. To the contrary, Section 14(e) "makes no provision whatever for a private cause of action." *Piper*, 430 U.S. at 24; *see also id.* at 42 (rejecting implied private right of action under Section 14(e) for tender offerors). And reading a private right of action into the statute also is inconsistent with congressional intent as reflected in the text of Section 14(e), which is directed exclusively at regulated persons. 15 U.S.C. § 78n(e) ("It shall be unlawful for any person . . . ."). Statutes like Section 14(e) 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.

The Court's decision in *Transamerica* underscores the lack of any basis for implying a private right of action under Section 14(e). There, the Court found an implied private right of action to void a contract under one provision of the Investment Advisors Act of 1940, but rejected a right of action for damages and other monetary relief under a separate section of the act. *See Transamerica*, 444 U.S. at 24. Like the statute that provided no private right of action in *Transamerica*, Section 14(e) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." *Id.* at 19. And, in contrast to the statute from which the Court inferred a private right of action, Section 14(e) does not carry any "customary legal incidents" that include "the availability of a suit" by a private party. *Id.*

The Court's task is "'limited solely to determining whether Congress intended to create the private right of action asserted.'" *Abbasi*, 137 S. Ct. at 1856. Because Section 14(e) displays no sign of the requisite intent, the Court should adhere to its decades-long resistance to creating new causes of action, including under the securities laws, *see Transamerica*, 444 U.S. at 24; *Touche Ross*, 442 U.S. at 579; *Piper*, 430 U.S. at 42, and hold that there is no implied private right of action under Section 14(e).

B. Placing Sole Enforcement Authority in the SEC Comports with Congressional Intent and Maximizes Market Efficiency.

Not only is rejecting an implied private right of action in Section 14(e) the only outcome consistent with statutory intent, it has the corresponding benefit of best promoting the aims of the nation's securities laws. Leaving the SEC as the sole enforcer of Section 14(e) maximizes market efficiency, conferring substantial benefits on companies and shareholders alike.

When interpreting securities laws—including in the context of whether they create implied private rights of action—this Court has paid careful attention to the congressional objectives that underpin the legislative framework. In *Piper*, for instance, the Court rejected an implied private right of action for unsuccessful tender offerors, emphasizing that a contrary holding might "prejudice[]" shareholders "because some tender offers may never be made if there is a possibility of massive damages claims for what courts subsequently hold to be an actionable violation of § 14(e)." 430 U.S. at 39–40. Similarly, the Court rejected implying aiding-and-abetting liability in a private suit under Rule 10b-5 and explained that imposing such liability "exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). And the Court adopted a demanding materiality standard for disclosure provisions on the basis that a less restrictive standard risked incentivizing companies to "bury the shareholders in an avalanche of trivial information . . . that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1976).

Fidelity to these and other congressional aims compels rejecting an implied private right of action under Section 14(e). As a threshold matter, *amici* strongly believe that securities fraud can cause substantial harms to the market and, as a result, must be regulated. *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A* *critical Analysis*, 158 Penn. L. Rev. 2173, 2179 (2010) [hereinafter "Rose, *The Multienforcer Approach*"] ("Securities fraud, like other failures in the market for information, produces deadweight social costs that may justify regulation."); A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 Va. L. Rev. 925, 937–38 (1999) (describing costs of securities fraud). Among other ills, securities fraud "increases the cost of capital in a variety of ways," "upset[s] the efficient allocation of resources in the economy," and "disguise[s] poor management and prevent[s] value-enhancing changes in control." Rose, *The Multienforcer Approach*, *supra* at 2179–80; *accord* Pritchard, *supra* at 937–38.

But the worthy pursuit of securities fraud must be tempered by the recognition that over-enforcement can damage markets and shareholders as well. "Just as securities fraud increases the cost of capital and reduces allocative efficiency, so, too, can misguided enforcement." Amanda M. Rose, *Designing an Efficient Securities Fraud Deterrence Regime*, The Heritage Foundation (Feb. 28, 2017), https://www.heritage.org/markets-and-finance/report/designing-efficient-securities-fraud-deterrence-regime. In fact, misguided enforcement "imposes a variety of other deadweight costs on firms and, ultimately, their shareholders, operating as a drag on economic growth." *Id.*

Concurrent public and private enforcement of securities laws gives rise to problems because of the different incentive structures between government agencies and private parties. "Private parties may, for example, rationally pursue claims that have a relatively low probability of success because defendants have an incentive to settle in order to avoid the costs of defense or to avoid the small prospect of a very large adverse judgment." Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961, 969–70 (1994); *accord* Pritchard, *supra* at 952–53 ("If the plaintiffs can withstand a motion to dismiss, defendants generally will find settlement cheaper than litigation. . . . Any case plausible on the pleadings will have a positive settlement value if only to avoid the costs of discovery and attorneys' fees, which can be substantial in these cases."). Thus private parties "may pursue cases that the government would refuse to bring even [if] it had infinite resources." Grundfest, *supra* at 970. At the same time, private parties might "fail to bring cases that the government would enthusiastically pursue, if only it had the time and money." *Id.* To take one example, private-party plaintiffs likely would not sue judgment-proof defendants no matter how unlawful their actions, whereas the government, aiming to deter misconduct, still would have an incentive to seek redress. *Id.* n.23.

As a result of the divergent incentives and objectives motivating public and private enforcement, "[l]aw and economics scholarship teaches that it is especially difficult to achieve optimal deterrence when private parties are granted the right to enforce overbroad liability rules for financial reward." Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301, 1304 (2008) [hereinafter "Rose, *Reforming Securities Litigation Reform*"]. This is particularly true in the securities-fraud context, where "[t]he settlement dynamic . . . fatally undermines the deterrent value" of securities class actions. Pritchard, *supra* at 959; *see also*, *e.g.*, Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1083 (2019) [hereinafter "*Rise of Securities-Fraud Class Actions*"] (explaining that the structure of class actions "encourages plaintiffs to file lawsuits in even the most tenuous of cases" and puts "enormous" pressure on defendants "to settle and avoid the uncertain crucible of a securities-fraud trial" if they lose at the class-certification stage); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. Fin. Econ. 207, 208 (2009) ("[P]rivate lawsuits . . . often do not penalize the relevant actors, can distort incentives, and can be inefficacious.").

A securities-fraud enforcement regime that over-deters regulated persons causes sweeping harm—including "some of the very same social costs as securities fraud itself," Rose, *The Multienforcer Approach*, *supra* at 2184. Over-deterrence "can increase the cost of capital (e.g., if fear of liability causes companies to overinvest in precautionary measures or causes financial intermediaries to charge more for their services) and upset the allocative efficiency of the economy (e.g., if fear of liability causes companies to reduce disclosure of truthful information or, conversely, to disclose too much trivial information, thereby impeding share-price accuracy)." *Id.*

Recognizing that Congress intended to vest the SEC with sole authority to enforce Section 14(e) is the best way to deter and remediate serious violations while guarding against the crushing costs of over-enforcement. For starters, consolidating enforcement authority in the SEC would reduce the threat of over-deterrence and its attendant harms. Indeed, "[t]he major advantage of centralizing authority is that the SEC, acting alone, can achieve a more optimal level of deterrence than the current multienforcer system does" because the SEC "does not have the same incentives as plaintiffs' attorneys do to bring frivolous cases, so it can instead focus on pursuing only meritorious cases." *Rise of Securities-Fraud Class Actions*, *supra* at 1084; *accord* Rose, *The Multienforcer Approach*, *supra* at 2195 (explaining that a "well-incentivized enforcer," like the SEC, "would forgo bringing some cases that might indeed win because it does not believe the defendants truly acted with scienter or because it recognizes that significant uncertainty exists on that score"); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 Cal. L. Rev. 115, 122 (2012) (explaining that public enforcers are "less likely to bring a questionable action where the social costs are high").

To the extent that the SEC exercises such restraint, it could "reduce the occurrence" of adverse outcomes to companies in enforcement actions despite their lack of merit, which, in turn, would decrease "the fear of legal error that leads to over-deterrence." Rose, *The Multienforcer Approach*, *supra* at 2195; *accord* Benjamin P. Edwards, *Disaggregated Classes*, 9 Va. L. & Bus. Rev. 305, 318 (2015) ("[A] purely public enforcement regime may be less likely to over-deter than an enforcement regime that relies on private enforcers."). Exclusive SEC enforcement also could lead to more "robust capital markets, as measured by market capitalization, trading volume, the number of domestic firms, and the number of initial public offerings." Jackson & Roe, *supra* at 208.

The benefits of sole SEC enforcement—and burdens of private actions—are heightened in the tender-offer context. For one thing, private parties have enormous incentives to file suits under Section 14(e), using the threat of a deal-blocking injunction to obtain lucrative settlement offers from companies. Indeed, "injunctive relief is clearly the remedy of choice in tender offer litigation" precisely because "[i]t is at once the most painless and potent way to derail or retard a high-wheeling tender offer juggernaut." Roger J. Magnuson, *Shareholder Litigation* § 7:31. Doubtless for this reason, "[m]ultiple teams of plaintiffs file lawsuits challenging virtually every public company merger, often in multiple jurisdictions." Jill E. Fisch, *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 558 (2015). This trend rapidly has gained steam in federal court in recent years. In the roughly three years since the Delaware Court of Chancery signaled that it would begin carefully scrutinizing settlements in these merger-objection cases, *see In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 885 (Del. Ch. 2016), more Section 14(e) suits have been filed in federal court than in the preceding twenty years combined.[3]

[3] Sixty-four Section 14(e) actions were filed in federal court from 1996 through 2015. Since the beginning of 2016, at least ninety-six such actions have been filed in federal court. (All data has been taken from the Stanford Law School Securities Class Action Clearinghouse by searching for "1934 act claims – section 14e" in the "Claims" field at the following web address: http://securities.stanford.edu/advanced-search.html.)

"Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims." Browning Jeffries, *The Plaintiffs' Lawyer Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 58 (2014). Predictably, this pattern of frivolous suit followed by coerced settlement yields "negative economic effects and . . . inequities . . . that result in no benefits to shareholders and windfalls to attorneys." *Id.* at 59–60.

Exclusive SEC enforcement also can best protect the benefits of mergers and acquisitions, which are a critical part of economic growth and dynamism. Indeed, "[a]ll parties benefit" in the tender-offer process. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1173 (1981). As this Court has emphasized, tender offers give shareholders the "opportunity to sell their shares at a premium"; allow for the "reallocation of economic resources to their highest valued use, . . . which can improve efficiency and competition"; and incentivize "incumbent management to perform well so that the stock prices remain high." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982). Congress, too, recognized these benefits of the tender-offer process when enacting the Williams Act, of which Section 14(e) is a key part. *See, e.g.*, James R. Pagano, *The Constitutionality of Second Generation Takeover Statutes*, 73 Va. L. Rev. 203, 220–21 (1987). Over-deterrence in the tender-offer context thus takes a particularly pernicious toll on the economy. The SEC, equipped with sole enforcement authority, is best able to ensure that the gains of tender offers are realized while still policing fraudulent conduct.

Recognizing that Congress intended the SEC to have sole authority to enforce Section 14(e) also would permit the Commission to "pursue a cooperative approach to regulation" by working collaboratively with companies to prevent fraud and make appropriate disclosures. Rose, *Reforming Securities Litigation Reform*, *supra* at 1336. That approach would increase efficiency by "encourag[ing] firms to adopt cost-effective internal controls to prevent fraud by their agents and . . . encourag[ing] well-intentioned officers to make cost-effective disclosure calls." *Id.*

Finally, reposing exclusive enforcement authority in the SEC would allow the agency to "create enforcement priorities and execute them properly." *Rise of Securities-Fraud Class Actions*, *supra* at 1085. The SEC, for instance, could identify the biggest threats to market efficiency and investor confidence and shape its Section 14(e) enforcement priorities to focus on combating and remediating those problems. Private enforcement undermines the SEC's pursuit of a cogent enforcement strategy because of the incentives of private parties to "relentlessly file[] suit" across the board. *See id.*[4]

Refusing to imply a private right of action in Section 14(e) thus would advance congressional objectives by maximizing market efficiency while still preventing the evils of securities fraud. The SEC—

[4] Of course, the SEC's power is not unchecked. Its enforcement authority is expressly granted—and limited—by statute.

granted with "an arsenal of flexible enforcement powers," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976)—is best able to realize the objective of Section 14(e) to "ensure that shareholders 'confronted by a cash tender offer for their stock [would] not be required to respond without adequate information,'" *United States v. O'Hagan*, 521 U.S. 642, 667 (1997). Permitting private enforcement despite a lack of any intent in Section 14(e) to do so runs counter to this Court's recent precedents. Private enforcement also risks undermining Congress's disclosure objectives by leading companies to "bury the shareholders in an avalanche of trivial information" out of a "fear of exposing [themselves] to substantial liability," *TSC Indus.*, 426 U.S. at 448; more broadly, it risks thwarting beneficial merger activity because of the "possibility of massive damages claims" under Section 14(e), *Piper*, 430 U.S. at 40.

In sum, resisting Respondents' and the Ninth Circuit's "invitation to have one last drink," the Court should decline to "ventur[e] beyond Congress's intent" and hold that Section 14(e) is not privately enforceable. *See Sandoval*, 532 U.S. at 287.[5]

[5] The Court should not hesitate to consider the fundamental question whether there is an implied private right of action under Section 14(e). *See, e.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (explaining that Court has discretion to consider issues "'fairly included' within the questions presented," such as those that are "'predicate to an intelligent resolution' of the question presented"); *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 266 n.12 (1992) (considering issue that was "fairly included" within the question presented and briefed on the merits).

C. Congress Remains Free to Create a Private Right of Action.

Both the text and legislative intent of Section 14(e) overwhelmingly militate against implying a private right of action to enforce the statute. The Court thus should reject the decision below and other lower-court decisions that have found an implied private right of action under Section 14(e). If Congress subsequently decides that Section 14(e) should be privately enforceable—a step that it conspicuously has not yet taken—it can pass legislation providing an express right of action under the statute.

The Court made much the same point when rejecting an implied private right of action under Section 17(a) of the Securities Exchange Act of 1934 in *Touche Ross*. As the Court explained there, "nothing we have said prevents Congress from creating a private right of action on behalf of brokerage firm customers for losses arising from misstatements contained in the § 17(a) reports." *Touche Ross & Co*, 442 U.S. at 579. "But," the Court emphasized, "if Congress intends those customers to have such a federal right of action, it is well aware of how it may effectuate that intent." *Id.*

So too here. If Congress decides that Section 14(e) ought to be privately enforceable, it has ample means to make that happen should the Court reject an implied private right of action in this case.[6]

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[6] *Amici* do not argue that there is no implied private right of action under Section 10(b) of the Securities Exchange Act of 1934. In contrast to Section 14(e), which the Court never has indicated, let alone held, includes an implied private right of action, the Court has "long recognized an implied private cause of action to enforce [Section 10(b)] and its implementing regula-

II. AT A MINIMUM, THE COURT SHOULD HOLD THAT A PRIVATE PLAINTIFF MUST PROVE SCIENTER TO PREVAIL UNDER SECTION 14(e).

Even if the Court declines to reach the question whether there is no implied private right of action under Section 14(e), it should reverse the decision below on the ground that scienter, not mere negligence, is the proper fault standard under the statute. The Ninth Circuit's negligence standard doubles down on the departure from statutory intent because it flows from two inferences untethered to statutory text or history: (1) that Congress intended Section 14(e) to be privately enforceable, and (2) that, with respect to private actions, Congress intended to adopt the most sweeping liability standard short of strict liability. Permitting private plaintiffs to prevail on a showing of mere negligence likely would encourage doubly vexatious litigation that undermines the fabric of the nation's securities laws. Affirming the decision below also would represent the first time since this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), that the Court has found an implied private right of action that could be proven through mere negligence. It would produce a particularly anomalous result, moreover, in light of the absence of any procedural

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tion," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014). Private claims under Section 10(b), moreover, do not exert the same irresistible settlement pressure on defendants as do Section 14(e) claims, given that plaintiffs proceeding under Section 10(b) "seldom" seek injunctive relief. *See* Magnuson, *supra* at § 2:32. Because private plaintiffs raising Section 14(e) claims often seek to enjoin a pending transaction, however, defendants in those cases face a choice between settlement and deal failure.

limitations on any implied private right in Section 14(e). *See* Br. of Pet'rs at 43–44.

As an initial matter, the Court consistently has emphasized the need for restraint when interpreting the scope of an implied private right of action. The Court has stressed the "narrow scope that [it] must give the implied private right of action," *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011), and referred to its "general reluctance to extend judicially created private rights of action," *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). *See also*, *e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us."). The need to narrowly cabin implied private rights of action counsels strongly in favor of adopting a scienter standard.

A scienter standard, rather than a negligence standard, is all the more warranted in light of the inherently vexatious nature of private securities-fraud litigation. As this Court has explained, "'litigation under Rule 10b-5'"—a provision analogous to Section 14(e)—"'presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.'" *Cent. Bank of Denver*, 511 U.S. at 189.

First, with regard to "securities laws governing disclosure of information[,] even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421

U.S. 723, 740 (1975). Thus "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.* Second, "[t]he potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation," thereby incurring "social cost[s]" by "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." *Id.* at 741; *accord Stoneridge*, 552 U.S. at 163 (reaffirming that "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies"). These concerns are magnified in the tender-offer context, in light of the pressures exerted by private plaintiffs' ability to block a pending transaction and the time-sensitive nature of the deals.

Requiring private plaintiffs alleging Section 14(e) violations to establish only negligence will amplify the vexatiousness of litigation under that provision. A less stringent fault standard unquestionably will spur more private plaintiffs to file suit, thereby thwarting beneficial business activity and "extort[ing]" more "settlements from innocent companies." *Stoneridge*, 552 U.S. at 163; *see Blue Chip Stamps*, 421 U.S. at 740–41. Negligence liability in disclosure actions under Section 14(e) threatens other "frightening" consequences, including bottling up information beneficial to shareholders and the investing public and depriving companies of their ability to debunk harmful rumors. *See SEC v.*

Tex. Gulf Sulphur Co., 401 F.2d 833, 866–67 (2d Cir. 1968) (Friendly, J., concurring).

As Justice Powell wrote when explaining why Section 10(b) should not be read to provide a cause of action for persons who neither purchased nor sold a security, "[t]he courts already have inferred a private cause of action that was not authorized by the legislation." *Blue Chip Stamps*, 421 U.S. at 759 (Powell, J., concurring). By layering a negligence standard unmoored from Section 14(e) on top of an equally unmoored implied right of action, the decision below dramatically expands the reach of the statute and the opportunities for mischief. "If such a far-reaching change is to be made, with unpredictable consequences for the process of raising capital so necessary to our economic well-being, it is a matter for Congress, not the courts." *Id.* at 759–60 (Powell, J., concurring).

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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