# BUT IN THE END, IT DOESN'T EVEN MATTER: HOW THE NINTH CIRCUIT'S SPLIT FROM FIVE OTHER CIRCUITS AND SUBSEQUENT SUPREME COURT CASE CHANGED NOTHING FOR SECTION 14(e) CLAIMS.

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## I. INTRODUCTION

The April 20, 2018 decision in *Varjabedian v. Emulex Corp.* established that a showing of negligence will allow plaintiffs to recover in claims alleging violations of Section 14(e) of the Exchange Act.[1] This decision broke with five other circuit courts, who have all held that plaintiffs are required to prove scienter. When the Supreme Court of the United States granted certiorari on January 4, 2019, the case garnered a lot of attention, resulting in the filing of eleven amicus briefs.[2] The attention was not surprising, considering the notable circuit split and the large pool of individuals, companies, and federal entities concerned with what they deemed to be a shift in the balance between shareholders and corporations. It was therefore shocking when, on April 23, 2019, two weeks after oral arguments were heard, the Supreme Court dismissed the writ of certiorari as improvidently granted.[3] Given that the entirety of the opinion is a single sentence stating as much, it is impossible to know the motivation behind the dismissal. However, as outlined in this case note, any decision the Court made would not ultimately have made a difference in the current state of Section 14(e) claims.

This case note will analyze the Ninth Circuit's decision, its effects on future mergers and acquisitions (M&A), and how the decision might affect investment by foreign corporations. Part II discusses the background of the Securities and Exchange Act with a focus on Sections 14(e) and 10(b). Part III provides the background of the case. Part IV explains the Ninth Circuit's holding and analyzes the reasoning. Specifically, Part IV will break down the Court's handling of relevant Supreme Court holdings, decisions from other circuits, analysis of relevant background and policy, and what the Court may have missed in its consideration. Part V discusses the future implications of the holding: the effect on future plaintiffs and the effect on foreign investors and corporations. Finally, Part VI discusses the Supreme Court filings and ultimate outcome.

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[1] *See* Varjabedian v. Emulex Corp., 888 F.3d 399, 401 (9th Cir. 2018), *cert. granted,* (U.S., Jan. 4, 2019), *cert. dismissed,* (U.S., Apr, 23, 2019).

[2] *Emulex Corp. v. Varjabedian,* SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/emulex-corp-v-varjabedian/ (showing all the briefs submitted).

[3] *Id.*

The decision of the Ninth Circuit and the Brief in Opposition filed by the respondent provide the strongest legal arguments based on the plain language of the statute and well-reasoned precedent, while the Petition for Writ of Certiorari and Amicus Briefs make strong policy arguments and somewhat tenuous legal arguments.[4] Given the Court's function as an interpreter of the law and not a law maker, i.e. plain meaning over policy, the Petitioner's cause would have been more appropriate in a legislative rather than judicial forum. The Petitioner, and several of the amicus briefs, described U.S. courts as already swarming with Section 14(e) claims, asserting that 90% of mergers and acquisitions result in a lawsuit under the section. It is difficult to see how the Ninth Circuit's lowering of the pleading standard would have any real effect on an already extreme situation.

## II. BACKGROUND OF SECURITIES AND EXCHANGE ACT

In October of 1929 the stock market crashed.[5] Congress believed the only way for the economy to recover was to restore investors' confidence in capital markets.[6] In pursuit of this goal, Congress passed the Securities Act of 1933, the first regulation covering securities in the United States.[7] The Securities Act of 1933 sought to reduce fraud and misrepresentation by requiring companies to register securities and provide potential investors with accurate financial information regarding the securities offered for public sale.[8] The Securities Exchange Act of 1934 followed a year later, expanding the scope of the original Act.[9] In the midst of the rapidly developing and expanding marketplace, the Act felt revolutionary to those first effected by it.[10] The punishments for violating the Act were costly, and companies' efforts to comply were executed somewhat blindly, as no development or interpretation of the Act had been expanded through government agencies or judicial proceedings.[11] The Securities Exchange Act was established to "regulate (1) credit in security transition(s)…; (2) security markets…; and (3) securities publicly traded…"[12] The purpose of these regulations was to limit speculation, prevent unfair practices, and make public enough adequate information to discourage insider trading.[13] In conjunction with The Securities Exchange Act of 1934, Congress created the Securities Exchange

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[4] *See* Analysis, *infra* Section III.

[5] *Creation of the SEC*, SEC, https://www.sec.gov/Article/whatwedo.html.

[6] *Id.*

[7] *The Laws That Govern the Securities Industry*, SEC, https://www.sec.gov/Article/whatwedo.html.

[8] *Id.*

[9] *See* CHARLES H. MEYER, THE SECURITIES EXCHANGE ACT OF 1934 11 (2003); *see also Securities Exchange Act of 1934,* SEC, https://www.sec.gov/Article/whatwedo.html.

[10] *See* MEYER *supra* note 9.

[11] *Id.*

[12] *Id.*

[13] *Id.*

Commission (SEC) to enforce the new regulations.[14] The Act also gave the SEC broad authority over the securities industry.[15]

Originally, the Securities and Exchange Act did not govern cash tender offers.[16] This lack of regulation provided the means for a dramatic increase of hostile takeovers in the mid-1960's, in which cash offers would be extended to shareholders without any information on the purchaser's intentions, or even identity.[17] The Williams Act was enacted in 1968 to fill this gap in the Securities and Exchange Act, by extending regulations to cash tender offers.[18] Five subsections were added to the Exchange Act through the Williams Act:[19] 13(d), 13(e), 14(d), 14(e), and 14(f).[20] These subsections were later broadened to cover exchange offers in addition to cash offers following an amendment in 1970.[21] The most relevant subsection for our purposes is 14(e).[22] Titled "Untrue statement of material fact or omission of fact with respect to tender offer," Section 14(e) states:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. 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.[23]

Following the 1970 amendment, it was believed by some that Section 14(e) was an antifraud provision which prohibited certain behavior during the tender offer period in the same manner that Rule 10b-5 created a right to action over misbehavior toward the buyer and/or seller.[24] However, the

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[14] *What We Do*, SEC, https://www.sec.gov/Article/whatwedo.html.

[15] *See Securities Exchange Act of 1934, supra* note 9.

[16] Andrew E. Nagel, Andrew N. Vollmer & Paul R.Q. Wolfson, *The Williams Act: A Truly "Modern" Assessment*, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. 1, 5 (2011), https://corpgov.law.harvard.edu/wp-content/uploads/2011/10/The-Williams-Act-A-Truly-Modern-Assessment.pdf.

[17] *Id.*

[18] *Id.*

[19] Alfred F. Conard, *Tender Offer Fraud: The Secret Meaning of Subsection 14(e)*, 40 BUS. LAW. 87, 88 (1984).

[20] *Id.*; Meredith M. Brown, The Scope of the Williams Act and Its 1970 Amendments, 26 BUS. LAW. 1637, 1637 (1971).

[21] *See* Brown, *supra* note 20, at 1637.

[22] 15 U.S.C.S § 78n(e) (2019).

[23] *Id.*

[24] Brown, *supra* note 20 at 1646.

amendment also granted the SEC the power to create regulations to enforce Section 14(e), and it became clear that the SEC intended to interpret the scope of activities and behaviors under the jurisdiction of Section 14(e) broadly.[25] The broad scope envisioned by the SEC in 1970 went well beyond the scope of disallowed conduct under Rule 10b-5.[26] However, legal commentators of the time questioned whether this scope would hold up in the courts.[27]

Unlike Section 14(e), which is part of the Securities Acts, Rule 10b-5 is part of the Code of Federal Regulations and is promulgated under Section 10, entitled Manipulative and Deceptive Devices and Contrivances. Under Section 10, Rule 10b-5 is similarly entitled Employment of Manipulative and Deceptive Devices and States:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (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
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> (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. [28]

One of the main debates in *Varjabedian* is whether the similar language of the two statutes justify similar treatment, or whether Rule 10b-5 placement under the Section governing Manipulative and Deceptive Devices constrains its application, while Section 14(e) is not so constrained.

Section 14(e) is unique in that it does not distinguish any particular type of securities covered by the section.[29] Instead, Section 14(e) applies to every kind of security: domestic, foreign, public, private, equity, debt, etc.[30] While one can read an implication into Section 14(e) to cover only those tender offers which are covered by other sections of the Exchange Act, the SEC has chosen to interpret it to mean all tender offers except those shielded by international laws.[31]

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[25] *See id.* at 1647.
[26] *Id.* at 1648.
[27] *See id.*
[28] 17 C.F.R. § 240.10 (2018 issue of the Federal Register).
[29] *See* Conrad, *supra* note 19, at 88.
[30] *Id.*
[31] *See id.* at 89.

To be clear, tender offers shielded by international laws will only include offers in which no U.S. interests are involved.[32] However, the U.S. has historically placed limited restrictions on direct foreign investors.[33] The most recent trend places heightened restrictions on areas which countries deem "critical infrastructure" in an effort to keep control of those businesses within the host nation for security purposes.[34] It is not a coincidence that "[t]he U.S. is both the world's largest foreign direct investor and the largest beneficiary of foreign direct investment."[35] Consistent economic growth and recent corporate tax cuts have helped the U.S. maintain its position as one of the most appealing countries for foreign direct investors.[36]

However, participating in a merger or acquisition in the U.S. has long carried the burden of more extensive litigation than in other countries.[37] In France, for example, stock exchange authorities pre-approve bids, and litigation is only useful to delay the transaction.[38] If the United States hopes to continue to attract foreign direct investors, broadening liability under Section 14(e) may lead foreign investors to justifiably hesitate investing in United States companies, despite lower taxes and limited restrictions.[39]

## III. FACTS OF THE CASE

In February 2015, Avago Technologies Wireless Manufacturing, Inc. ("Avago") and Emulex Corp. ("Emulex") issued a joint press release announcing their merger.[40] On April 7, 2015, Emerald Merger Sub ("Merger Sub"), a subsidiary of Avago, initiated a tender offer for Emulex's outstanding stock.[41] Avago was offering $8.00 per share, a 26.4% premium on the stock price before the merger was announced.[42] In preparing to issue a statement recommending shareholders accept or reject the offer, Emulex hired Goldman Sachs to evaluate the merger's effects on its shareholders.[43]

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[32] *See id.* at 106.

[33] *See generally* DAVID J. BENDANIEL & ARTHUR H. ROSENBLOOM, THE HANDBOOK OF INTERNATIONAL MERGERS & ACQUISITIONS (1990).

[34] *See* Paul A. Laudicina, Erik R. Peterson & Courtney Rickert McCaffrey, *The 2018 A.T. Kearney Foreign Direct Investment Confidence Index, Global Business Policy Council: Research Report*, ATKEARNEY, https://www.atkearney.com/foreign-direct-investment-confidence-index.

[35] Jonathan Masters & James McBride, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security (last updated Aug. 28, 2018).

[36] *See* Laudicina, *supra* note 34.

[37] Constraints on Cross Border Takeovers and Mergers: A Catalogue of Disharmony, 19 INT'L BUS. L. 51, 83-84 (1991).

[38] *Id.* at 84.

[39] *See generally* Masters, *supra* note 35 ("burdensome restrictions on FDI inflows could inspire retaliatory policies by other nations").

[40] Varjabedian v. Emulex Corp., 888 F.3d 399, 401 (9th Cir. 2018), *cert. granted,* (U.S., Jan. 4, 2019), *cert. dismissed,* (U.S., Apr, 23, 2019).

[41] *Id.* at 402.

[42] *Id.* at 401.

[43] *Id.* at 402.

Goldman Sachs determined the agreement was fair to shareholders and provided their findings to Emulex.[44] The report provided to Emulex included details of their process, analysis of four particular financial concerns, and a one-page chart analyzing the premium offered on the stock.[45] While the overall finding of Goldman Sachs was that the agreement was fair, the premium of 26.4% was below average, despite being within the range of normal premiums of semiconductor mergers.[46] Emulex used the report from Goldman Sachs to create a forty-eight page Recommendation Statement with the Securities and Exchange Commission ("SEC") pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9.[47] The Recommendation Statement enumerated reasons Emulex supported the tender offer and recommended the shareholders tender their shares.[48] The Recommendation Statement did not, however, include the one-page Goldman Sachs chart showing that the premium was below average.[49] Though several shareholders were unsatisfied with price offered per share, enough shareholders accepted the tender offer to consummate the merger, and on May 5, 2015, Merger Sub merged into Emulex and Emulex became a wholly owned subsidiary of Avago.[50]

The shareholders that were unsatisfied with the tender offer brought suit against Emulex, Avago, Merger Sub, and the Emulex Board of Directors (collectively, "Defendants").[51] The shareholders alleged that the Defendants violated Section 14(e) of the Exchange Act by failing to include the one-page premium analysis chart from Goldman Sachs.[52]

The District Court dismissed the case with prejudice, finding, among other things, that Section 14(e) claims require the plaintiff to show scienter.[53] The Court's decision was in line with five other circuits and Supreme Court decisions touching on similar claims. The United States Court of Appeals for the Ninth Circuit reviewed the issue on appeal.[54]

## IV. SUMMARY AND ANALYSIS OF THE NINTH CIRCUIT'S HOLDING

The Court of Appeals for the Ninth Circuit reversed the District Court's holding, emphasizing that the Ninth Circuit had yet to decide whether Section 14(e) claims required scienter and that following out-of-circuit authorities was not the solution.[55] The Court of Appeals reversed the District Court's holding by determining that a showing of negligence and not scienter

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[44] *Id.*
[45] *Id.*
[46] *Varjabedian,* 888 F.3d at 402-03.
[47] *Id.* at 402.
[48] *Id.*
[49] *Id.* at 403.
[50] *Id.*
[51] *Id.*
[52] *Varjabedian,* 888 F.3d at 403.
[53] *Id.*
[54] *Id.* at 404-05.
[55] *Id.* at 409-10.

was required for a successful claim under Section 14(e).[56] In coming to this conclusion, the Court analyzed prior Supreme Court decisions, the decisions of the five circuits that ruled on the issue, and the language and history of the statute itself.[57] The Court's reasoning will be broken down in this section and then analyzed.

### *A. Analysis of United States Supreme Court cases*

The Ninth Circuit Court of Appeals discussed three Supreme Court cases: *Aaron v. SEC*,[58] *Ernst & Ernst v. Hochfelder*,[59] and *United States v. O'Hagan*.[60] The analysis of *Ernst* and *Aaron* play a particularly large part in the Ninth Circuit's holding in *Varjabedian*, as well as the holdings of the other circuits. In fact, as discussed in its analysis of the other circuit's holdings, the Ninth Circuit determined that several circuits improperly interpreted or simply ignored the precedent of *Ernst* and *Aaron* when they concluded that Section 14(e) required scienter.[61]

The first Supreme Court case discussed by the Ninth Circuit is *Ernst & Ernst v. Hochfelder*.[62] The Court of Appeals determined the other circuits improperly interpreted *Ernst* as holding the language of Rule 10b-5 required a showing of scienter, when in fact, *Ernst* held that Rule 10b-5's language allowed for a broader range of culpability.[63] The confusion of the other circuits could stem from the distinction between Section 10(b) and Rule 10b-5. The *Ernst* Court spent a significant amount of time discussing the language and history of Section 10(b), which they firmly decided required a showing of scienter.[64] However, the discussion of Rule 10b-5, which is promulgated under Section 10(b) is quite brief.[65] The Supreme Court in *Ernst* stated:

> Viewed in isolation the language of subsection (b), and arguably that of subsection (c), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not.[66]

However, the Supreme Court in *Ernst* pointed to the limited rulemaking powers of the SEC, which must "adopt regulations to carry into effect the will

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[56] *Id.* at 407-08.
[57] Varjabedian v. Emulex Corp., 888 F.3d 399 (9th Cir. 2018), *cert. granted,* (U.S., Jan. 4, 2019), *cert. dismissed,* (U.S., Apr, 23, 2019).
[58] Aaron v. SEC, 446 U.S. 680 (1980).
[59] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).
[60] United States v. O'Hagan, 521 U.S. 642 (1997).
[61] *Varjabedian*, 888 F.3d at 401.
[62] *Id.* at 405 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 191 (1975)).
[63] *Id.* at 405.
[64] *Ernst & Ernst*, 425 U.S. at 212 (1976).
[65] *Id.* at 212-15.
[66] *Id.* at 212.

of Congress as expressed by the statute."[67] Therefore, since Rule 10b-5 was a regulation promulgated under Section 10(b), dealing with fraudulent practices, the rules made under the authority of this section must also deal with fraudulent practices.[68]

The Ninth Circuit correctly notes that Rule 10b-5 is titled "Employment of manipulative and deceptive devices," which, the *Ernst* Court reasonably inferred, limits the scope of culpable conduct under the rule.[69] No such restriction was placed on Section 14(e), which was an amendment added directly to the Securities Acts, and is not limited by the SEC's power to regulate in the way that Section 10(b) and Rule 10b-5 are restricted.[70] It cannot be denied that the Ninth Circuit's reading of *Ernst* is clear and well supported. As discussed *infra*, some of the other circuits' holdings came before the *Ernst* decision and are effectively overruled by it. Other circuits seem to have latched on to the similarity of language in Section 14(e) and Rule 10b-5 and adopted *Ernst's* holding that Rule 10b-5 requires scienter into their understanding of Section 14(e) without ever diving into the reasoning of the Court in establishing that holding.

The second Supreme Court case discussed is *Aaron v. SEC*, which dealt with Section 17(a)(2) of the Securities and Exchange Act, another section with nearly identical wording to section 14(e).[71] Section 17(a)(2) makes in unlawful:

> 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.[72]

The Ninth Circuit observed that the Supreme Court in *Aaron* determined Section 17(a)(2) did not require a showing of scienter.[73]

However, the holding in *Aaron* was more complicated than the Ninth Circuit implies. The Supreme Court in *Aaron* held that while the language of Section 17(a)(1) did require scienter, Sections 17(a)(2) and 17(a)(3) did not.[74] The Supreme Court compared the language of Section 17(a)(2) with Section 17(a)(1), which disallows acting "to employ any device, scheme, or artifice to defraud."[75] In concluding this, the Supreme Court looked to the plain language of the rules, noting that the actions

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[67] *Ernst & Ernst*, 425 U.S. at 212-215 (1976) (citing Dixon v. United States, 381 U.S. 68, 74 (1965)).

[68] *Id.*

[69] *Id.* at 191.

[70] 15 U.S.C.S § 78n(e).

[71] Aaron v. SEC, 446 U.S. 680, 684 (1980).

[72] 15 USCS § 77q(a)(2)

[73] *Varjabedian*, 888 F.3d at 406 (quoting *Aaron*, 446 U.S. at 695-96).

[74] *Aaron*, 446 U.S. at 695-96.

[75] 15 USCS § 77q(a)(2).

Congress was seeking to prevent under Section 17(a)(1) were made clear by their use of the words "deceptive," "scheme," and "artifice."[76] The Supreme Court also discusses *Ernst* and the similarity in language between Rule 10b-5, and Section 17(a)(2), quoting their own decision in *Ernst* to say the section "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not."[77] In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.[78] However, this reading does not completely clear up the issue, because while the language is similar, Section 14(e) has two distinct clauses, one of which clearly intends an element of scienter to be present.

In analyzing the final case, *United States v. O'Hagan*, the Ninth Circuit quoted the Supreme Court in *O'Hagan* as saying "[U]nder § 14(e), the [SEC] may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent.'"[79] The Ninth Circuit concluded that "[i]f the SEC can prohibit 'acts themselves not fraudulent' under Section 14(e), then it would be somewhat inconsistent to conclude that Section 14(e) itself reaches only fraudulent conduct requiring scienter."[80] This conclusion makes a bit of a leap. While *O'Hagan* allows for SEC prohibitions on acts not fraudulent on their own, it may only regulate such acts if the prohibition will prevent "acts and practices [that] are fraudulent."[81] This does not equate to a lack of scienter requirement, as the ultimate goal is still to prevent fraud and the cited authority provides no guidance on the issue of intent. There are plenty of actions a company may take which are not in and of themselves fraudulent acts but are undertaken with the intent to manipulate or defraud the investors, buyers, or sellers, thus fulfilling a scienter requirement.

### *B. Analysis of other Circuits*

This section will explain the courts analysis on the five circuit courts who held that a showing of fraud is required: the Second Circuit[82]; Fifth Circuit[83]; Third Circuit[84]; Sixth Circuit[85]; and Eleventh Circuit.[86] The Ninth Circuit examined each circuits' reasoning and determined all five circuit

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[76] *Aaron*, 446 U.S. at 696.
[77] *Id.* (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-15 (1976)).
[78] *Id.* at 700.
[79] *Varjabedian*, 888 F.3d at 407 (quoting United States v. O'Hagan, 521 U.S. 642, 673 (1997)).
[80] *Id.*
[81] *Id.*
[82] Chris-Craft Indus. Inc. v. Piper Aircraft Corp., 480 F.2d 342, 362 (2d Cir. 1973).
[83] Smallwood v. Pearl Brewing Co., 489 F.2d 579, 606 (5th Cir. 1974)
[84] *In re* Digital Island Sec. Litig., 357 F.3d 322, 328 (3d Cir. 2004).
[85] Adams v. Standard Knitting Mills, 623 F.2d 422, 431 (6th Cir. 1980).
[86] United States SEC v. Ginsburg, 362 F.3d 1292, 1304 (11th Cir. 2004).

courts incorrectly analyzed the language or was later overruled by the Supreme Court.[87] The Ninth Circuit stated:

> [W]e are persuaded that the rationale underpinning those decisions does not apply to Section 14(e) of the Exchange Act. At their core, the decisions from these five circuits rest on the shared text found in both Rule 10b-5 and Section 14(e). Yet important distinctions exist between [them]- distinctions that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e).[88]

The first relevant decision is *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.* In *Chris-Craft*, the Second Circuit determined that since the language of Rule 10b-5 and Section 14(e) are nearly identical, and Section 14(e)'s only contribution to the Securities and Exchange Act is to extend protection to the tender offer stage of dealings, a requirement of scienter must exist in both Rule 10b-5 and 14(e).[89] The Fifth Circuit followed suit a year later in *Smallwood v. Pearl Brewing Co.*, sighting to *Chris-Craft*, and acknowledging they were adopting the same interpretation.[90] Two years after *Smallwood*, the Supreme Court decided *Ernst*, and affirmed a requirement of scienter under Rule 10b-5.[91] However, the Ninth Circuit noted the Supreme Court's reasoning in *Ernst* directly contradicts the holdings in *Chris-Craft* and *Smallwood*.[92] The Ninth Circuit explained the Supreme Court decisions, as discussed *supra*, and how *Aaron* and *Ernst* directly undermine the reasoning in *Chris-Craft* and *Smallwood*.[93] According to the Ninth Circuit, subsequent circuits were blindly following the others despite this contradiction, including the Third Circuit in *In re Digital Island Securities Litigation* in 2004.[94] The Ninth Circuit quotes the Third Circuit as stating "[W]e therefore join those circuits that hold that scienter is an element of a Section 14(e) claims."[95] Although the Ninth Circuit does not discuss the Third Circuits reasoning beyond stating that it cited *Smallwood*, the decision in *Digital Island* does warrant some discussion.[96]

In *Digital Island*, Third Circuit first discussed the holding of its lower court, which found a requirement of scienter in Section 14(e), and noted that "both parties appear[ed] to agree."[97] It then quoted a 1985 Supreme

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[87] Varjabedian v. Emulex Corp., 888 F.3d 399, 407-08 (9th Cir. 2018), *cert. granted,* (U.S., Jan. 4, 2019), *cert. dismissed,* (U.S., Apr, 23, 2019).
[88] *Id.* at 405.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Varjabedian,* 888 F.3d at 405.
[94] *Id.* at 407.
[95] *Id.*
[96] *Id.* at 406-407.
[97] *In re* Digital Island Sec. Litig., 357 F.3d 322, 328 (3d Cir. 2004).

Court decision, stating the Section 14(e) is "modeled on the antifraud provisions of § 10(b)… and Rule 10b-5."[98] The Third Circuit found similarity in language and scope which, along with an assumption that Congress used the same language with full knowledge of Rule 10b-5's standing interpretations, implied that scienter was also required in Section 14(e).[99] While the Third Circuit did reference *Smallwood* as an example of courts which have found a requirement of scienter, it did not rely on the *Smallwood* decision as the Ninth Circuit suggests.[100]

The Ninth Circuit found a different flaw in the reasoning of the Sixth Circuit.[101] In 1980, the Sixth Circuit in *Adams v. Standard Knitting Mills* held that Section 14(e) required a showing of scienter.[102] The Ninth Circuits brief discussion on *Adams* is accurate, stating that the Sixth Circuits reliance on the words "fraudulent," "deceptive," and "manipulative" is unsupportable, because it fails to consider the entire first clause of Section 14(e).[103] *Adams* was also decided one month prior to the Supreme Court's decision in *Aaron*, and is thus overruled in some aspects based on the new understanding of the language common to Section 14(e) and Section 17(a)(2).[104]

The final circuit decision discussed is the Eleventh Circuits' holding in *United States SEC v. Ginsburg* in 2004.[105] It appears that the Eleventh Circuit simply cited to intra-circuit precedent, however, this intra-circuit precedent did not discuss Section 14(e).[106] Accordingly, the Ninth Circuit determined that *Ginsburg* must have simply relied on the common language between the two sections, which is improper, as "Section 14(e) differs fundamentally from Section 10(b)."[107]

The Ninth Circuit was ultimately dissatisfied with every circuit decision which has considered Section 14(e). The Ninth Circuit paints a picture of lazy judicial opinions and a bandwagon or domino effect, in which circuits adopt the flawed or unsupported reasoning of the other circuits. Its analysis is convincing, and the interpretations of case law are accurate. Upon hearing that the Ninth Circuit split with five other circuits, one might be inclined to assume a political motive or a flaw in its argument which other circuits address. In this case however, it appears that the Ninth Circuit was simply the first to directly and comprehensively address the issue of intent requirement under Section 14(e). This is particularly clear in the Fifth, Sixth

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[98] *Id.* (quoting Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10 (1985)).

[99] *Digital Island*, 357 F.3d 322, 328.

[100] *Id.*

[101] Varjabedian v. Emulex Corp., 888 F.3d 399, 407 (9th Cir. 2018), *cert. granted,* (U.S., Jan. 4, 2019), *cert. dismissed,* (U.S., Apr, 23, 2019) (quoting U.S. v. O'Hagan, 521 U.S. 642, 673 (1997)).

[102] Adams v. Standard Knitting Mills, Inc., 623 F.2d 422, 431 (6th Cir. 1980).

[103] *Varjabedian*, 888 F.3d at 407.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

and Eleventh Circuits, which followed the holdings in *Chris-Craft* and *Smallwood* even after the Supreme Court's decisions in *Aaron* and *Ernst* changed the understanding of language common between Sections 10(b), 14(e), and 17(a)(2).

## V. ANALYSIS OF EFFECT OF THE HOLDING

### A. *Effect on dismissed cases*

It has historically been very difficult for plaintiffs to reach the burden of proof required in Section 14(e) claims, resulting in the swift dismissal of claims.[108] The Ninth Circuit's lower threshold seemingly means that a large group of these cases will be harder to dismiss in the early stages.[109] Surviving the early stages will mean a longer delay in the merger or acquisition taking place and a stronger position for shareholders in settlement negotiations. It could also mean that more plaintiffs will try to seek recovery in the Ninth Circuit, while more companies will evaluate forum selection clauses in their M&A and Tender Offer proceedings.[110] However, the statistics offered by the Securities Industry and Financial Markets Association, analyzed *infra*, suggests that, prior to the Ninth Circuit's holding, roughly 90% of all M&A deals were already challenged. It is difficult to see how the lowered standard will increase litigation which already occurs at an astronomically high percentage.

### B. *Effect on International Tender Offers*

As discussed *supra* international investors are a large part of the United States economy. Two substantial factors that are appealing to foreign investors are the low corporate tax rate and historically lenient restrictions. However, should the Ninth Circuits decision stand, the increased risk and cost of litigation may deter some foreign investors. One possible solution is developing in Delaware, where the majority of corporations in the United States are incorporated.[111] Delaware courts have recognized a prominent problem of high cost litigation which results in expansive attorney's fees but little recovery.[112] The courts have developed a strategy to combat this issue, part of which involves forum selection clauses in contracts.[113] In 2015, the state amended its law to allow companies to adopt an exclusive forum in its

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[108] William F. Sullivan et al, *9th Circ. Lowers the Bar on Tender Offer Claims*, LAW360, (May 01, 2018, 11:21 AM), https://www.law360.com/articles/1038386/9th-circ-lowers-the-bar-on-tender-offer-claims.

[109] *See id.*

[110] *See id.*; Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate Contracts*, 93 WASH. L. REV. 265, 274 (2018).

[111] Hershkoff, *supra* note 110, at 269-270, 272.

[112] *See id.* at 270.

[113] *See id.*

charter or bylaws, so long as Delaware is one of the provisioned forums.[114] While the law's enforceability in other forums is questionable, it could still provide an effective strategy for companies to avoid some litigation.[115] Should this strategy prove effective, foreign investors could be reassured that litigation cost and risk will not increase after the Ninth Circuit holding, and perhaps they can avoid the Ninth Circuit entirely.

## VI. THE SUPREME COURT FILINGS

The Supreme Court received the Petition for Certiorari on October 11, 2018.[116] Two Amicus briefs were filed on November 13, 2018: one by the Securities Industry and Financial Market Association and one by the Chamber of Commerce of the United States of America.[117] The Brief in Opposition was filed by the respondents on November 30, 2018.[118] Finally, a Reply Brief was filed by the petitioners on December 18, 2018.[119] These briefs were distributed for the January 4, 2018 conference of the Supreme Court to determine if it would be heard.[120] While nine additional amicus briefs were filed prior to the Supreme Court hearing oral arguments in April, 2019, this section will focus on the filings on record when the Supreme Court granted certiorari.[121] This article will not discuss the subsequent filings and oral arguments that led to the dismissal of the case by the Supreme Court, as they focus on an entirely different issue, irrelevant to this article.

### A. *Petition for Writ of Certiorari*

The Petition for Writ of Certiorari strongly emphasizes the circuit split, identifying the question presented as:

> Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.[122]

The circuit split issue is mentioned often throughout: "Five different circuits, in an unbroken line of decisions dating back nearly half a century, have held

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[114] *See id.* at 269-270.
[115] *See id.* at 270.
[116] *Id.*
[117] Hershkoff, *supra* note 110, at 270.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Petition for a Writ of Certiorari at i, Emulex Corp. v. Varjabedian, 888 F.3d 399 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1407 (2019) (No. 18-459) [hereinafter Petition].

that mere negligence is insufficient."[123] In section A of the argument, the petition states that the circuit split is "as square, obvious, and consequential as they come."[124] This clearly acknowledged circuit split, along with the possible effects of the Ninth Circuit's decision remaining in effect, are the two primary arguments in the Petition supporting a review by the Supreme Court.[125] The Petition also has two main arguments in support of the assertion the Ninth Circuit Court of Appeals was wrong: 1) the text and background of Section 14(e) supports an antifraud focus[126] and 2) Section 14(e) contains no express right of action, and inferring a right will shift the statute's established balance between protecting investors and preventing frivolous litigation.[127]

The Petition asserts that the Court of Appeals went against case law and provides its own analysis of the district court and Supreme Court decisions.[128] The Petition argues that the precedent allows for culpability in unintentional wrongdoing, but does not stretch so far as to create an inferred private right of action based on negligence.[129] The Brief reiterates that the Ninth Circuit went too far and broadened the statue too much.[130] For each of the five circuit's holdings, the Petitioners Brief quotes the relevant portion to illustrate its undeniable place in case law.[131] These have been discussed extensively *supra* in the section covering the Ninth Circuits analysis. The only new arguments not addressed by the Ninth Circuit's reasoning are policy concerns, which were explored in slightly more detail in the Amicus Briefs and will be discussed *infra.*

### *B. Amicus Brief of Securities Industry and Financial Markets Association*

The Securities Industry and Financial Markets Association ("SIFMA") identifies itself as "the leading securities industry trade associations."[132] The SIFMA Brief predicts an increase in frivolous lawsuits that will arise from the lessened pleading standard adopted by the Ninth Circuit.[133] In support of this conclusion, the SIMFA Brief makes several policy arguments in support of the Court granting the Petition for Writ of

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[123] *Id.* at 2.
[124] *Id.* at 15.
[125] *Id.* at 15, 23-25.
[126] *Id.* at 15-17.
[127] *Id.* at 18-20, 25.
[128] Petition, *supra* note 122, at 18-20.
[129] *Id.* at 20-21.
[130] *Id.* at 21.
[131] *Id.* at 9, 11-14.
[132] Brief for Securities Industry and Financial Market Association as Amici Curiae Supporting Petitioner at 1 [hereinafter SIFMA Brief].
[133] *Id.* at 5, 7.

Certiorari and reversing the decision of the Ninth Circuit Court of Appeals.[134]

The SIMFA Brief first examines the blight of “merger objection” cases which already overwhelm the courts and are so common they are considered “part of the cost of doing M&A transactions.”[135] The percentage of M&A deals which resulted in a lawsuit has risen from 54% in 2008 to 85-90% in 2015. [136] The SIMFA Brief paints a bleak picture of such lawsuits, describing the “typical case” as a broad complaint followed by a motion for a temporary restraining order and preliminary injunction enjoining the transaction, effectively holding the transaction hostage, while offering a settlement.[137] The SIMFA Brief asserts that the typical settlement proposal results in massive plaintiff's attorneys fees being paid by the defendants, while the plaintiffs provide a broad class-wide release from liability to the defendant in exchange for supplemental or corrective disclosure. [138] Companies are usually tempted to accept these proposals regardless of the validity of the claim or the likelihood of the court granting the injunction, in order to avoid any risk to or delay of the transaction.[139] The Brief equates the Plaintiff's Bar with a racket, in which attorneys routinely and easily make a fortune off of M&A transactions, at great expense to the transacting company, while providing little to no benefit to the stockholders.[140]

According to the SIMFA Brief, the majority of these cases were filed in Delaware, until the Delaware Chancery Court, acknowledging the problems with these “disclosure-only” settlements, held in *In re Trulia, Inc. Stockholder Litigation* that such settlements would “be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission.”[141] Following this holding, there was a shift of “merger objection” claims to the federal courts.[142] While some federal courts followed the *Trulia* decision and disfavored “disclosure-only” settlements, some allowed them.[143]

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[134] *See id.* at 18.

[135] *Id.* at 9 (*citing* Browning Jeffries, *The Plaintiff's Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 108 (2014)).

[136] *Id.* at 9 (citing Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018)).

[137] SIFMA Brief, *supra* note 132, at 8.

[138] *Id.* (citing *In re* Walgreen co. Stockholder Litig., 831 F.3d 718, 724 (7th Cir. 2016); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 478 (2015) (“Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.”).

[139] SIFMA Brief, *supra* note 132, at 8.

[140] *Id.* at 8-10.

[141] *Id.* at 11 (quoting *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016)).

[142] *Id.* at 12.

[143] *Id.* at 13 (citing *In re* Walgreen Co. Stockholder Litig., 832 F.3d at 724-26 (following *Trulia*); *In re* Hatteras Fin., Inc., S'holder Litig., 286 F. Supp. 3d 727, 730-31 (M.D.N.C. 2017) (allowing disclosure settlement despite immateriality of the supplemental disclosure).

While this argument in the SIMFA Brief makes it clear that M&A transactions are routinely challenged, and that "disclosure-only" settlement should be disfavored in order to discourage frivolous lawsuits, this point misses the mark on the issue presented in this case. If, as the SIMFA Brief states, the majority of merger objection claims are already frivolous and usually settle before a judge considers any motions or issues of merit, how would a lessened standard create more frivolous suits than already exist? Furthermore, as 85-90% of mergers were challenged the year before the holding of the Ninth Circuit, the pleading standard does not seem to be relevant and no logical inference can be reached to that effect. The SIMFA Brief makes a strong argument against "disclosure-only" settlements, and then simply states in conclusion that the lowered standard of the Ninth Circuit "will burden the federal court system with an increasing number of frivolous 'merger objection cases."[144] This hole in the Brief's argument can be seen again in Section II, when it states that the negligence standard in the Ninth Circuit, along with the Exchange Acts loose jurisdiction requirements, will "encourage stockholder plaintiffs to *continue* filing frivolous 'merger objection' cases… to circumvent *Trulia*."[145]

The next major argument made in the SIMFA Brief is that the Ninth Circuit's decision will create more risk for companies, who will then be encouraged to essentially overwhelm stockholders with information, whether it is relevant or not, to protect themselves and minimize risk.[146] The SIMFA Brief argues that courts have struck a balance over the years between ensuring stockholders are informed as to the material information necessary to accept or reject the tender offer, and avoiding over-disclosure which may overwhelm them.[147]

The SIMFA Brief then asserts that the Ninth Circuit holding improperly broadens the scope of what companies and stockholders will consider material information, ensuring that the already voluminous tender offer documents become even more cumbersome in the future.[148] This is only a valid argument, as it pertains to companies who will not settle before any evaluation on the motions or merits. If it is indeed standard practice to accept "disclosure-only" settlement proposals, then it would seem useless to compile and distribute a massive amount of information to stockholders only to participate in the same process of suing and settlement. In other words, the choices presented to a company in this brief are to: (1) disclose the usual amount and face an 85-90% chance of being sued and settling before the claim is proved frivolous or not, or (2) provide a voluminous amount of tender offer information and documents, and face the same odds. It seems

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[144] *Id.* at 13.
[145] SIFMA Brief, *supra* note 132, at 13-14 (emphasis added).
[146] *Id.* at 15, 17.
[147] *Id.* at 17.
[148] *Id.* at 18.

this issue could also be alleviated with a federal ruling on "disclosure-only" settlements, but not a ruling regarding the pleading standard.

After a short argument as to why financial institutions will face increased risk when participating in M&A transactions, the SIMFA Brief offers arguments as to why the Ninth Circuit's adoption of a negligence standard was misguided.[149] The first argument is that other circuits have correctly understood the similarities between Section 10(b) and Section 14(e), including the Supreme Court in *Schreiber v. Burlington Northern, Inc.*.[150] The Supreme Court in *Schreiber* did refer to Section 14(e) as an "antifraud provision."[151] However, *Schreiber* was concerned with whether or not a disclosure-based claim was required under the section, when the plaintiff claimed a non-disclosure related violation centered on the word "manipulative" in Section 14(e). The *Schreiber* court did not specifically rule on the intent requirement of §14(e).[152] Should the Court wish to overrule the Ninth Circuit, it would find supportive language in *Schreiber*, but it would not be overruling itself by upholding the negligence standard.

The remaining arguments against the Ninth Circuit's interpretation are quite short, with four or less sentences on each assertion. The SIMFA Brief asserts: Congress was aware of previous judicial interpretation of Section 14(e) when it enacted PSLRA and SLUSA and chose not to modify Section 14(e)[153]; by viewing Section 14(e) as two separate clauses, the Ninth Circuit violated "the principle that courts should not 'construe statutory phrases in isolation"[154]; even if viewed as two separate clauses, the first clause makes no reference to the mental state required[155]; 14(e) does not fit the standards "Congress employs when expressly enacting a civil remedy for negligence"[156]; and the Supreme Court has not yet ruled as to whether 14(e) provides a private right of action.[157]

### *C. Amicus Brief of Chamber of Commerce of the United States of America*

The Chamber of Commerce's Brief (CoC Brief) identifies its interest in the matter as avoiding an increased litigation burden it believes its members will face if the Ninth Circuit holding is allowed to stand. The CoC Brief focuses on three reasons in favor of the Supreme Court granting the Petition for Writ of Certiorari: the decision splits with six other circuits, the

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149 *Id.* at 21.
150 *Id.* at 22 (citing Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10-11 (1985)).
151 Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10 (1985).
152 *Id.* at 11.
153 SIFMA Brief, *supra* note 132 at 22.
154 *Id.* at 22-23 (quoting United States v. Morton, 467 U.S. 822, 828 (1984)).
155 *Id.* at 23 (quoting Varjabedian v. Emulex Corp., 888 F.3d 399, 408 (2018)).
156 *Id.* (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208-09 (1975)).
157 *Id.* (citing *Ernst*, 425 U.S. at 208-09).

decision improperly recognized a private right of action under § 14(e), and the question presented is important.

The CoC Brief acknowledges that five other circuit decisions have been compared to the Ninth Circuit decision at length in the petitioner and respondent briefs. However, no other party has yet identified another circuit, the Eighth Circuit, which the Brief asserts has also held intentional conduct is required for a § 14(e) claim.[158] In support of this position, a quote from the Court in *Feldbaum v. Avon Products, Inc.* is extracted, which states: "some element of deception or misrepresentation[, or]… intentional… conduct designed to deceive or defraud investors… is essential to a valid Section (14)e claim."[159] While this excerpt clearly supports the CoC Brief's position, a full reading of the case provides a fuzzier picture. When the Court in *Feldbaum* made this statement, they were discussing whether or not the granting of a purchase option to the buyer was a "manipulative device" and was not considering a question of adequate disclosure.[160] The Eighth Circuit in *Feldbaum* separately evaluated adequate disclosure under § 14(e) and manipulative acts under § 14(e), effectively breaking the statute into two separate clauses, as the Ninth Circuit did.[161] When discussing adequate disclosure, the Eighth Circuit was not so explicit, stating "federal securities law requires the accurate disclosure of material facts."[162] It disapproved of courts evaluating the underlying wisdom or fairness of such transactions, but held that "federal law ensures that shareholder approval is fairly sought and freely given."[163] One possibility as to why the briefs of the Petitioner and SIFMA did not mention the *Feldbaum* case is that it actually supports the argument that Section 14(e) is two separate and distinct clauses, and the requirements that disclosure be "accurate" and "fairly sought" do not firmly support the assertion that disclosure violations under the first clause require scienter.

The next argument in the CoC Brief is that the Supreme Court should grant the Petition for Writ of Certiorari in order to bring decisions of the lower courts in conformity with previous Supreme Court holdings that prevent courts from inferring a private right of action when the statute does not "display an intent to create a private remedy."[164] Along with a handful of Supreme Court cases, the CoC Brief offers a few policy arguments in support of this: the creation of a private right of action is a legislative not judicial

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[158] Brief for Chamber of Commerce as Amici Curiae Supporting Petitioners at 4, Emulex Corp v. Varjabedian, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Chamber of Commerce Brief] (citing Feldbaum v. Avon Products, Inc., 741 F.2d 234, 237 (1984)).

[159] *Id.* at 4 (quoting *Feldbaum*, 741 F.2d at 237 (8th Cir. 1984)).

[160] *Feldbaum*, 741 F.2d at 237.

[161] *Id.* at 236-37.

[162] *Id.* at 236.

[163] *Id.* at 237.

[164] Chamber of Commerce Brief, *supra* note 158, at 5.

function[165]; the courts task is to interpret the statute as written[166]; and inferring a private right of action under § 14(e) would imply that nearly every provision of the Securities Acts also inferred a private right of action.[167]

The final and arguably strongest argument asserted by the Brief is that the question presented is important and the Supreme Court should grant the Petition in order to provide clarity and uniformity across the circuits.[168]

### D. *Brief in Opposition*

The Brief in Opposition asserts three simple points: (1) the decision below does not create a square circuit conflict; (2) the decision is correct; and (3) the petition does not present an important question for review. [169]

In support of the argument that a circuit split has not been created by the Ninth Circuit's decision, the Respondent's Brief examines each circuit holding presented by the Petitioner.[170] The Brief ultimately determines that no other circuit has directly analyzed the issue of the state of mind requirement under Section 14(e) since the Supreme Court's holdings in *Ernst* and *Aaron*, which it argues completely changed the analysis after *Chris-Craft*.[171]

The argument that no circuit split exists starts with two marks against *Chris-Craft*, the case proffered as the Second Circuit's holding that scienter is required.[172] The Respondent's Brief points out that *Chris-Craft* did not break down the text of Section 14(e) in order to analyze it and simply treated it the same as Rule 10b-5 because the language was so similar.[173] This treatment of Section 14(e) is incorrect for three reasons.[174] First, the Supreme Court clarified in *Ernst* that Rule 10b-5 is limited by Section 10(b), the fraud statute under which it is promulgated, while Section 14 is not so restricted.[175] Second, while the Second Circuit stated more than negligence was required, the actual standard it gave reads like a negligence standard; holding that a party would be liable if they "failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort."[176] Finally, there is no conflict between the Ninth Circuit's

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165 *Id.*
166 *Id.* at 7.
167 *Id.*
168 *Id.* at 16.
169 Brief for Respondent's in Opposition to Petition for Writ of Certiorari at III, Emulex Corp v. Varjabedian, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Respondent's Brief].
170 *Id.* at 7-13.
171 *Id.* at 13-14.
172 *See id.* at 8.
173 *Id.*
174 *Id.* at 8-9.
175 Respondent's Brief, *supra* note 169, at 8.
176 *Id.* (quoting Chris-Craft Indus. Inc. v. Piper Aircraft Corp., 480 F.2d 342, 364 (2d Cir. 1973)).

holding and the Second Circuit, because neither *Chris-Craft* nor *Connecticut Nat'l Bank v. Fluor Corp.* (the only other Second Circuit cases cited by the petition) directly addressed the legal question at issue here, namely whether a scienter requirement exists within the first clause of Section 14(e).[177]

### *E. Reply Brief*

The Reply Brief filed by the Petitioners focuses on the Supreme Courts duty to resolve circuit splits: "For now, it suffices that the Ninth Circuit consciously and expressly rejected the position of every prior court of appeals to have considered the Question Presented."[178] The Brief contests the Respondent's position that other circuits have not properly considered this issue, and "further percolation" is needed.[179] The Petitioner boldly states that the Respondent's argument that a genuine circuit split is not present "cannot be taken seriously."[180] The Brief further argues that the Respondent's evaluation of other circuits reasoning as "thin" and "sparse" are erroneous, because no amount of dissection on their reasoning will change the fact that the other circuits unmistakably held that negligence was not enough to support a claim under Section 14(e).[181] The Petitioner also reiterates several points regarding the analysis of Section 14(e) as a whole and not as isolated clauses; the policy concerns and increased litigation; and the issue of an implied private right of action.[182] It ends by urging the Supreme Court to "resolve the Question Presented and restore uniformity and predictability to Section 14(e) litigation" by holding that the Ninth Circuit erred both in its holding on inferred private rights, and its holding that a Section 14(e) claim can be supported by mere negligence.[183]

## VII. CONCLUSION

The Ninth Circuit's holding is supported by the plain language of the statute and by viewing the Code as a whole. Additionally, the Ninth Circuit's interpretation of Supreme Court cases are well reasoned and supported and the Court correctly identified flaws in the reasoning of the other circuits. While the Petitioner's Brief and both Amicus Briefs address serious social, economic, and political concerns surrounding M&A litigation, the issues they present are appropriate problems for the legislature and not the judiciary. To use a well-known axiom, it is the court's task to interpret the law, not to make it. Furthermore, because the substantial problems with

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[177] *Id.* at 9 (citing *Chris-Craft*, 480 F.2d at 364; Connecticut Nat'l Bank v. Fluor Corp. 808 F.2d 957, 961 (1987)).

[178] Brief for Petitioners in Reply to Respondent's Brief at 1, Emulex Corp v. Varjabedian, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Reply Brief].

[179] *Id.* at 1.

[180] *Id.* at 2.

[181] *Id.* at 5.

[182] *Id.* at 9-10.

[183] *Id.* at 10

M&A litigation are longstanding and occurred at such high percentages before the Ninth Circuits ruling, it is difficult to see how the decision will truly make anything worse and, indeed, how overruling the Ninth Circuit would improve anything.

The Supreme Court ultimately dismissed the case, effectively upholding the Ninth Circuit's finding that Section 14(e) only requires a showing of negligence and not scienter. Some argue that this leaves the circuits in chaos.[184] However, the Respondent's Brief in Opposition made convincing arguments that two circuits were already overruled by *Ernst* and *Aaron* and that no other circuits have specifically addressed the issue, making it impossible to overrule anything.[185] Despite the strength of this reasoning, the issue of the circuit split is widely accepted by the circuits, M&A companies, attorneys, etc. and we have certainly not reached the conclusion of this issue.

Ultimately, as a result of this case, serious problems have come to the forefront of consideration for both the courts and, hopefully, the legislature. It is clear that there are serious concerns with the current state of M&A litigation which go beyond the Court's authority to interpret laws and cross into the territory or policy. By dismissing this case, the Supreme Court has appropriately placed the issue at the feet of the legislature, who possess the authority to make changes and improvements to benefit the economy and provide stable and enticing opportunities for both domestic and foreign investors.

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[184] Emulex Corp. v. Varjabedian, 139 S. Ct. 1407 (2019).
[185] Respondent's Brief, *supra* note 169, at 7.