

WHEN THE SAME WORDS MEAN DIFFERENT THINGS: *VARJABEDIAN v.* *EMULEX CORP.* AND THE REQUIREMENTS OF SECTION 14(e) OF THE EXCHANGE ACT

Abstract: On April 20, 2018, in *Varjabedian v. Emulex Corp.*, the United States Court of Appeals for the Ninth Circuit held that Section 14(e) of the Securities Exchange Act of 1934 requires only a showing of negligence, not scienter, to establish a violation. The Ninth Circuit derived that requirement from the fact that Section 14(e) resembles Section 17(a)(2) of the Securities Act of 1933. In reaching this conclusion, the Ninth Circuit split with all the other courts to consider this question. The Second, Third, Fifth, Sixth, and Eleventh Circuits had previously held that Section 14(e) shares more similarities with Rule 10b-5, itself promulgated under Section 10(b) of the Exchange Act. Under that line of reasoning, because Rule 10b-5 actions have a scienter requirement, so too do Section 14(e) actions. This Comment argues that the majority view, that Section 14(e) more closely resembles Rule 10b-5 and thus requires a showing of scienter, not mere negligence, is correct.

INTRODUCTION

Following the financial panic of 1929, Congress enacted the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”) to protect investors from misleading claims about stock values.¹ Though the Securities Act governed the issuance of new securities and the Exchange Act covered subsequent stock transactions, neither regulated cash tender offers.² In the 1960s, large corporations took ad-

¹ See George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132, 132 (1973) (noting that fears of misleading claims in part motivated stock market reform); Carol J. Simon, *The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues*, 79 AM. ECON. REV. 295, 296 (1989) (observing that Congress passed the Securities Act to guard against false statements about the value of securities); Steven Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 409 (1990) (showing that a strong desire for overhauling the laws governing the stock market existed before the 1929 financial panic).

² See Christina M. Sautter, *Tender Offers and Disclosure: The History and Future of the Williams Act*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 359, 359 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (explaining that neither the Securities Act or the Exchange Act regulated cash tender offers before the 1960s); Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 215–16 (2007) (making clear that no laws covered cash tender offers before the 1960s); Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1895 (1989) (pointing to this gap in the securities law before the 1960s). A tender offer is an offer to purchase a large amount of equity from a compa-

vantage of this loophole and consummated many acquisitions by making cash tender offers to shareholders without telling shareholders, among other things, whether the premium to the market price represented a fair valuation.³ To remedy this problem, Congress built upon the securities regulation regime with the Williams Act of 1968.⁴ In particular, with the addition of Section 14(e) to the Exchange Act as part of the Williams Act, Congress aimed to deter fraud by requiring those involved in the cash tender offer process to be honest and forthright in their dealings with shareholders.⁵ This requirement of disclosure, however, did not invite courts to judge the fairness of tender offers.⁶ In the succeeding years, courts have analogized Section 14(e) to Securities Exchange Commission (SEC) Rule 10b-5, promulgated under Section 10(b) of the Exchange Act.⁷ Under this line of reason-

ny's shareholders. Sautter, *supra*, at 358–59; Johnson & Millon, *supra*, at 1891. See generally *Fast Answers: Tender Offer*, U.S. SEC. & EXCH. COMM'N (Jan. 16, 2013), <https://www.sec.gov/fast-answers/answerstenderhtm.html> [<https://perma.cc/4743-RU2N>] (providing background on tender offers). A tender offer is one way to carry out a hostile takeover of a company. Sautter, *supra*, at 358; Johnson & Millon, *supra*, at 1891. There are two types of tender offers: stock tender offers and cash tender offers. Sautter, *supra*, at 358. With a stock tender offer, the offeror gives stock in exchange for the equity of the target company. *Id.* With a cash tender offer, the offeror gives cash in exchange for the equity of the target company. *Id.* In the 1960s, cash tender offers had a distinct advantage over stock tender offers, as the government required registration of the shares to be used in a stock tender offer, thereby depriving the hostile bidder of secrecy and surprise. *Id.*

³ Sautter, *supra* note 2, at 360–61.

⁴ See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (spelling out that the purpose of the Williams Act is to make sure that those making cash tender offers disclose relevant facts to the target company's shareholders); Johnson & Millon, *supra* note 2, at 1895 (demonstrating that Congress wished to increase disclosure with respect to cash tender offers with the Williams Act).

⁵ 15 U.S.C. § 78n(e) (2012); see *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 24 (1977) (specifying that Section 14(e) Williams Act was targeted towards those looking to sway investors with tender offers); Mark J. Loewenstein, *Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons*, 71 GEO. L.J. 1311, 1311 n.1 (1983) (indicating that the Williams Act represented Congress's response to the increasing use and abuse of the cash tender offer). Section 14(e) provides, in relevant part:

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.

15 U.S.C. § 78n(e).

⁶ *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 11–12 (1985) (“Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure, or that the term ‘manipulative’ should be read as an invitation to the courts to oversee the substantive fairness of tender offers; the quality of any offer is a matter for the marketplace.”).

⁷ *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (analogizing Section 14(e) to Rule 10b-5); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 429–31 (6th Cir. 1980) (discussing the similar purpose and requirements of Section 14(e) and Rule 10b-5 and determining that the

ing, because Rule 10b-5 actions have a requirement of scienter, so too do Section 14(e) actions.⁸ In this context, scienter refers to a “mental state embracing intent to deceive, manipulate, or defraud.”⁹ Scienter differs from negligence in that the latter encompasses mere failure to exercise a reasonable duty of care.¹⁰

In 2018, in *Varjabedian v. Emulex Corp.*, the United States Court of Appeals for the Ninth Circuit split from the other circuits to consider the question and concluded that Section 14(e) resembles Section 17(a)(2) of the Securities Act and therefore requires only a showing of negligence, not scienter.¹¹ This Comment discusses the circuit split over the requirements of

legislative history shows Section 14(e) was “patterned” on Rule 10b-5); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973) (“In determining whether § 14(e) violations were committed in the instant case, we shall follow the principles developed under Rule 10b-5 regarding the elements of such violations.”). Section 10(b) makes it unlawful to violate an SEC rule. Steven Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1, 4–5. Together with Section 10(b), Rule 10b-5 has come to serve as the primary vehicle by which investors bring securities fraud class actions. Yuliya Guseva, *The SEC and Foreign Private Issuers: A Path to Optimal Public Enforcement*, 59 B.C. L. REV. 2055, 2082–83 (2018) (explaining that Rule 10b-5 constitutes the typical weapon used by private plaintiffs in their class actions); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1302 (2008) (showing that private plaintiffs most frequently employ Rule 10b-5 in securities fraud class actions). Rule 10b-5(b) provides, in relevant part, “It shall be unlawful for any person . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . . in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5 (2018).

⁸ *Ginsburg*, 362 F.3d at 1297; *Adams*, 623 F.2d at 429–31; *Chris-Craft Indus., Inc.*, 480 F.2d at 362.

⁹ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976) (providing the definition of scienter).

¹⁰ See Comment, *Negligent Misrepresentations Under Rule 10b-5*, 32 U. CHI. L. REV. 824, 839 (1965) (defining negligence in the securities law context as failure to exercise a reasonable duty of care).

¹¹ *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 406 (9th Cir. 2018), *cert. granted*, 2019 U.S. LEXIS 8 (Jan. 4, 2019) (No. 18-459) (connecting the interpretation of Section 14(e) with the interpretation of Section 17(a)(2)). Section 17(a)(2) provided, in relevant part:

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly . . . 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.

15 U.S.C. § 77q(a)(2) (2011), *amended* by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 762(b)(2) (codified as amended as 15 U.S.C. § 77q). Whereas Rule 10b-5 prohibits fraud, Section 17(a)(2) bars theft of money or property through fraud. *SEC v. Tambone*, 597 F.3d 436, 444 (1st Cir. 2010) (specifying the difference between Rule 10b-5 and Section 17(a)(2)).

Section 14(e) of the Exchange Act.¹² Part I describes the legislative history of the Williams Act and the facts of the *Varjabedian* case.¹³ Part II explains how courts have interpreted Section 14(e) and how the Ninth Circuit reached its conclusion.¹⁴ Part III argues that Ninth Circuit should not have departed from its sister circuits in making its determination.¹⁵

I. DISCLOSURE AND THE LACK THEREOF: FROM THE GREAT DEPRESSION TO *VARJABEDIAN*

It is difficult to understand *Varjabedian* without reference to the history of the Williams Act and the peculiar facts that gave rise to the case.¹⁶ To that end, Section A of this Part presents the history of the Williams Act.¹⁷ Section B introduces the facts at the heart of the *Varjabedian* case.¹⁸

A. A Matter of Disclosure: The Legislative History of Securities Regulation

During the Great Depression, Congress passed the Securities Act and the Exchange Act.¹⁹ The former served to protect investors during the initial distribution of securities and the latter governed transactions on secondary markets.²⁰ Both laws were enacted based on the principle that more disclosure improves market outcomes.²¹ Congress believed that the disclosure of more information would enable investors to value their holdings independently, thereby allowing them to see through exaggerated claims about

¹² Compare *Ginsburg*, 362 F.3d at 1297 (holding that violations of Section 14(e) require a showing of scienter), and *Adams*, 623 F.2d at 431 (“The language of the Williams Act clearly demonstrates that Congress envisioned scienter to be an element of 14(e).”), with *Varjabedian*, 888 F.3d at 407 (ruling that violations of Section 14(e) require only a showing of negligence).

¹³ See *infra* notes 16–45 and accompanying text.

¹⁴ See *infra* notes 46–97 and accompanying text.

¹⁵ See *infra* notes 98–128 and accompanying text.

¹⁶ See *Varjabedian*, 888 F.3d at 403 (laying out the facts of the case and a history of modern securities regulation).

¹⁷ See *infra* notes 19–32 and accompanying text.

¹⁸ See *infra* notes 33–45 and accompanying text.

¹⁹ *Varjabedian*, 888 F.3d at 403; see John Hanna, *The Securities Exchange Act as Supplementary of the Securities Act*, 4 L. & CONTEMP. PROBS. 256, 257 (1937) (providing background on and analysis of the Exchange Act). But see Thel, *supra* note 1, at 409 (arguing, contrary to conventional beliefs, that by the time Franklin Roosevelt assumed the presidency, agreement already existed about the need for securities regulation).

²⁰ Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 678 (2002) (pointing to the main difference between the Securities Act and the Exchange Act).

²¹ See *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 563 (E.D.N.Y. 1971) (making clear that disclosure underpins the entire system of securities regulation).

stock values.²² In the 1960s, however, large corporations began carrying out their acquisitions by cash tender offer.²³ In making offers of this sort, would-be acquirers did not need to tell shareholders, among other things, whether the premium represented a fair valuation in comparison to the market price.²⁴

To remedy these issues, Congress once again turned to disclosure.²⁵ In 1968, Congress passed the Williams Act.²⁶ In particular, with the addition of Section 14(e) to the Exchange Act as part of the Williams Act, it aimed to deter fraud by requiring those involved in the cash tender offer process to be honest and forthright in their dealings with shareholders.²⁷ This requirement of disclosure, however, was not intended to invite courts to judge the fairness of tender offers.²⁸

In adding Section 14(e) to the Exchange Act, Congress employed familiar language.²⁹ Section 14(e) resembles Section 17(a)(2) of the Securities Act as well as SEC Rule 10b-5, itself promulgated under Section 10(b) of the Exchange Act.³⁰ Since 1973, courts have looked almost exclusively to Rule 10b-5 and its requirement of scienter for guidance in analyzing Section 14(e).³¹ It was not until 2018 that the Ninth Circuit broke with its sister circuits and held that Section 14(e) should be analyzed in concert with Section 17(a)(2) and its requirement of negligence.³²

²² See Benston, *supra* note 1, at 132 (asserting that a belief about bankers' and brokers' chicanery drove securities regulation reform efforts after the Great Depression); Simon, *supra* note 1, at 296 (noting that a fear of inadequate disclosure in part motivated the Securities Act).

²³ Sautter, *supra* note 2, at 354; see Davidoff, *supra* note 2, at 215 (showing how mergers and acquisitions activity picked up in that period).

²⁴ Sautter, *supra* note 2, at 359–61. In this period, individual investors predominated, and had to determine for themselves the intentions and calculations behind a cash tender offer. *Id.*

²⁵ Johnson & Millon, *supra* note 2, at 1895.

²⁶ See *Rondeau*, 422 U.S. at 58 (observing that the Williams Act aims to provide investors with information about tender offers); Johnson & Millon, *supra* note 2, at 1895 (maintaining that the Williams Act represented an extension of the disclosure regime).

²⁷ 15 U.S.C. § 78n(e); *Piper*, 430 U.S. at 24.

²⁸ *Schreiber*, 472 U.S. at 11–12 (“Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure, or that the term ‘manipulative’ should be read as an invitation to the courts to oversee the substantive fairness of tender offers; the quality of any offer is a matter for the marketplace.”).

²⁹ Loewenstein, *supra* note 5, at 1312–13.

³⁰ *Id.* at 1313. To further complicate matters, the language of Rule 10b-5 came from Section 17. See Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 541 (2011) (pointing to this quirk in securities law regulation).

³¹ *Ginsburg*, 362 F.3d at 1297; *Adams*, 623 F.2d at 431; *Chris-Craft Indus., Inc.*, 480 F.2d at 362.

³² *Varjabedian*, 888 F.3d at 406.

B. A Premium Offer? The Dispute at the Heart of Varjabedian

On February 25, 2015 two technology companies, Emulex and Avago, announced their merger agreement.³³ Under the terms of the agreement, Avago would pay \$8.00 for each share of Emulex stock.³⁴ That amount represented a 26.4% premium, as the day before Emulex was trading at roughly \$6.32 a share.³⁵ Per the agreement, an Avago subsidiary made a tender offer on April 7, 2015.³⁶ In accordance with federal securities regulations, Emulex released a statement informing its shareholders about the appropriate course of action to take with regards to the outstanding offer.³⁷ In recommending that its shareholders accept the offer from Avago's subsidiary, Emulex omitted one analysis produced by its financial advisor, Goldman Sachs.³⁸ In that analysis, Goldman Sachs found that, when compared to seventeen semiconductor transactions between 2010 and 2014, the 26.4% premium fell below the mean, although it was within the range of normal prices.³⁹ Consistent with management's recommendation, Emulex's shareholders blessed the transaction.⁴⁰

Subsequently, shareholders sued the company, its board of directors, and the entities acquiring it on the ground that they had accepted the tender offer under false pretenses.⁴¹ The plaintiffs claimed that the defendants had violated Section 14(e) by not including Goldman Sachs's analysis.⁴² The United States District Court for the Central District of California dismissed the complaint, following the lead of every circuit court to have considered the issue, all of which had held that scienter is a necessary element of a Section 14(e) violation.⁴³ On appeal, the Ninth Circuit held that negligence alone would suffice for Section 14(e) violations.⁴⁴ The Supreme Court granted the defendants' petition for writ of certiorari on January 4, 2019.⁴⁵

³³ *Id.* at 401.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 402.

³⁷ *Id.*

³⁸ *Id.* at 402–03.

³⁹ *Id.*

⁴⁰ *Id.* at 403.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 408.

⁴⁵ *Emulex Corp. v. Varjabedian*, 2019 U.S. LEXIS 8, at *8 (Jan. 4, 2019) (granting the petition for a writ of certiorari).

II. WHEN THE SAME WORDS MEAN DIFFERENT THINGS: THE BATTLE OVER SECTION 14(E) INTERPRETATION

Faced with the history and facts laid out above, the Ninth Circuit challenged the traditional consensus about the interpretation of Section 14(e).⁴⁶ To this end, Section A of this Part introduces the history of Section 14(e) jurisprudence and shows how this consensus came to be.⁴⁷ Section B explains how the Ninth Circuit used this history to reach its conclusion in *Varjabedian*.⁴⁸

A. Blurred Lines: The History of Section 14(e) Jurisprudence

Since the passage of the Williams Act, courts have looked almost exclusively to Rule 10b-5 for guidance in interpreting Section 14(e).⁴⁹ Indeed, it did not take long for scholars to notice the increasingly blurred lines between the statute and the regulation.⁵⁰ The analogizing between Section 14(e) and Rule 10b-5 began in 1973 when, in *Chris-Craft Industries v. Piper Aircraft Corp.*, the United States Court of Appeals for the Second Circuit noted that in the absence of precedent construing Section 14(e), Rule 10b-5 provided the best guidance due to its “virtually identical” prohibition.⁵¹ As the court made clear, its prior decisions had shown that negligence did not satisfy the so-called “scienter” requirement of Rule 10b-5.⁵² Though the court did not define scienter, it suggested that knowledge or recklessness might suffice.⁵³

Other courts had reached different conclusions about the culpability requirements of the regulation.⁵⁴ For instance, although the Ninth Circuit

⁴⁶ See *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 406 (9th Cir. 2018) (pointing to problems with the traditional understanding of Section 14(e)).

⁴⁷ See *infra* notes 49–82 and accompanying text.

⁴⁸ See *infra* notes 83–97 and accompanying text.

⁴⁹ See, e.g., *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (analogizing Section 14(e) to Rule 10b-5); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) (same); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973) (same).

⁵⁰ See, e.g., *Loewenstein*, *supra* note 5, at 1356 (noting that in the view of the courts, no distinction exists between Section 14(e) and Rule 10b-5).

⁵¹ *Chris-Craft Indus., Inc.*, 480 F.2d at 362.

⁵² *Id.* at 363.

⁵³ See *id.* (not offering a definition of the term “scienter”).

⁵⁴ *Myzel v. Fields*, 386 F.2d 718, 734–35 (8th Cir. 1967) (holding that a showing of scienter is not necessary to establish a Rule 10b-5 violation); *Kohler v. Kohler Co.*, 319 F.2d 634, 637 (7th Cir. 1963) (same); see Bruce Alan Mann, *Rule 10b-5: Evolution of a Continuum of Conduct to Replace the Catch Phrases of Negligence and Scienter*, 45 N.Y.U. L. REV. 1206, 1206 (1970) (pointing to the controversy over the requirements of Rule 10b-5); James R. McGuirk & Peter E. Moll, Comment, *Lanza v. Drexel & Co. and Rule 10b-5: Approaching the Scienter Controversy in Private Actions*, 15 B.C. INDUS. & COM. L. REV. 526, 529 (1974) (discussing the ongoing debate about the requirements of Rule 10b-5).

had not arrived at a clear standard for Rule 10b-5, it had expressed openness to eliminating the scienter requirement.⁵⁵ This diversity of opinion among the circuits began to disappear after the Second Circuit's *Chris-Craft Industries* decision.⁵⁶ In 1974, in *Smallwood v. Pearl Brewing Co.*, the United States Court of Appeals for the Fifth Circuit aligned with the Second Circuit in holding that scienter represented an element of both Section 14(e) and Rule 10b-5 violations.⁵⁷

Two years later, in *Ernst & Ernst v. Hochfelder*, the Supreme Court provided more clarity about the requirements of Rule 10b-5.⁵⁸ In ruling that violations of Section 10(b) and Rule 10b-5 required scienter, the Court offered another definition of the term.⁵⁹ Writing for the majority, Justice Powell made clear that scienter referred to a "mental state embracing intent to deceive, manipulate, or defraud."⁶⁰ In the Court's view, the language of Rule 10b-5 did not expressly require this type of intentional wrongdoing.⁶¹ Rule 10b-5, however, implicitly targeted acts carried out with this mental state, because Section 10(b) of the authorizing statute spoke of manipulation and deception.⁶²

Justice Powell also provided a definition of one of the terms used in Section 14(e).⁶³ Section 14(e) specifically prohibits "fraudulent, deceptive or manipulative acts or practices."⁶⁴ The word "manipulative" in Section 10(b), Justice Powell explained, suggests "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affect-

⁵⁵ Alan J. Ross & James F. Sealler, Note, *Scienter and Rule 10b-5: Development of a New Standard...*, 23 CLEV. ST. L. REV. 493, 510 (1974) (demonstrating the wide range of positions taken by the Ninth Circuit in this debate).

⁵⁶ See, e.g., *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir. 1974) (noting that scienter is an element of Section 14(e) violations).

⁵⁷ *Id.* Although the Fifth Circuit agreed with Judge Timber's analysis, it recognized the ongoing debate about whether negligence or some higher form of culpability represented the appropriate standard. *Id.* at 606.

⁵⁸ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 (1976) (holding that Rule 10b-5 requires a showing of scienter).

⁵⁹ *Id.* at 194 n.12.

⁶⁰ *Id.*

⁶¹ *Id.* at 212. Most importantly, Justice Powell wrote that the language of Rule 10b-5 "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." *Id.*

⁶² *Id.* at 214; *Varjabedian*, 888 F.3d at 406; see also *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977) ("The language of § 10(b) [sic] gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception.").

⁶³ *Ernst & Ernst*, 425 U.S. at 199; see *Adams*, 623 F.2d at 431 (indicating the relevance of *Ernst & Ernst* and its analysis of the word "manipulative" to the interpretation of Section 14(e)).

⁶⁴ 15 U.S.C. § 78n(e) (2012); *Adams*, 623 F.2d at 431.

ing the price of securities.”⁶⁵ Negligent conduct, in other words, would not give rise to a Section 10(b) violation.⁶⁶ Nevertheless, Justice Powell did not specify whether any correspondence existed between manipulative conduct and conduct carried out with scienter.⁶⁷ Although manipulative conduct seemed to share many of the same attributes as conduct carried out with scienter, it was unclear where the former ended and the latter began.⁶⁸

Despite this uncertainty, a consensus soon began to emerge, a consensus based on the idea that scienter is a necessary element of both Section 14(e) and Rule 10b-5 actions.⁶⁹ In 1980, in *Adams v. Standard Knitting Mills, Inc.*, the United States Court of Appeals for the Sixth Circuit held that both Rule 10b-5 and Section 14(e) require a showing of scienter.⁷⁰ A month later, in *Aaron v. SEC*, the Supreme Court reaffirmed its ruling that violations of Section 10(b) and Rule 10b-5 required scienter.⁷¹ At the same time, the Court made clear that Section 17(a)(2) of the Securities Act requires only a showing of negligence.⁷²

In 1985, in *Schreiber v. Burlington Northern, Inc.*, the Supreme Court spelled out even more explicitly the requirements of Section 14(e).⁷³ Congress, the Court noted, looked to the antifraud prohibitions of Section 10(b) of the Exchange Act and Rule 10b-5 in fashioning Section 14(e)’s sweeping antifraud provision.⁷⁴ That is to say, Section 14(e) had much in common with Section 10(b) and Rule 10b-5.⁷⁵ In addition, the Supreme Court construed Section 14(e) in light of Justice Powell’s analysis of the word “manipulative” in *Ernst & Ernst*.⁷⁶ Section 14(e), in other words, targeted inten-

⁶⁵ *Ernst & Ernst*, 425 U.S. at 199; *Adams*, 623 F.2d at 431 (noting the importance of the *Ernst & Ernst* ruling to understanding Section 14(e)).

⁶⁶ *Ernst & Ernst*, 425 U.S. at 199.

⁶⁷ *Id.* That being said, some courts have interpreted *Ernst & Ernst* to mean that the use of the word “manipulative” by Congress automatically implies scienter. See, e.g., *Adams*, 623 F.2d at 431 (declaring that the court has an obligation to find scienter when Congress employs the word “manipulative” in conjunction with “fraudulent” and “deceptive”).

⁶⁸ See *Ernst & Ernst*, 425 U.S. at 199 (holding that the use of the word “manipulative” implies intentionality, but not necessarily scienter).

⁶⁹ See *Aaron v. SEC*, 446 U.S. 680, 691 (1980) (holding that violations of Section 10(b) and Rule 10b-5 require a showing of scienter); *Adams*, 623 F.2d at 428 (ruling that scienter is a necessary element of both Rule 10b-5 and Section 14(e) violations).

⁷⁰ *Adams*, 623 F.2d at 428–31.

⁷¹ *Aaron*, 446 U.S. at 691.

⁷² *Id.* at 697; *Varjabedian*, 888 F.3d at 406.

⁷³ See *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985) (specifying the parallels between Rule 10b-5 and Section 14(e)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 6.

tional conduct, not the failure to exercise a reasonable duty of care.⁷⁷ Furthermore, the Court found it significant that the word “manipulative” follows “fraudulent” and “deceptive” in Section 14(e).⁷⁸ In the eyes of the Supreme Court, this grouping indicated that the first two adjectives meant much the same as the last.⁷⁹ That is to say, these three adjectives together provided further support for the idea that Congress intended Section 14(e) to apply to intentional conduct, not mere negligence.⁸⁰ Section 14(e) thereafter became synonymous with Rule 10b-5.⁸¹ This remained the state of law until 2018, when the United States Court of Appeals for the Ninth Circuit broke with its sister circuits.⁸²

B. Dead Precedents? The Ninth Circuit’s Approach to Section 14(e)

In finding that scienter was not an element of Section 14(e) violations, the Ninth Circuit looked to *Ernst & Ernst* and *Aaron*.⁸³ For the Ninth Circuit, those cases demonstrated that Section 14(e) required a showing of mere negligence, because the Supreme Court’s decisions seemed to indicate as much.⁸⁴ Only after showing that Section 14(e) could be subject to this different interpretation, did the Ninth Circuit address the legislative history of the statutory provision and the powers it grants the SEC.⁸⁵ The court began its analysis by noting that analogizing Section 14(e) to Rule 10b-5 be-

⁷⁷ See *id.* (stressing the fact that “manipulative” connotes intentionality or willfulness); *Ernst & Ernst*, 425 U.S. at 199 (specifically excluding negligent conduct from the definition of “manipulative”).

⁷⁸ *Schreiber*, 472 U.S. at 8.

⁷⁹ *Id.*

⁸⁰ *Id.* (rooting the interpretation of “manipulative” and the associated adjectives in *Ernst & Ernst*); *Ernst & Ernst*, 425 U.S. at 199 (specifically excluding negligent conduct from the definition of “manipulative”); *Adams*, 623 F.2d at 431 (adopting precisely that interpretation of Section 14(e) and therefore finding scienter to be a necessary element of any action brought under the statutory provision).

⁸¹ See, e.g., *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp. (TXU Corp.)*, 565 F.3d 200, 207 (5th Cir. 2007) (holding that violations of Section 14(e) and Rule 10b-5 have the same elements); *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (same); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004) (same). Most commentators did not find the Court’s interpretation of Section 17(a)(2) in *Aaron* relevant to the understanding of Section 14(e). *Aaron v. SEC*, 446 U.S. 680, 697 (1980); see, e.g., James C. Wine, *Private Litigation Under the Williams Act: Standing to Sue, Elements of a Claim and Remedies*, 7 J. CORP. L. 545, 546 (1982) (noting parallels between Section 14(e) and Rule 10b-5). But see Loewenstein, *supra* note 5, at 1331 (pointing to the seeming inconsistency in the Supreme Court’s decisions).

⁸² *Varjabedian*, 888 F.3d at 405.

⁸³ *Id.* at 406.

⁸⁴ See *id.* at 406–07 (first citing *Ernst & Ernst*, 425 U.S. at 212–14; then citing *Aaron*, 446 U.S. 680, 696–97; then citing *Chris-Craft*, 480 F.2d at 359; and then citing *Smallwood*, 489 F.2d at 605) (indicating the inconsistency between the Supreme Court’s decisions in *Ernst & Ernst* and *Aaron* and the appeals court decisions in *Chris-Craft* and *Smallwood*).

⁸⁵ *Id.* at 407–08.

gan with *Chris-Craft Industries* in 1973.⁸⁶ The court then turned its focus to the Fifth Circuit's agreement with the Second Circuit in *Smallwood* the following year.⁸⁷

Following this survey of the legal landscape up to 1976, the Ninth Circuit took issue with the consensus view of Section 14(e).⁸⁸ The court articulated the view that Justice Powell had made clear in *Ernst & Ernst* that the language of Rule 10b-5 did not expressly require a violating act to be carried out with scienter.⁸⁹ The requirement of scienter, the Ninth Circuit emphasized, came from the fact that Section 10(b) of the authorizing statute spoke of manipulation and deception.⁹⁰ The Ninth Circuit did not end its analysis there.⁹¹ In 1980, in *Aaron*, the Supreme Court had observed that Section 17(a)(2) of the Securities Act, itself similar in language to Section 14(e), requires only a showing of negligence.⁹² For the Ninth Circuit, this amounted to further proof that *Chris-Craft Industries* and *Smallwood* needed reconsideration.⁹³

The legislative history of Section 14(e) and the powers it grants the SEC reinforced this idea.⁹⁴ The statutory provision, the court observed, empowered the SEC to police non-fraudulent conduct as long as the mechanism was tailored to fraudulent acts.⁹⁵ Given that Section 14(e) allows the SEC to reach non-fraudulent acts not requiring scienter, it follows that negligent conduct falls within the agency's purview.⁹⁶ Beyond that, the disclosure rules of the Williams Act reflected a concern with the quality of information about tender offers, not the mental state of would-be acquirers.⁹⁷

⁸⁶ *Id.* at 405.

⁸⁷ *Id.*

⁸⁸ *Id.* at 405–06.

⁸⁹ *Id.*

⁹⁰ *Id.* at 406.

⁹¹ *Id.* at 407. The Ninth Circuit also criticized the Sixth and Eleventh Circuits for finding that Section 14(e) requires a showing of scienter. *Id.*

⁹² *Id.* at 406.

⁹³ *Id.*

⁹⁴ *See id.* at 407–08 (arguing that text of Section 14(e) empowers the SEC to reach non-fraudulent conduct not requiring scienter and that, in drafting this provision, Congress cared more about failure to disclose than the intentions of an individual involved in the tender offer process).

⁹⁵ *Id.* at 407.

⁹⁶ *Id.* The Ninth Circuit makes an excellent point here, as the SEC has endorsed a very similar interpretation. *See* WHX Corp., Exchange Act Release No. 47,980, 80 SEC Docket 1153 (June 4, 2003) (noting that Section 14(e) authorizes the SEC to “promulgate rules to regulate non-fraudulent activity, without regard to state of mind, as a means of preventing fraudulent, deceptive or manipulative acts”).

⁹⁷ *Varjabedian*, 888 F.3d at 408.

III. WHY THE SAME WORDS SHOULD MEAN DIFFERENT THINGS: THE UNDERLYING POLICY AND TEXT OF SECTION 14(E) SUPPORT A SCIENTER REQUIREMENT

In *Varjabedian*, the Ninth Circuit ascribed too much importance to the Supreme Court's decision in *Aaron*.⁹⁸ Although Section 14(e) and Section 17(a)(2) have almost identical language, the same words do not necessarily mean the same thing.⁹⁹ The text and history of Section 14(e) strongly suggests that Section 14(e) necessitates a showing above mere negligence.¹⁰⁰

The Supreme Court has held that the text of Section 14(e) speaks of intentional acts, not merely negligent conduct.¹⁰¹ The provision specifically targets “fraudulent, deceptive or manipulative acts or practices.”¹⁰² As the Court made clear in *Ernst & Ernst*, the word “manipulative” in particular implies “intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”¹⁰³ In *Ernst & Ernst*, the Supreme Court specified that negligent conduct in particular would not fit this definition.¹⁰⁴ Beyond that, the fact that the word “manipulative” follows “fraudulent” and “deceptive” indicates that the first two adjectives mean much the same as the last.¹⁰⁵ In short, these three adjectives together make it clear that Congress intended Section 14(e) to apply to intentional

⁹⁸ See *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 406 (9th Cir. 2018) (citing *Aaron v. SEC*, 446 U.S. 680, 696 (1980)) (emphasizing that in light of the similarities in language between Section 14(e) and Section 17(a)(2), the holding in *Aaron* that Section 17(a)(2) requires a showing of negligence applies to Section 14(e)). *But see* *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 6–10 (1985) (indicating the parallels between Section 14(e) and Rule 10b-5, and making clear that both target intentional conduct).

⁹⁹ See *Schreiber*, 472 U.S. at 6–10 (noting that Section 14(e) not only resembles Section 10(b) and Rule 10b-5 but also targets intentional conduct); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976) (observing that the word “manipulative” in the securities law context connotes intentional conduct); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) (pointing to the relevance of *Ernst & Ernst* for understanding the meaning of the word “manipulative” in Section 14(e)).

¹⁰⁰ See *Schreiber*, 472 U.S. at 6–10 (relying on the similarity between Section 14(e), Section 10(b) and Rule 10b-5 to find that Congress intended Section 14(e) to apply to intentional or willful conduct); *Ernst & Ernst*, 425 U.S. at 199 (“Use of the word ‘manipulative’ . . . connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.”); *Adams*, 623 F.2d at 431 (looking to *Ernst & Ernst* to find that the word “manipulative” in Section 14(e) requires more than mere negligence for imposing liability).

¹⁰¹ *Schreiber*, 472 U.S. at 6–10; *Ernst & Ernst*, 425 U.S. at 199; *Adams*, 623 F.2d at 431.

¹⁰² 15 U.S.C. § 78n(e) (2012).

¹⁰³ *Ernst & Ernst*, 425 U.S. at 199; *Adams*, 623 F.2d at 431.

¹⁰⁴ *Ernst & Ernst*, 425 U.S. at 199.

¹⁰⁵ See *Schreiber*, 472 U.S. at 8 (pointing out this principle of statutory construction); *Adams*, 623 F.2d at 431 (using this principle to find a requirement of scienter in the language of Section 14(e)).

conduct, not mere negligence.¹⁰⁶ Indeed, in 1985, in *Schreiber*, the nation's highest court endorsed this exact construction of Section 14(e).¹⁰⁷

Even if one sets aside the prohibition against “fraudulent, deceptive or manipulative acts or practices,” Section 14(e) still appears to support a requirement of scienter.¹⁰⁸ On every occasion where the Supreme Court has considered the nearly identical language of Rule 10b-5, it has consistently stated that the entire provision requires a showing of scienter.¹⁰⁹

Beyond that, the Court has been explicit about the textual parallels between Rule 10b-5 and Section 14(e).¹¹⁰ Congress, the Supreme Court has noted, looked to the antifraud prohibitions of Section 10(b) of the Exchange Act and Rule 10b-5 in fashioning Section 14(e)'s sweeping antifraud provision.¹¹¹ Under that line of precedent, comparing Section 14(e) of the Exchange Act to Section 17(a)(2) of the Securities Act, although tempting, would be inapt.¹¹²

These textual considerations seem to suggest that *Aaron* does not call for a reconsideration of the settled understanding of Section 14(e).¹¹³ In *Aaron*, the Court held that violations of Section 10(b) and Rule 10b-5 require a showing of scienter.¹¹⁴ The Supreme Court, however, also ruled that negligent conduct would fall within the ambit of Section 17(a)(2).¹¹⁵ Given that the Supreme Court has construed Section 14(e) to require a showing of scienter, consistently noted the intentional conduct targeted by Rule 10b-5, and

¹⁰⁶ See *Schreiber*, 472 U.S. at 8 (indicating that the “deceptive” and “fraudulent” mean much the same as “manipulative”); *Adams*, 623 F.2d at 431 (employing this tool of statutory interpretation to find a requirement of scienter in the language of Section 14(e)).

¹⁰⁷ *Schreiber*, 472 U.S. at 6–8.

¹⁰⁸ See 15 U.S.C. § 78n(e) (prohibiting omissions and untrue statements in the tender offer process); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 156–57 (2008) (noting that scienter represents an element of Rule 10b-5 actions); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318–19 (2007) (same); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (same).

¹⁰⁹ *Stoneridge Inv. Partners, LLC*, 552 U.S. at 156–57; *Tellabs, Inc.*, 551 U.S. at 318–19; *Dura Pharm., Inc.*, 544 U.S. at 341; see *United States v. Bonds*, 784 F.3d 582, 593 (9th Cir. 2015) (stating that it is necessary to look at the company a word keeps to divine its meaning in context).

¹¹⁰ See *Schreiber*, 472 U.S. at 10 (specifying the parallels between Section 14(e) and Section 10(b) as well as Rule 10b-5).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *id.* at 6–10 (noting that Section 14(e) targets intentional conduct and is similar to Section 10(b) and Rule 10b-5); *Ernst & Ernst*, 425 U.S. at 199 (observing that the word “manipulative” in the securities law context connotes intentional conduct); *Adams*, 623 F.2d at 431 (pointing to *Ernst & Ernst* for understanding the meaning of the word “manipulative” in Section 14(e) and its requirements for liability).

¹¹⁴ *Aaron v. SEC*, 446 U.S. 680, 691 (1980).

¹¹⁵ *Id.* at 697.

analogized the statutory provision to the regulation, comparisons to Section 17(a) seem inappropriate.¹¹⁶

Moreover, the fact that disclosure underpins Section 14(e) gives no indication as to the mental state or conduct targeted.¹¹⁷ All federal securities regulation relies in one way or another on the disclosure of material information to protect shareholders.¹¹⁸ For some of these rules, negligent conduct will suffice to establish a violation.¹¹⁹ For others, a showing of some sort of willfulness is necessary.¹²⁰ Consequently, the Act's use of disclosure does not tip the scales in favor of negligence.¹²¹

¹¹⁶ See *Stoneridge Inv. Partners, LLC*, 552 U.S. at 156–57 (noting that Rule 10b-5 actions have a requirement of scienter); *Tellabs, Inc.*, 551 U.S. at 318–19 (same); *Dura Pharm., Inc.*, 544 U.S. at 341 (same); *Schreiber*, 472 U.S. at 6–10 (observing that Section 10(b) and Rule 10b-5 served as the model for Section 14(e), and that Section 14(e) focuses on intentional conduct). In addition, whereas the language of Section 14(e) and Rule 10b-5 focuses on the mindset of the defendant, that of Sections 17(a)(2) and 17(a)(3) focuses on the conduct of the defendant. See 15 U.S.C. § 78n(e) (forbidding fraud); *id.* § 78q(a)(2)–(3) (prohibiting the theft of money or property through fraud); 17 C.F.R. § 240.10b-5 (2018) (proscribing fraud).

¹¹⁷ See *Johnson & Millon*, *supra* note 2, at 1895 (observing the ubiquity of disclosure requirements in the securities regulation regime); Michael L. Siegel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1567 (noting that the difference between civil and criminal punishments for securities law violations hinges on the definition of willfulness).

¹¹⁸ See *Johnson & Millon*, *supra* note 2, at 1895; (pointing to the centrality of disclosure to all American securities regulation); Daniel M. Gallagher, *The Importance of the SEC Disclosure Regime*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 13, 2013), <https://corpgov.law.harvard.edu/2013/07/16/the-importance-of-the-sec-disclosure-regime/> [<https://perma.cc/W34X-GTCW>] (noting that the SEC's mission centers on disclosure).

¹¹⁹ See, e.g., *Aaron*, 446 U.S. at 697 (noting that negligence suffices for violations of Section 17(a)(2) of the Securities Act).

¹²⁰ See *Buell*, *supra* note 30, at 544 (observing that the DOJ can bring criminal charges with regard to willful conduct); Siegel, *supra* note 117, at 1567 (noting that the difference between civil and criminal punishments for securities law violations hinges on the definition of willfulness); Mary Jo White, Chair, *All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets*, U.S. SEC. & EXCH. COMM'N (Mar. 31, 2014), <https://www.sec.gov/news/speech/2014-spch033114mjw> [<https://perma.cc/A9NM-LN83>] (“[E]ssentially any violation of the federal securities laws and regulations can be a criminal violation if done willfully, that is, with intent to violate the law.”).

¹²¹ See *Johnson & Millon*, *supra* note 2, at 1895 (noting that the entire securities regulation regime rests on disclosure); Gallagher, *supra* note 118 (observing that disclosure lies at the heart of what the SEC does). In addition, the limited nature of the Williams Act raises further questions about whether Congress intended to reach negligent conduct. See *Johnson & Millon*, *supra* note 2, at 1895 (noting that Congress only “modestly amended” the securities regulation regime with the Williams Act). But see Meredith M. Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 BUS. L. 1637, 1647–48 (1971) (arguing that the SEC wished for a broad reading of the Williams Act). Beyond that, a good deal of authority establishes that Section 14(e) should be read to require a showing of scienter, not negligence. See *Sautter*, *supra* note 2, at 365 (noting that Section 14(e) meant to cover gaps left by Section 10(b) of the Exchange Act and Rule 10b-5); S.J. Grossman & O.D. Hart, *Disclosure Laws and Takeover Bids*, 35 J. FIN. 323, 326 (1980) (noting that Section 14(e) aims to prevent fraudulent non-disclosure).

Furthermore, even if the *Varjabedian* analysis is correct that the text of Section 14(e) suggests a requirement of negligence, courts often resolve statutory ambiguities by looking to the purpose underlying a given statute.¹²² Though Section 14(e) mandates the disclosure of information related to tender offers, it does not invite courts to judge the fairness of these transactions.¹²³ That is to say, the omission of one document by the Emulex board does not upend settled assumptions about shareholders having the freedom and autonomy to accept or reject any tender offer before them.¹²⁴ Lastly, firms in the one of the world's largest centers of economic activity require uniformity in legal standards and adherence to precedent to plan their affairs with certainty inside and outside the Ninth Circuit.¹²⁵ After all, the likes of Amazon, Alphabet, Apple, Boeing, Disney, Facebook, Intel, Microsoft, and Starbucks call the Ninth Circuit home.¹²⁶ Having one set of rules apply to their business inside the Ninth Circuit and another set of rules apply to their business outside the Ninth Circuit is hardly ideal.¹²⁷ In addition, *Varjabedian* disrupted the settled understanding of Section 14(e), thereby making it more difficult for firms to rely on precedent to plan with certainty.¹²⁸

¹²² See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940) (pointing out that the Court looks to the purpose of the statute rather than the plain language when using the latter as a guide produces absurd results); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (arguing that courts should pay attention to legislative intent, as the law serves pragmatic ends). But see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 343 (1st ed. 2012) (urging judges not to follow their beliefs about the purpose of a statute, as doing so may lead to uncertainty and confusion).

¹²³ *Schreiber*, 472 U.S. at 11–12 (“Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure, or that the term ‘manipulative’ should be read as an invitation to the courts to oversee the substantive fairness of tender offers; the quality of any offer is a matter for the marketplace.”).

¹²⁴ See *id.* (making clear that courts should leave decisions about the fairness of tender offers to the marketplace).

¹²⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

¹²⁶ Makeda Easter, *The New Fortune 500 List Is Out. These California Companies Made the Cut*, L.A. TIMES (June 7, 2017), <http://www.latimes.com/business/la-fi-fortune-500-california-2017-0607-story.html> [<https://perma.cc/ZC24-SRNJ>]; CHOOSE WASH.: WASH. ST. DEP’T OF COMMERCE, <http://choosewashingtonstate.com/> [<https://perma.cc/E86R-QXPG>].

¹²⁷ Compare *SEC v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004) (holding that violations of Section 14(e) require a showing of scienter), and *Adams*, 623 F.2d at 431 (same), with *Varjabedian*, 888 F.3d at 407 (ruling that violations of Section 14(e) require only a showing of negligence).

¹²⁸ See *Planned Parenthood*, 505 U.S. at 844 (underscoring the importance of adhering to precedent).

CONCLUSION

In *Varjabedian*, the Ninth Circuit ascribed too much importance to the Supreme Court's decision in *Aaron*. In doing so, it shed light on how earlier courts could have construed similar language in a similar fashion. This approach, however, conflicts with the Court's construction of Section 14(e) and Rule 10b-5 as well as the decisions of five other circuits. Furthermore, although Section 14(e) mandates the disclosure of information related to tender offers, it does not invite courts to judge the fairness of these transactions. That is to say, the omission of one document by the Emulex board does not upend settled assumptions about shareholders having the freedom and autonomy to accept or reject any tender offer before them. When coupled with the fact that such companies as Amazon, Apple, Boeing, Disney, Facebook, Google, Intel, and Starbucks call the Ninth Circuit home, uniformity in legal standards and adherence to precedent in the securities law domain matter even more. Therefore, when the Supreme Court rules on *Varjabedian*, it should follow its own precedent, return uniformity in legal standards to the nation, and hold that Section 14(e) requires a showing of scienter.

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