

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Emulex cert petition dismissed as improvidently granted, \(Apr. 23, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

Dismissal of *Emulex* lets stand a Ninth Circuit holding that there is an inferred private right of action under Section 14(e) based on negligence.

One week after oral argument, the Supreme Court dismissed the writ of certiorari in *Emulex Corporation v. Varjabedian* as improvidently granted. The dismissal leaves open the question of whether the Ninth Circuit correctly held that Exchange Act Section 14(e) supplies an inferred private cause of action based on mere negligence. The one-sentence order provides no explanation for the dismissal, but, during oral argument, several justices expressed concerns about whether the issue was adequately raised below ([Emulex Corporation v. Varjabedian](#), April 23, 2019).

Private right of action? The court granted [certiorari](#) on January 4, 2019. The respondent shareholders alleged that a recommendation statement that Emulex filed with the SEC in support of a 2015 merger created a materially misleading impression in violation of Section 14(e). The district court dismissed the complaint for lack of scienter, but the [Ninth Circuit](#) reversed, holding that Section 14(e) supports an implied private right of action for mere negligence. The [petition](#) asked whether the Ninth Circuit was correct in finding an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer, stressing that the Ninth Circuit expressly split from the Second, Third, Fifth, Sixth, and Eleventh Circuits, which all require proof of scienter.

Not raised below. At the outset of oral argument, held on April 15, 2019, the petitioners' attorney noted that the government [acknowledged](#) that the Court's precedents "compel the conclusion that Section 14(e) does not confer any implied private right at all." Four justices, led by Justice Ginsburg, immediately questioned the timing of the issue, noting that the existence of a private right of action was not argued in either the trial or appellate courts. Indeed, Emulex's counsel conceded before the Ninth Circuit that his client did not dispute that Section 14(e) provides for a private right of action, and this point was amplified upon in the [respondent brief](#). Justice Sotomayor wondered if this was "moving the ball on cert grounds."

Each party was also grilled as to the statutory context of Section 14(e), that is, whether Congress intended a private remedy. Both the counsel for the petitioner and the assistant Solicitor General (as amicus curiae, in support of neither party) did not consider the language in Sections 10(b) or 14(a), which have been interpreted to provide private rights of action, to be analogous. For his part, the respondents' counsel maintained that the entire dispute could be resolved by "looking to this Court's usual tools of statutory construction and the text, context, purpose, and history of Section 14(e)" and that "Congress unmistakably intended this very statute to be privately enforceable, despite not including an express private remedy."

The case is [No. 18-459](#).

Attorneys: Daniel L. Geyser (Geyser PC) for Gary Varjabedian. Gregory George Garre (Latham & Watkins) for Emulex Corp.

Companies: Emulex Corp.

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