Docket No. 21-15923

In the

United States Court of Appeals

For the

Ninth Circuit

NOELLE LEE, derivatively on behalf of The Gap, Inc.,

Plaintiff-Appellant,

v.

ROBERT J. FISHER, SONIA SYNGAL, ARTHUR PECK, AMY BOHUTINSKY, AMY MILES, ISABELLA D. GOREN, BOB L. MARTIN, CHRIS O'NEILL, ELIZABETH A. SMITH, JOHN J. FISHER, JORGE P. MONTOYA, MAYO A. SHATTUCK III, TRACY GARDNER, WILLIAM S. FISHER, DORIS F. FISHER,

Defendants-Appellees,

and

THE GAP, INC.,

Nominal Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:20-cv-06163-SK · Honorable Sallie Kim

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INTEREST OF AMICI

Amici Curiae are scholars who teach and write about securities law.[1] They have an interest and expertise concerning enforcement of protections for investors under the national securities laws. This brief is offered to assist the Court in defining the interaction of private ordering with such enforcement.

Wendy Couture is the James E. Wilson Distinguished Professor of Law at the University of Idaho College of Law.

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[1] This brief is filed with the written consent of the parties. Pursuant to Fed. R. App. P. 29(4)(E), counsel for Amici affirm that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*'s counsel and Grant & Eisenhofer, P.A., make a monetary contribution to the preparation or submission of this brief. Counsel for Amici and the Grant & Eisenhofer firm are not affiliated with any party to this case.

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ARGUMENT

Defendants in this case seek to enforce a forum-selection provision in Gap's bylaws that would send all derivative claims against the company to the Delaware Court of Chancery—a court that all acknowledge cannot hear plaintiffs' federal claim under the Securities Exchange Act. That effort cannot stand scrutiny under the Supremacy Clause. Although federal courts have articulated a policy presumptively favoring enforcement of forum-selection clauses, that policy has not been—and cannot be—applied to supersede federal *statutory* policies by wholly extinguishing a claim under a federal statute. Moreover, the clause in question occurs in a corporate bylaw—not a freely negotiated agreement—and does not implicate concerns about

comity in foreign commerce. These facts take this case outside the federal policy favoring forum-selection clauses by its own terms.

Because the forum-selection provision here is a bylaw, not a private agreement, it raises the question whether Delaware law would authorize a bylaw that purports to extinguish federal statutory claims under the Exchange Act. Delaware courts have never held that, and this court should not press Delaware law into conflict with important federal statutory and constitutional principles. Any state law authorizing corporations to foreclose private claims under federal regulatory statutes would run afoul of longstanding precedent that state law may not impede federal rights of action. And because such a bylaw may sweep beyond the corporation's internal affairs, such authorization would also raise constitutional problems by regulating extraterritorially. In light of these difficulties, this court should not extend federal policy favoring enforcement of privately-negotiated forum-selection clauses to this new scenario.

I. Forum-selection clauses may not be enforced where doing so would destroy plaintiffs' claims under the Exchange Act.

The Panel and the District Court proceeded in this case as if the single overriding consideration was a general federal policy in favor of enforcing forum-selection clauses. *See Lee v. Fisher*, 2021 WL 1659842, at *2-3 (N.D. Cal. 2021); *Lee v. Fisher*, 34 F.4th 777, 780 (9th Cir. 2022), reh'g en banc granted, *opinion*

vacated, 2022 WL 13874339 (9th Cir. Oct. 24, 2022). That was inappropriate for two independent reasons. First, federal policies embodied in the Exchange Act's substantive requirements and anti-waiver provision trump general principles of private ordering here. Second, that principle is inapplicable by its own terms to a forum-selection clause appearing not in a negotiated agreement between sophisticated parties but in a corporation's bylaws.

A. Federal policy on forum-selection clauses does not supersede the Exchange Act's federal right of action.

Section 14(a) of the Exchange Act reflects "the congressional belief that '(f)air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.'" *J.I. Case Co. v. Borak*, 377 U.S 426, 431 (1964) (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess., 13). *Borak* explained that "among [§ 14(a)'s] chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." *Id.* at 432. Implication of a private right of action generally reflects a judgment that that "remedy is necessary or at least helpful to the accomplishment of the statutory purpose." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979) (citing *Borak* as an example). Plaintiff's Exchange Act claims here thus themselves represent an important federal statutory policy.

Congress included two additional provisions underscoring its commitment to investor protection. The antiwaiver provision provides that "[a]ny condition,

stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void." 15 U.S.C. § 78cc(a). The panel inexplicably found that "the Exchange Act's antiwaiver provision does not contain a clear declaration of federal policy," 34 F.4th at 781. The Seventh Circuit drew the more obvious inference in a similar case, concluding that "forc[ing] plaintiff to raise its claims in a Delaware state court, which is not authorized to exercise jurisdiction over Exchange Act claims . . . would be difficult to reconcile with Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act." *Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022).[2]

Second, the Exchange Act provides for exclusive federal jurisdiction. Such exclusivity typically indicates a legislative concern for greater federal control over the adjudication of particular federal claims.[3] Allowing a party to *eliminate* federal claims by selecting a forum unable to hear exclusive federal claims would turn this policy on its head. Parties cannot, by private agreement, empower a state forum to decide a claim that federal statutes forbid it to decide. And even if it were permissible

[2] *See also Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (holding that a similar Idaho nonwaiver provision "clearly states a strong public policy").

[3] *See, e.g.*, Paul Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 158-59 (1953); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 511-13 (1957).

for a party to waive all Exchange Act claims in advance, couching the waiver as a seemingly procedural forum-selection clause would violate the corporation's obligations of disclosure. But in any event, such a waiver is precisely what the antiwaiver provision of the Act forbids.

Concluding otherwise, the Panel relied on *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987), which said that "[b]ecause [the Exchange Act's exclusive jurisdiction provision] does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act." *See* 34 F.4th at 781. But *Shearson* actually proves the point. That case involved an agreement to arbitrate a dispute, which the plaintiffs argued would violate the Exchange Act's antiwaiver provision by waiving the Act's provision for exclusive jurisdiction. The Court found that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 482 U.S. at 229-30 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). This case, however, involves a forum-selection clause pointing to a forum that all parties agree simply cannot hear the Exchange Act claim. The operation of the clause thus does not simply move that claim to another forum, but

rather forecloses the claim altogether.[4] That is plainly a waiver of substantive rights.[5]

Whether or not this case falls within the anti-waiver provision, however, enforcement of the forum-selection clause is simply preempted by the federal courts' statutory obligation to hear the Exchange Act claim. The federal policy favoring enforcement of forum-selection agreements is, at best, a creature of federal common law.[6] In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court concluded that presumptive enforcement of forum-selection clauses was "the correct doctrine to be followed by federal district courts sitting in admiralty," based on policy concerning "expansion of American business and industry," *id.* at 9-10. In *Atlantic Marine Constr. Co. v. U.S. District Court*, 571 U.S. 49 (2013), the Court found a similar policy in the transfer statute, 28 U.S.C. § 1404(a), but recognized that enforcement of such clauses pointing to a state or foreign forum must rest on the federal common law doctrine of *forum non conveniens*, *see id.* at 59-60.

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[4] *Shearson*, moreover, involved an arbitration clause that was part of a negotiated contract, *see* 482 U.S. at 223, not simply inserted into a corporation's bylaws, and the imperative to arbitrate rested on the Federal Arbitration Act, not a judge-made federal common law rule.

[5] Defendants have argued that waiving Plaintiff's *right to sue* under the Exchange Act falls outside the antiwaiver provision because it does not waive the Defendants' duty to comply. But *Borak* implied a private right of action precisely because those substantive duties are inextricably bound up with the right to judicial enforcement. *See* 377 U.S. at 431-32.

[6] As we argue in Part II *infra*, in this case the forum-selection clause in the Defendant's corporate bylaws is more accurately characterized as an obligation imposed by *state* law.

But federal common law must give way to national policy articulated in a federal statute. In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court rejected an argument that there should be a presumption that federal statutes do not displace federal common law rules, just as there is a presumption that such statutes do not preempt *state* law. The federalism concerns behind the latter rule, the Court said, "are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. . . . [W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id*. at 316-17. In the event of a conflict, the federal statutory policy in the securities laws necessarily prevails over federal common law rules favoring forum-selection clauses.[7]

The District Court and the Panel were thus wrong to begin with *Atlantic Marine* and its standard for enforcement of a forum-selection clause. *See* 2021 WL 1659842, at *2; 34 F.4th at 780. The dispositive question, rather, was whether enforcement of the clause would impede the Plaintiff's federal right to litigate her

[7] Even if the antiwaiver provision did not itself forbid applying the forum-selection provision here, doing so would nonetheless violate the policy embodied in the Exchange Act § 14(a) cause of action. *Cf. Geier v. American Honda Motor Corp.*, 529 U.S. 861, 872-74 (2000) (holding that the Court's finding that a state tort claim was subject to ordinary conflict preemption even though it fell outside the scope of the federal statute's express preemption clause).

statutory claims. Both courts compounded this error by holding that "the strong federal policy in favor of enforcing forum-selection clauses . . . supersede[s] antiwaiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court." *Id.* at 781 (quoting *Sun v. Advanced China Healthcare*, 901 F.3d 1081, 1090 (9th Cir. 2018)); *see also* 2021 WL 1659842, at *3 (same). Taken literally, this language contravenes not only *City of Milwaukee*'s rule that statutory rules supersede common law ones, but also the text of the Supremacy Clause, which makes no mention of judge-made policies. *See* U.S. CONST. Art. VI, cl. 2.

Sun did not—and could not—decide that question, however. Plaintiffs there had sued in federal district court in Washington state, and the court enforced a forum-selection clause pointing to California state court. *See* 901 F.3d at 1093. The agreement specifically provided that claims subject to exclusive federal jurisdiction could be filed in the federal district court in California, thus avoiding any issue of foreclosing federal claims from being litigated in federal court. *See id.* at 1085. Further, the district court's order in *Sun* had conditioned dismissal based on the forum-selection clause on several requirements protecting the plaintiffs' ability to bring comparable California-law claims in the new forum, and the defendant's counsel had pledged at oral argument not to contest the applicability of Washington

state law in California state court. *See id.* at 1085-86, 1092.[8] *Sun* certainly did present a forum-selection clause that was compatible with the Exchange Act's antiwaiver provision, and perhaps that is what the court meant to convey. But the *Sun* court did not have before it a *conflict* between an antiwaiver provision and a forum-selection clause, and it certainly did not discuss how a federal common law policy favoring forum-selection clauses could "supersede" a contrary federal statutory imperative.

Nor does the broad rule that the panel read into *Sun* make much sense. *Sun* said that "[b]ecause an antiwaiver provision by itself does not supersede a forum-selection clause, in order to prove that enforcement of such a clause 'would contravene a strong public policy of the forum in which suit is brought,' the plaintiff must point to a statute or judicial decision that clearly states such a strong public policy." 901 F.3d at 1090 (quoting *M/S Bremen*, 407 U.S. at 15). The panel in the present case read that to mean that "binding precedent forecloses reliance on the Exchange Act's antiwaiver provision" to state the requisite public policy. *See* 34 F.4th at 782. On the other hand, this Court went the other way in *Gemini*, holding that a similar Idaho nonwaiver provision "clearly states a strong public policy." 931 F.3d at 916. The only apparent difference between the Washington antiwaiver provision in *Sun* and the Exchange Act's antiwaiver provision in this case, on the

[8] Unlike the present case, the parties' agreement also contained a choice of law clause pointing to California law, *see id.* at 1085 n.1.

one hand, and the Idaho provision, on the other, is that the latter actually used the words "public policy." *See id.* But all antiwaiver provisions express a public policy against waiver of statutory rights, and *Gemini*'s contrived distinction indicates the confusion *Sun* produced. In any event, because the antiwaiver provision is in a federal statute, it cannot so easily be shunted aside by a federal common law rule.

Finally, federal jurisdictional statutes likewise state a strong federal policy. *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 377 (2012), emphasized that jurisdictional statutes "[r]ecogniz[e] the responsibility of federal courts to decide claims, large or small, arising under federal law," *id.* at 377, and reaffirmed Chief Justice John Marshall's admonition that federal courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,'" *id.* at 376 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). Hence the Court held that federal courts' basic jurisdiction is not ousted by implication when a federal statute expressly confers jurisdiction over a federal cause of action only on state courts. *See id.* at 386-87. But *Cohens*'s rule should hold even more strongly when the surrender of federal jurisdiction would result in a party's inability to pursue a federal claim.

B. Federal decisions favoring enforcement of forum-selection clauses don't apply on their own terms.

The Panel read federal decisions to impose a "heavy burden to show that Gap's forum-selection clause is unenforceable." *See* 34 F.4th at 779-80 (citing

Atlantic Marine, *M/S Bremen*, and *Sun*). But unlike *Shearson*, which relied on a broad federal *statutory* policy favoring arbitration, *see* 482 U.S. at 226, 231-34, the forum-selection cases involve a judicially-formulated policy that is keyed to particular aspects of the transactions involved. In particular, the key forum-selection precedents involve negotiated agreements between sophisticated parties, clauses that do not wholly foreclose a class of federal claims, and—in many instances—concern foreign transactions where international commerce and comity impose particular reasons not to insist on preserving rights to sue under domestic law.

These facts are crucial. A policy respecting private ordering necessarily assumes a real agreement among the parties. Non-foreclosure of federal claims is necessary to avoid the preemption issues already discussed. And respect for foreign law and non-interference with foreign transactions is itself a strong policy of federal securities law. However, each of these points cuts *against* the forum-selection provision here.

1. Corporate bylaws are not contractual in the same sense as freely-negotiated agreements between sophisticated parties.

The forum-selection clause in this case is not part of a negotiated agreement between the parties. It is, rather, embedded in Gap's corporate bylaws. *See* 34 F.4th at 779. Commentators have argued that bylaws should not be regulated or enforced in the same way as contracts because shareholders do not meaningfully consent to managerial actions or because shareholders typically lack meaningful notice of the

bylaws' terms.[9] Others have noted that corporations may amend their bylaws without shareholders consent, but contract law generally forbids one party to unilaterally change the terms of the deal.[10] The bottom line is that "corporate law does not rely on shareholder consent to justify directorial action. Instead, directors' power to act is conferred by the state as a part of the corporate form, and that power is constrained by state rules and state-imposed obligations."[11]

The basic lack of meaningful shareholder consent to corporate bylaws makes those instruments a poor fit with the Supreme Court's forum-selection cases. Those cases emphasize consent at every turn. The *M/S Bremen* opinion, for instance, stresses that "[t]he choice of [an English] forum was made in an arm's length negotiation by experienced and sophisticated businessmen," 407 U.S. at 12, and that the parties agreed to the forum-selection clause "[a]fter reviewing the contract and making several changes, but without any alteration in the forum-selection or exculpatory clauses." *Id.* at 3.[12] Unlike a corporate bylaw unilaterally framed by the

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[9] *See, e.g.*, Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999); Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 114-15 (2012).

[10] *See, e.g.*, G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 545-46 (1989).

[11] Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L. J. 583, 605 (2016).

[12] *See also* 407 U.S. at 12-13 (concluding that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening

corporation, the forum-selection clause in *Bremen* "was not simply a form contract with boilerplate language that Zapata had no power to alter." *Id.* at 12 n.14.[13]

Similarly, *Atlantic Marine* presumed that the plaintiff had "agree[d] by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant"; that is why, "as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum *for which the parties bargained* is unwarranted." 571 U.S. at 63 (emphasis added). And the Court stressed that "'enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.'" *Id.* (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

Purchasers of Gap stock may or may not be sophisticated parties, but they have no opportunity to negotiate the content of the bylaws or alter particular terms not to their liking. They certainly did not agree to the forum-selection provision 'in exchange for other binding promises by the defendant,' nor does it represent 'their legitimate expectations.' This is why corporate law and particularly federal

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bargaining power, such as that involved here, should be given full effect"); *id.* at 17-18 (assuming that "inconvenience" of the selected forum would be "clearly foreseeable at the time of contracting").

[13] *See also Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) (assuming that a forum-selection clause "represents the parties' agreement as to the most proper forum").

securities law assumes a far more regulatory stance toward bylaws and other corporate documents than does contract law, predicated on the free and informed consent of the parties.[14] None of the leading cases involved forum-selection clauses inserted in corporate bylaws, and the Panel was wrong to assume—without discussion—that a general policy favoring private agreements to select a forum could be readily imported to this context.

2. Federal decisions enforcing forum-selection clauses have not involved the waiver of federal claims.

Although any federal common law preference for enforcing forum-selection clauses must give way before the federal *statutory* policy embodied in the Exchange Act, cases like *Atlantic Marine*, *M/S Bremen*, and *Sun* need not be read as setting up that sort of conflict. That is because none of those cases has enforced a forum-selection clause that would have required the plaintiff to surrender a federal statutory

[14] *See, e.g.*, Securities Exchange Act of 1934, ch. 404, title I, Sec. 2, 48 Stat. 881 (June 6, 1934) (stating that "transactions in securities . . . are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto"); *Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990) ("The fundamental purpose undergirding the Securities Acts is 'to eliminate serious abuses in a largely unregulated securities market.'") (quoting *United Housing Found. v. Forman*, 421 U.S. 837, 849 (1975)); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 389 (1983) ("[A]n important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry."); *Borak*, 377 U.S. at 432 ("protection of investors" is among the "chief purposes" of the Exchange Act's proxy rules); *see also* Joel Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance* 53-54, 157 (2003).

claim. *Atlantic Marine* involved a clause requiring transfer between federal courts in different states, and the plaintiff's reason for resisting the forum clause involved arguments about convenience and relative expertise of federal judges in different states with respect to state law claims. *See* 571 U.S. at 67-68. *M/S Bremen* involved claims under the general maritime law, and the plaintiff did not argue so much that the foreign court selected by the contractual agreement would apply a different substantive law as that it was more likely to enforce the exculpatory clause to which the plaintiff had already agreed. *See* 407 U.S. at 15-16. And as already discussed, *Sun* was a case in which both the district court and the parties largely ensured that the forum selected by contract would have the opportunity to apply the same law as the initial forum, and any impediments to the plaintiff's choice of substantive law arose only from a separate choice of law clause in the contract. *See* 901 F.3d at 1085-86, 1092.

The present case is critically different in two respects. One is that the risk posed by enforcement of a forum selection clause is quite different. In the leading cases just discussed, the reasons to resist the selected forum have to do primarily with convenience for the plaintiff and the costs of litigation. Here, by contrast, the concern is that a forum-selection clause becomes effectively a vehicle to opt out of particular substantive claims by selecting a forum in which certain claims simply cannot be brought. Second, the array of policies and interests necessarily differs from

Atlantic Marine and other cases when a forum-selection clause would operate to bar a federal statutory claim. Under the Supremacy Clause, the plaintiff's right to pursue such a claim must necessarily take precedence over other policy considerations.

3. This case does not involve a foreign transaction.

This court has enforced a forum-selection clause in situations in which that clause might foreclose particular substantive claims only in cases involving foreign parties and transactions. *See, e.g.*, *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (en banc); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999).[15] Likewise, the Supreme Court's decision in *M/S Bremen* enforced a forum-selection clause despite the possibility that the English forum selected might apply English maritime law. *See* 407 U.S. at 13 n.15. Importantly, these cases generally saw application of foreign law as a possibility, not a certainty.[16] In this case, the Panel was certain that the selected forum *would* foreclose Plaintiff's federal claims. 34

[15] *Simula* involved an arbitration clause selecting a Swiss forum for a case involving foreign parties. It was thus driven in significant part by the federal statutory policy favoring arbitration. *See* 175 F.3d at 722-23. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), likewise involved a clause selecting a foreign forum *for arbitration*.

[16] *See, e.g.*, *Simula*, 175 F.3d at 723 n.4 (noting that "it is possible that the Swiss Tribunal might apply U.S. antitrust law to the dispute"). In *M/S Bremen*, English maritime law was not necessarily distinct from American maritime law. *See* 407 U.S. at 12 (noting the English courts' "long experience in admiralty litigation"); *The Lottawanna*, 88 U.S. 558, 572 (1874) (noting that although individual countries adopt and enforce their own versions of maritime law, "the great mass of maritime law is the same in all commercial countries").

F.4th at 779-80; *see also id.* at 781 ("By its terms, [15 U.S.C. § 78aa] forbids non-federal courts from adjudicating Section 14(a) claims. Gaps bylaws do not force the Delaware Court of Chancery to adjudicate Lee's derivative Section 14(a) claim. Rather, the bylaws result in [Lee's Exchange Act] claim being dismissed in federal court.").[17]

Importantly, the cases noted enforced forum-selection clauses to vindicate policies largely unique to foreign commerce. *M/S Bremen*, for example, said that "[t]e expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." 407 U.S. at 9. Where different nations have roughly equally plausible claims of power to govern an international transaction, there cannot be a hierarchical ordering of different nations' potentially applicable laws. International comity thus benefits from respecting parties'

[17] Some courts have inquired into whether foreign law would provide an equivalent remedy to domestic law claims foreclosed by selecting a foreign forum. But in this domestic setting, the Supreme Court has generally held that plaintiffs with federal causes of action cannot be required to pursue state causes of action instead—whether or not those state claims are adequate. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (stating with respect to 42 U.S.C. § 1983 that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"). And with respect to the Exchange Act claims at issue here, *Borak* makes clear that "[i]t is for federal courts to adjust their remedies so as to grant necessary relief where federally secured rights are invaded." 377 U.S. at 433; *see also Seafarers*, 23 F.4th at 727 ("[n]on-waiver is woven into the public policy of the federal securities laws because it is the express statutory law").

agreements to choose one forum, and sometimes one forum's law. But in the wholly domestic context of this case, there *is* a hierarchy. Valid federal statutes govern, and they prevail not only over state laws but also over federal common law policies formulated by courts.

Finally, this court has acknowledged that enforcement of forum-selection clauses in securities cases involving foreign parties is connected to concerns about the extraterritorial application of U.S. securities statutes. In *Richards*, for instance, this court said that "were we to find that *Bremen* did not apply, the reach of United States securities laws would be unbounded." 135 F.3d at 1293. Those concerns, of course, have been vindicated by the Supreme Court's later holding in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which sharply limited such extraterritorial application of the securities laws. *Morrison* strongly suggests, however, that the correct way to guard against extraterritorial applications of those laws is by limiting their substantive reach—not, as *Richards* suggested, by holding that the common law policy of enforcing forum-selection clauses trumps federal securities statutes. *See* 135 F.3d at 1293-94.

This case does not implicate that conflict either, however, because the Gap is a domestic corporation, all acknowledge that domestic law applies, and the forum-selection clause in question points toward Delaware state court.[18]

C. Plaintiff has no viable remedy through a direct action under the Exchange Act.

The Panel decided this case on the assumption that enforcement of the forum-selection clause would deprive Plaintiff of the ability to assert her claims under the Exchange Act. *See* 34 F.4th at 779-80. Nor did the panel speculate whether Plaintiff could bring any *other* claim under the Exchange Act that would fall outside the forum-selection clause. But to the extent it is relevant, a direct action by individual plaintiffs under the Exchange Act provides no viable substitute for the derivative claim they would forfeit under the forum-selection clause.

The leading case distinguishing derivative from direct claims under Delaware law is *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). "Under the *Tooley* test," whether a stockholder's claim is direct or derivative "'must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders,

[18] Indeed, in *Richards* this court considered precedents involving wholly domestic transactions irrelevant to cases about international transactions. *See* 135 F.3d at 1293 n.3.

individually)?'" *Brookfield Asset Management, Inc v. Rosson*, 261 A.3d 1251, 1263 (Del. 2021) (quoting *Tooley*, 845 A.2d at 1033 (emphasis in original)). In a sense, *every* injury to a corporation injures the shareholders to the extent that it undermines the corporation's business and reduces its value. *Tooley*, however, suggested that a key question is "whether the stockholder had demonstrated that he or she has suffered an injury that is *not* dependent on an injury to the corporation." *Brookfield*, 261 A.3d at 1263 (citing *Tooley*, 845 A.2d at 1036, and *Agostino v. Hicks*, 845 A.2d 1110 (Del. Ch. 2004)).

The gravamen of Plaintiff's complaint here is that, by "fail[ing] to create meaningful diversity within company leadership roles" and making "false statements to shareholders in its proxy statements about the level of diversity it had achieved," 34 F.4th at 779, Gap and its directors undermined the company's performance and value. If true, that would injure the shareholders—but only through the mechanism of injuring (and decreasing the value of) the corporation. That injury is straightforwardly derivative under *Tooley*'s test. As *Brookfield* makes clear, plaintiffs would lack standing to pursue direct claims individually if their claims are actually derivative. *See* 261 A.3d at 1263. Plaintiff thus lacks a direct remedy under Section 14(a) that would fall outside the forum-selection clause, if that clause is enforceable.

II. Delaware law should not be construed as attempting to make policy for the nation by permitting inclusion of forum selection clauses in corporate bylaws.

Because the forum-selection clause here appears within Gap's bylaws, rather than in some separate private agreement, its validity necessarily depends upon what Delaware—the state of Gap's incorporation—allows bylaws to include. Bylaws can be made and altered unilaterally by the corporation, and thus corporate law regulating what those bylaws may provide for or require stands in for actual negotiated consent as protection for the interests of investors. Delaware has interpreted its corporation laws to permit bylaw provisions that bear on the enforcement of federal rights to a limited extent. *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) (upholding a Delaware corporation's bylaw requiring any member unsuccessfully suing the corporation and its management to reimburse the defendants' fees and costs—even for federal antitrust claims); *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020) (upholding Delaware charter provisions requiring that claims filed under the Securities Act of 1933, which provides for concurrent federal/state jurisdiction, be filed in federal rather than state court). It is far from clear, however, that Delaware would permit the bylaw provision

at issue in this case. *See, e.g.*, *Seafarers*, 23 F.4th at 722 (construing Delaware law *not* to permit such a provision).[19]

The Panel, however, considered Delaware law only in passing. *See* 34 F.4th at 782 (stating that "the law of the forum identified in the forum-selection clause is not 'irrelevant' in determining whether the clause is enforceable," but asking only whether Lee had "identified Delaware law clearly stating that she could not get any relief in the Delaware Court of Chancery"). The consequence of the Panel's *assumption* that Delaware law would permit the forum-selection bylaw here are potentially far-reaching. One scholar described this case as "explicitly authoriz[ing] every publicly traded corporation to opt out of private Exchange Act liability by the simple expediency of having its directors pass a bylaw designating the Delaware Court of Chancery as the exclusive forum for Exchange Act claims." Ann Lipton, *Inside Out (or, One State to Rule them All): New Challenges to the Internal Affairs Doctrine*, at 34, Oct. 23, 2022, forthcoming Wake Forest L. Rev., available at https://ssrn.com/abstract=4256316.

It bears repeating that the Delaware courts have never construed their corporation law to authorize a forum-selection bylaw that would altogether cancel a

[19] *See also Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 959, 961 (Del. 2013) (refusing to consider as a "law school hypothetical[]" an argument that a forum-selection bylaw "could somehow preclude a plaintiff from bringing a claim that must be brought exclusively in a federal court").

claim under the federal securities law. For multiple good reasons, this court should not be the first to construe Delaware as attempting to do so.

A. State law cannot interfere with federal causes of action.

The notion that state law could authorize parties subject to federal regulation effectively to contract out of that regulation's enforcement is largely unprecedented. But the question whether such state law agreements would be valid practically answers itself. It is inconceivable, for instance, that state law could authorize an employer to create an employee agreement under which its employees agreed to waive their rights against discrimination based on race or gender under Title VII of the 1964 Civil Rights Act. Nor could such an object or effect be legally accomplished through a forum-selection agreement selecting a forum that could not enforce such claims.

States usually do not attempt to prevent federal claims from being litigated in federal court. Existing case law concerns, instead, the more common scenario in which state procedural limitations restrict litigation of federal claims in *state* court. "[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009). In *Felder v. Casey*, 487 U.S. 131 (1988), for example, the Court held that a state notice of claim rule could not be applied to bar a federal civil rights action

under 42 U.S.C. § 1983. The Court explained that "[t]he question before us . . . is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 138 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).[20] The Court's decisions impose two specific requirements: (1) the state rule must not *discriminate* against federal claims, and (2) a state rule cannot effectively "undermine federal law, no matter how evenhanded it may appear." *Haywood*, 556 U.S. at 738-39. This analysis, designed to operate with respect to state rules governing the states' own judicial systems, must impose at least a minimum test for state laws that restrict federal plaintiffs' access to a *federal* forum.

If Delaware law enabled forum-selection bylaws that eliminate a plaintiff's ability to bring a federal statutory claim, it would fail both prongs of this analysis. First, it would discriminate against federal claims. It does no harm to state-law claims to force them into a state court (at least for claims under Delaware law). But federal claims subject to exclusive federal jurisdiction will be lost under such a

[20] *See also Gade v. Nat'l Solid Wastes Mgt. Assn.*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause . . . 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'") (quoting *Felder*, 487 U.S. at 138).

provision, as all parties here concede. And even if the forum-selection bylaw operated more evenhandedly—if, for example, the Court of Chancery were closed to all claims alleging certain forms of fraud—that would fatally undermine the enforcement of the Exchange Act in cases subject to the bylaw. The Supreme Court effectively recognized as much in *Borak*, stating that "we believe that the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law." 377 U.S. at 434. To the extent that Delaware law authorizes a bylaw preventing shareholders from enforcing their federal rights by forcing them into a forum that may not hear them, that law is preempted under *Haywood* and *Felder*.

Gap's bylaw here raises an additional problem under the Seventh Amendment. The Delaware Court of Chancery sits without a jury—which it is perfectly entitled to do. When a plaintiff voluntarily files her claim in state court, "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). But if the forum-selection bylaw here is enforced, the Plaintiff will not have meaningfully consented to that removal—or, therefore, to the waiver of her Seventh Amendment

right to a jury trial.[21] Whether or not the purchase of shares subject to a bylaw provision for a specific forum is ordinarily sufficient to satisfy the consent standards of contract law, it is unlikely that action suffices for the waiver of constitutional rights.[22] This court should not lightly read Delaware law to authorize enforcement of a bylaw that would raise such problems under either the Seventh Amendment or the Supremacy Clause.

B. The extraterritorial effect of Delaware's bylaws, if construed as unlimited to the corporation's internal affairs, raises additional constitutional problems.

Finally, construing Delaware law to authorize bylaws effectively foreclosing enforcement of non-Delaware law would raise constitutional problems on account of its extraterritorial effect. Both the *Salzberg* and *ATP* decisions construed Delaware law to permit bylaws or charters to govern not only corporate governance but also the rights of employees, shareholders, and even antitrust claims brought against the corporation, "making it very unclear what, if any, subjects would be off-limits." Lipton, *Inside Out*, *supra*, at 36-37. Most rights protected by the federal securities laws do not concern corporate governance but rather the investor's

[21] *See* Lipton, *Inside Out*, *supra*, at 38 ("[A] forum selection clause that shunts cases into Delaware may simultaneously operate as a jury waiver.").

[22] *Cf. Handoush v. Lease Finance Grp., LLC*, 41 Cal. App. 5th 729, 736-41 (2019) (concluding that forum-selection clause could not waive jury trial right under California constitution).

decision to purchase or sell securities; if Delaware law were to authorize corporate bylaw or charter provisions preventing enforcement of such rights, it would dramatically extend its extraterritorial reach.

The Supreme Court has held that state laws with extraterritorial effect raise are constitutionally problematic. *See, e.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945) (striking a state law under the Dormant Commerce Clause where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state").[23] In *Edgar v. MITE Corp*, 457 U.S. 624 (1982), the Court suggested that states might regulate the "internal affairs" of companies incorporated under their laws, but that broader regulation is more doubtful, *see id.* at 645. It is far from clear that Delaware in fact seeks to regulate so broadly, and this court should not lightly assume that the forum-selection bylaw would be enforced by the Delaware courts.

[23] *See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-72 (1996) (holding that states may not ordinarily impose their own policy choices on other states); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

Conclusion

This Court should decline to enforce Gap's forum-selection bylaw in this case.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Ninth Circuit Rule 29-2(c)(3) because it contains 6,960 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14- point font.

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I hereby certify, on the 14th day of November 2022, the foregoing brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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