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, *et al.*,
Defendants-Appellees,

and

THE GAP, INC.,
Nominal Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3: 20-cv-06163-SK, Hon. Sallie Kim

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, CONSUMER FEDERATION OF AMERICA, AND BETTER MARKETS IN SUPPORT OF PLAINTIFF-APPELLANT

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November 14, 2022

CORPORATE DISCLOSURE STATEMENT

Amici curiae Public Citizen, Inc., Consumer Federation of America, and Better Markets, Inc., are nonprofit, non-stock corporations. None of the three entities has a parent corporation, and no publicly traded corporation has an ownership interest in any of them.

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INTEREST OF AMICI CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues defining and limiting the jurisdiction of the courts, because such issues often have significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen frequently appears as amicus curiae in cases involving important issues of federal jurisdiction.

Consumer Federation of America (CFA) is an association of more than 250 nonprofit consumer organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amici curiae, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

education. Ensuring a fair financial marketplace has long been a top priority for CFA.

Better Markets, Inc., is a nonprofit organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for a stable financial system, fair and transparent financial markets, and strong enforcement of the law through both government actions and private lawsuits against those who commit fraud and other forms of financial abuse.

Amici have a strong interest in preventing the unwarranted expansion of tools, including forum-selection clauses, that shield corporations from federal statutory liability and from accountability for harm to investors and consumers. Amici submit this brief to explain that, if accepted, Appellees' arguments would wrongly deprive shareholders, and potentially a wide range of injured companies and consumers, of access to meaningful remedies.

INTRODUCTION

Under The Gap's forum-selection clause, any derivative action must be brought in the Delaware Court of Chancery. Yet under federal law,

derivative claims under Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act) cannot be brought in state courts. Enforcing the forum-selection clause, therefore, will make it impossible for Appellant to pursue her Section 14(a) claim. The district court nonetheless held that the clause should be enforced.

The district court's holding should be reversed. The Exchange Act's exclusive jurisdiction and anti-waiver provisions set forth two unambiguous statutory prohibitions: the first precludes the adjudication of Exchange Act claims in state court, and the second forbids the waiver of the Act's substantive obligations, including the ability to assert claims for relief under the Act. Enforcing the forum-selection clause would bar Appellant from pursuing the Section 14(a) derivative claims in any court because the state court lacks power to adjudicate those claims. Enforcement would therefore violate the anti-waiver clause, as well as broader public policies prohibiting forum-selection clauses from waiving substantive rights. Importantly, unlike in direct shareholder suits, the remedies available through derivative actions, such as corporate governance reforms and any payment, flow to the corporation.

Because corporations are increasingly adopting clauses similar to The Gap's, the outcome of this case will have broad effect. And because exclusive federal jurisdiction is not limited to the Exchange Act, the outcome will affect the ability to enforce a range of federal statutes—including the antitrust laws, ERISA, and others.

BACKGROUND

Congress enacted the Exchange Act in the aftermath of the 1929 stock market crash to regulate the trading of public securities on national stock exchanges. Section 14(a) of the Act and its implementing regulation, SEC Rule 14a-9, prohibit material misstatements or omissions in a proxy statement. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a). Shareholders may enforce Section 14(a) either in direct actions asserting their own rights or in derivative actions asserting the rights of a corporation harmed by a violation. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964). Section 27(a), 15 U.S.C. § 78aa(a), provides federal district courts with exclusive jurisdiction over claims arising under the Act and thus prohibits state courts from adjudicating those claims. And Section 29(a), 15 U.S.C. § 78cc(a), provides that any "condition,

stipulation, or provision" waiving compliance with the substantive requirements of the Act is "void."

Plaintiff-Appellant Noelle Lee brought this derivative action in the United States District Court for the Northern District of California against The Gap and certain of its officers and directors.[2] Lee alleged that The Gap failed to create meaningful diversity within company leadership roles and made false and misleading statements to shareholders in 2019 and 2020 proxy statements about the level of diversity achieved. Lee alleged a violation of Section 14(a) of the Exchange Act and SEC Regulation 14a-9, as well as state-law claims.

The Gap's bylaws contain a forum-selection clause requiring "any derivative action or proceeding brought on behalf of the Corporation" to be adjudicated in the Delaware Court of Chancery. The district court enforced the forum-selection clause by granting The Gap's motion to dismiss under the *forum non conveniens* doctrine. A panel of this court affirmed, holding that Appellant had not carried her burden to show that

[2] Like all derivative claims, the claims assert the company's right to recover for the alleged wrongdoing of the defendants. Because, however, The Gap is also a nominal defendant and the allegations of wrongdoing are based on actions it took as a result of the officers' and employees' breach of duty, this brief refers to Appellees as "The Gap."

The Gap's forum-selection clause was unenforceable. On October 24, 2022, this court vacated the three-judge panel opinion and ordered that this case be reheard en banc.

ARGUMENT

I. Corporations increasingly use exclusive forum clauses to evade federal statutory liability.

Over the past decade or so, many corporations have adopted forum-selection clauses in their bylaws or articles of incorporation. Initially, corporations adopted forum-selection clauses to limit and control the jurisdictions in which they could be subject to lawsuits challenging mergers and other corporate transactions based on alleged breaches of fiduciary duties. *See* Verity Winship, *Contracting Around Securities Litigation: Some Thoughts on the Scope of Litigation Bylaws*, 68 SMU L. Rev. 913, 914–15 (2015); *e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013). Use of this tool has been increasing significantly: Before 2010, only sixteen publicly traded companies had forum-selection provisions in their charters or bylaws; by 2014, more than 700 publicly traded companies had adopted an exclusive forum provision. *Sciabacucchi v. Salzberg*, 2018 WL 6719718, at *9 (Del. Ch. Dec. 19, 2018), *rev'd on other grounds*, 227 A.3d 102 (Del. 2020).

More recently, many corporations have expanded these "litigation-limiting provisions to cover … claims for violation of *federal* law." Ann Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, Wake Forest L. Rev. (forthcoming Oct. 2022) (manuscript at 26), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4256316. Like the forum-selection clause at issue in this case, many such clauses do not simply choose a forum for litigating certain federal claims; they effectively block litigation of those claims by selecting a forum in which federal claims cannot be brought. Based on SEC filings, it appears that, in the last 10 years, approximately 167 corporations have adopted clauses in their bylaws or articles of incorporation stating that derivative actions, including derivative actions asserting claims under the Exchange Act, may be brought only in Delaware state courts, which lack jurisdiction over actions arising under the Exchange Act.[3] *See* 15 U.S.C. § 78aa (specifying exclusive federal jurisdiction).

[3] This number is based on a search of filings on the Securities and Exchange Commission's website, https://www.sec.gov/edgar/search/, for the language: "Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or

These increasingly common clauses not only block adjudication of Section 14(a) derivative claims such as those at issue in this case; they effectively foreclose all Exchange Act causes of action that can be brought derivatively. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 93–94 (1991) (derivative suit alleging a claim under § 20(a), 15 U.S.C. § 80a–20(a), for materially misleading proxy statements). For example, in 2017, after it came to light that Wells Fargo employees had illicitly created millions of deposit and credit card accounts for customers without the customers' knowledge or consent, *see generally* Hearing of House Fin. Servs. Comm. 114-109 (Sept. 29, 2016), shareholders brought a derivative action alleging, among other things, claims under Section 14(a) of the Exchange Act and SEC Rule 14a–9, as well as under Section 10(b) and SEC Rule 10b–5 (which prohibit, in connection with the purchase or sale of any security, manipulation or deception in contravention of SEC regulations), Section 20A (which prohibits insider

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proceeding brought on behalf of the Corporation." The number excludes search results showing 43 corporations that have adopted such provisions but carved out either claims over which the Court of Chancery lacks jurisdiction or claims under the Exchange Act or the Securities Act of 1933.

trading), and Section 29(b) (which provides equitable remedies allowing for the voiding of contracts where the performance involves violation of any provision of the Exchange Act). *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1088 (N.D. Cal. 2017). The lawsuit resulted in a settlement that provided significant benefits, including corporate governance reforms,[4] "clawbacks" (that is, stock grant forfeitures, reduced compensation, and return of incentive compensation by certain officers and directors),[5] and a substantial payment by the insurer to the company.[6] If Wells Fargo's bylaws had contained a provision like The Gap's, enforcement of the provision would have barred the suit from proceeding; the company would have escaped accountability under the Exchange Act, and the corporate governance reforms and clawbacks would likely not have happened.[7]

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[4] *See* Stipulation and Agreement of Compromise, Settlement and Release, No. 16-05541, ECF 270-1 (N.D. Cal. filed Feb. 28, 2019), https://wellsfargoderivativesettlement.com/wp-content/uploads/2019/05/wf-doc-270-1.pdf, at 40–44 (Exhibit A at 4–8).

[5] *See id*. at 47–48 (Exhibit B at 2–3).

[6] *See id*. at 9.

[7] *See id*. (stating Wells Fargo's agreement that the derivative suit promoted the corporate governance reforms and clawbacks).

Moreover, if forum-selection clauses in corporate bylaws are enforceable even when they bar adjudication of federal claims by requiring a forum that lacks jurisdiction over them, similar clauses placed in employment agreements, pension plans, or contracts governing commercial transactions could threaten other statutory rights of action over which federal courts have exclusive jurisdiction, including: claims by companies under the federal antitrust laws, 15 U.S.C. § 15(a); many claims by participants in ERISA plans, 29 U.S.C. §§ 1132(a)(1), 1132(e)(1); intellectual property disputes under the copyright, patent, or trademark laws, 28 U.S.C. § 1338(a); claims by employees under the Trafficking Victims Protection Act, 18 U.S.C. § 1595(a), *e.g.*, *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430 (E.D.N.Y. 2017); and admiralty claims, 28 U.S.C. § 1333. The Court should reverse the district court's decision so that corporations cannot opt out of accountability for violations of a range of federal laws.

II. Enforcement of The Gap's forum-selection clause would violate the Exchange Act's anti-waiver provision.

A forum-selection clause is unenforceable where "enforcement would contravene a strong public policy of the forum in which suit is brought … declared by statute or by judicial decision." *The Bremen v.*

Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); *see also Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088 (9th Cir. 2018). As The Gap concedes, Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a), embodies such a public policy by "prohibit[ing] waiver" of the "substantive obligations imposed by the Exchange Act." Appellees' Br. 31–32 (ECF 21) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987)). The Gap also acknowledges that Section 27(a) of the Exchange Act imposes a jurisdictional bar on state-court adjudication of claims arising under the Act by giving federal courts exclusive jurisdiction over such claims. *Id*. at 4; *see* 15 U.S.C. § 78aa. The forum-selection clause thus precludes litigation of derivative actions asserting Exchange Act claims in a forum with jurisdiction (federal court) by requiring a forum that lacks jurisdiction (the Delaware Chancery court). Because the clause leaves no forum available for assertion of such claims on the corporation's behalf, its enforcement violates the statutory prohibition on waiver of substantive Exchange Act rights. If enforceable, the clause would allow The Gap, and the many other corporations that have added such clauses to their corporate bylaws, *see supra* at p. 7, to

opt out of accountability for violations of the substantive obligations imposed by Section 14(a).

A. Enforcement of the forum clause would block assertion of Exchange Act claims on behalf of the corporation.

Section 27(a) of the Exchange Act explicitly provides federal courts with exclusive jurisdiction over claims arising under the Act and the SEC's rules: It grants federal district courts (and territorial courts) "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 393 (2016) ("Section 27 provides exclusive federal jurisdiction of the same class of cases as 'arise under' the Exchange Act for purposes of § 1331.").

Because the Exchange Act confers exclusive jurisdiction on federal courts, state courts lack subject-matter jurisdiction to adjudicate claims arising under the Exchange Act. As the Supreme Court stated in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), "the statute plainly mandates that suits alleging violations of the Exchange Act may be maintained only in federal court," and "prohibits state courts

from adjudicating claims arising under the Exchange Act." *Id.* at 381. Any attempt by a state court, such as the Delaware Chancery Court, to adjudicate such a claim would "trespass[] upon the exclusive territory of the federal courts," as "binding legal determinations of rights and liabilities under the Exchange Act are for federal courts only." *Id.* at 382, 384. Indeed, if a "complaint alleged violations of the Exchange Act and the Delaware court rendered a judgment on the merits of those claims," its judgment would be void "for lack of subject-matter jurisdiction." *Id.* at 386–87.

These consequences flow from the long-established principle that the core meaning and function of a statutory provision conferring exclusive jurisdiction on federal courts is to "exclude the courts of the States" by "assur[ing] that … jurisdiction was not conferred upon the courts of any State." *California v. Arizona*, 440 U.S. 59, 66, 68 (1979); *see Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (stating that statutes vesting exclusive jurisdiction in federal courts "oust the jurisdiction of [a] State court," rendering any assertion of jurisdiction "beyond its power, void, and subject to collateral attack"); *Pratt v. Paris Gas Light & Coke Co.*, 188 U.S. 255, 259 (1897) (same); *The Belfast*, 74 U.S. 624, 644 (1868)

(same). In short, where Congress has vested exclusive jurisdiction in federal courts, it necessarily has "withdrawn from all other courts all power under any circumstances to maintain" actions within the scope of such jurisdiction. *Kalb*, 308 U.S. at 439.

Given that state courts lack power to adjudicate Exchange Act claims, the enforcement of The Gap's forum-selection clause with respect to such a claim forecloses adjudication of the claim altogether: If a litigant brings a derivative Exchange Act claim in a federal court that has jurisdiction under Section 27(a) of the Exchange Act, the clause requires dismissal of the claim in favor of the Delaware Chancery Court.[8] But if the litigant attempts to bring the claim in the Delaware Chancery Court, the state court must dismiss it for lack of jurisdiction. Enforcement of the forum-selection clause thus prevents assertion of Exchange Act claims on behalf of the corporation in a derivative action.

[8] There is no doubt that a derivative action asserting a Section 14(a) violation arises under the Exchange Act and thus falls within the scope of exclusive federal jurisdiction under Section 27(a) because federal law creates the right of action and the action asserts the breach of a federal-law duty. *See Manning*, 578 U.S. at 383–84. The Gap does not dispute that a derivative action asserting a Section 14(a) claim falls within Section 27(a).

The clause thus violates Section 29(a) of the Exchange Act. Section 29(a) provides that any "condition, stipulation, or provision" that "waives compliance with any provision" of the Act is "void." 15 U.S.C. § 78cc(a)). As the Supreme Court has held, this anti-waiver provision "prohibits waiver of the substantive obligations imposed by the Exchange Act." *McMahon*, 482 U.S.at 228. And an agreement waives substantive rights if it "weaken[s] [the parties'] ability to recover under the [Exchange] Act"; such an effect "is grounds for voiding the agreement under § 29(a)." *Id*. at 230–31. Steering Exchange Act claims to a forum that lacks any power to adjudicate them does not just "weaken" the substantive right to recover under the Act; it eliminates it altogether. Such a result would deprive investors of "an adequate means of enforcing the provisions of the Exchange Act." *Id*. at 229; *see also McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1051 (2d Cir. 1995) (stating that contract provisions that "would bar [a] plaintiff from commencing a securities law claim" are paradigmatic examples of the waivers barred by Section 29(a)). "The statutory framework of the … 1934 Act[] compels the conclusion that individual securityholders may not be forced to forego their rights [to bring actions] under the federal securities laws due to a contract

provision." *McMahan*, 65 F.3d at 1051; *accord Pasternack v. Shrader*, 863 F.3d 162, 171 (2d Cir. 2017).

The Gap nonetheless argues that its clause is consistent with the Exchange Act because "enforcing the clause does not result in state courts adjudicating Exchange Act claims," but rather "results in dismissal of those claims." Appellees' Br. 4 (ECF 21). That consequence, however, is *what makes the clause impermissible*. The reason the forum-selection clause is infirm is not that it somehow requires state courts to exercise jurisdiction they lack—private parties can never confer subject-matter jurisdiction on a court that lacks it. *See CFTC v. Shor*, 478 U.S. 833, 850–51 (1986). Rather, the clause violates the anti-waiver clause because the only forum it permits for any derivative action asserting an Exchange Act claim is one that *cannot* adjudicate it. The Gap's concession that the clause always "results in dismissal" of such claims, whether filed in federal or state court, is not a defense of its legality, but an admission that it violates the anti-waiver provision by "defeat[ing] the claims entirely." *Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022).

The Gap's (and the panel's) assertion that the Supreme Court's decision in *McMahon* supports the validity of the forum-selection clause is equally misguided. In *McMahon*, the Court held that the parties' agreement to *arbitrate* Exchange Act claims did not violate Section 29(a)'s anti-waiver prohibition.[9] Critical to the Court's analysis were its conclusion that the Federal Arbitration Act (FAA) authorizes agreements to arbitrate Exchange Act and other statutory claims, 482 U.S. at 225–27, and its view that, in most instances, arbitration is an adequate forum for the vindication of substantive rights under the Exchange Act, *id*. at 227–39. The Court held that "where arbitration *does* provide an adequate means of enforcing the provisions of the Exchange Act," Section 29(a) does not void an agreement to arbitrate Exchange Act claims, *id* at 229

[9] Importantly, *McMahon* does *not* hold that provisions in *corporate charters or bylaws* can obligate a *shareholder* to arbitrate Exchange Act claims (or any other claims). Unlike the parties' agreement in *McMahon,* such provisions are not included in written contracts evidencing commercial transactions between the shareholder and the corporation, and thus fall outside the scope of the Federal Arbitration Act (FAA). *See* 9 U.S.C. § 2. Nonetheless, the reasons that *McMahon* gave for holding that agreements under the FAA requiring arbitration of Exchange Act claims do not violate the anti-waiver provision are instructive, because they demonstrate why forum-selection clauses requiring shareholders to bring Exchange Act claims in courts that lack jurisdiction over the claims *do* violate the anti-waiver provision.

(emphasis added), while observing that an arbitration agreement that *impaired* the right to recover under the Exchange Act would violate the anti-waiver provision, *see id*. at 230–31.

Put differently, an arbitration agreement does not violate Section 29(a) because it is an exercise of "a broader right to select the forum for resolving disputes," not a means of waiving claims. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989). The Gap's forum-selection clause is just the opposite (even putting aside that it is not an agreement). Rather than allowing resolution of Exchange Act disputes, it forecloses all derivative claims under the Act. *McMahon* nowhere suggests that a provision relegating Exchange Act claims to a forum that lacks authority to adjudicate them is enforceable. Quite the contrary: Under *McMahon*'s reasoning, such a provision, which *cannot* be adequate to vindicate Exchange Act rights, violates Section 29(a) because the specified forum, as both Appellant and Appellees agree, is "inadequate to enforce the statutory rights created by [the Act]." *McMahon,* 420 U.S. at 228–29.

In holding that Section 29(a) does not bar enforcement of agreements to arbitrate of Exchange Act claims, *McMahon* explained

that the entitlement to select the exclusive judicial forum specified by Section 27(a) is waivable because the designation of a forum is not in itself a substantive right protected by Section 29(a). That is, an agreement to assert Exchange Act claims in another *competent* forum "does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)," *id.*, so long as "arbitration is adequate to vindicate Exchange Act rights," *id.* at 238. As the Court subsequently described its holding, "parties to an arbitration agreement could waive the right to have their Exchange Act claims tried in federal court and agree to arbitrate the claims." *Matsushita*, 516 U.S. at 385.

The panel, however, misread *McMahon* to stand for the broad proposition that the "Exchange Act's exclusivity provision is waivable," Panel Op. 9—a formulation that is, at best, imprecise. While allowing an agreement that specifies an adequate alternative forum, *McMahon* nowhere suggests that the parties to a private agreement can "waive" the exclusivity provision's denial of subject-matter jurisdiction to state courts. Such a reading of *McMahon* would place it at odds with the long-established principle that a party cannot waive a court's lack of subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes of the Colville*

Reservation, 873 F.2d 1221, 1228 (9th Cir. 1989). Because the parties cannot waive Section 27(a)'s designation of federal courts as the exclusive *judicial* forums for Exchange Act claims, a forum-selection clause that purports to route such a claim to a state court—unlike one that specifies arbitration—does not fall within *McMahon*'s approval of forum choices that permit vindication of Exchange Act rights.

Finally, the panel contended that the "strong federal policy in favor of enforcing forum-selection clauses … supersede[s] antiwaiver provisions in state statutes as well as federal statutes." Panel Op. 8 (quoting *Advanced China Healthcare*, 901 F.3d at 1090). But *Advanced China Healthcare* and the cases underlying it do not support the broad proposition that the panel attributed to it and do not save The Gap's forum-selection clause. Unlike in *McMahon*, which required the Supreme Court to reconcile the Federal Arbitration Act's "federal policy favoring arbitration" and the Exchange Act's anti-waiver provision, *McMahon*, 482 U.S. at 226, here, the "strong federal policy in favor of enforcing forum-selection clauses," *Advanced China Healthcare,* 901 F.3d at 1090, is not derived from a competing federal statute; it is a matter of federal

common law. That policy yields—in the absence of comity principles favoring enforcement—when it contravenes federal statutory rights.

Although The Gap makes much of both *Advanced China Healthcare* and *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *see* Appellees' Br. 33–35 (ECF 21), those cases are consistent with this principle. *Advanced China Healthcare* involved state-law claims, not federal statutory rights, and enforcement of the forum-selection clause there did not result in the waiver of those substantive state-law rights because the defendants had "committed to refraining from raising any argument" that Washington securities laws were inapplicable in the selected California forum. *Advanced China Healthcare*, 901 F.3d at 1085–86; *id.* at 1093 (stating that "the district court's conditions of dismissal and [the defendant's] commitment at oral argument mean that the Suns may pursue a remedy under California and Washington securities laws"). And in *Richards*, the Court's decision to uphold the forum-selection and choice-of-law provisions leaned heavily on "the context of an international agreement" and Supreme Court case law specific to that context. 135 F.3d at 1295. Thus, both *Richards* and *Advanced China Healthcare* involved forum-selection and choice-of-law

clauses that implicated the interests of two equal sovereigns whose laws advanced the same interests. *See also Seafarers*, 23 F.4th at 726 (noting that the "international nature of the transactions and the availability of adequate remedies under British law" was central to the court's decision in *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), which involved the same forum-selection and choice-of-law clauses as *Richards*).

The considerations of the Court in those cases are inapplicable here, where enforcement of the forum-selection clause will thwart federal law by blocking any adjudication of Section 14(a) claims. Extending *Advanced China Healthcare* and *Richards* to this situation "would undermine the pivotal decisions by Congress in 1933 and 1934 to assume the dominant role in securities regulation after decades of ineffective state regulation." *Seafarers*, 23 F.4th at 727.

Indeed, in such circumstances, the Supreme Court has made abundantly clear that any interest in enforcement of forum-selection clauses does not support their use to deprive litigants of substantive rights under applicable laws. The Court has emphasized that a forum-selection clause "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Viking River Cruises, Inc. v.*

Moriana, 142 S. Ct. 1906, 1919 (2022). Even in the absence of an express statutory prohibition on waivers of substantive rights, any federal policy in favor of enforcing choice-of-forum agreements—even the FAA's statutory policy of enforcing the "specialized kind" of forum-selection provision embodied in an agreement to arbitrate—stops when that agreement abridges a substantive right. *See id*.

B. Derivative claims under the Exchange Act offer meaningful relief that is not available through direct claims under Section 14(a).

The Gap asserts that the forum-selection clause "does not waive or otherwise implicate the Company's substantive compliance duties" because "with or without the clause" the Gap "remains subject" to the "substantive obligations" created by Section 14(a). Appellees' Br. 31–32 (ECF 21). That assertion misunderstands the workings and importance of derivative litigation.

First, Appellees contend that because The Gap remains subject to Section 14(a) and thus "may not issue proxy statements with false or misleading statements of material fact," its forum-selection clause has not waived the "substantive obligations" imposed by the Act. *Id.* Although Appellees rely on *McMahon* in making this claim, *McMahon* does not

support their contention. To the contrary, it recognizes that a private agreement need not dismantle federal law entirely to waive "the substantive obligations imposed by the Exchange Act" and violate the anti-waiver provision. *McMahon*, 482 U.S. at 228. A waiver in violation of Section 29(a) exists where the predispute agreement waives the plaintiff's right to a forum that is adequate to enforce the substantive obligations created by the Act. *Id.* at 228–29.

Second, The Gap asserts that Appellant "can still enforce Section 14(a) through a direct claim." Appellees' Br. 33 (ECF 21). But derivative and direct claims capture different types of harms and assert the substantive rights of different parties: In a direct action, the plaintiff shareholder, *on behalf of himself* and, usually, a class of shareholders, seeks damages, typically as compensation for loss in stock value, based on securities law violations, fraud, or other causes of action. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014). By contrast, a derivative action allows an individual shareholder "to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own," *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949), by asserting a cause of action *on behalf of the corporation*,

against its officers, directors, or third parties. "Devised as a suit in equity, the purpose of the derivative action [is] to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Kamen*, 500 U.S. at 95 (citations and internal quotation marks omitted). The two types of suits are not interchangeable: Whether a stockholder's claim is direct or derivative "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (emphasis in original); *see New York City Employees' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010), *overruled in non-relevant part*, *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012) (in Section 14(a) case, citing *Tooley*).

Eliminating derivative claims by enforcing forum-selection clauses like the one here would be no small matter, especially in the context of Section 14(a), because "[t]he injury [that] a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily

flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder." *J.I. Case Co.*, 377 U.S. at 432. Here, Appellant alleges that harm was suffered by the company: She alleges that, as a result of the failure to disclose material information, the company engaged in discriminatory hiring and compensation practices, and that *the company* has incurred and will continue to incur substantial costs related to remediating that harm. Appellant's Reply 11–12. Moreover, regardless of whether The Gap might argue (as it has suggested) that Appellant's claims are not derivative, plaintiffs will sometimes be able to assert only derivative claims because of the type of harm at issue.

That the "Company itself can still enforce Section 14(a) through a direct claim," Appellees' Br. 33 n.13 (ECF 21), also misunderstands the distinct role that derivative claims play in corporate governance. Derivative rights exist to protect a corporation's interests when its "board has been so faithless to investors' interests that investors must be allowed to pursue a claim in the corporation's name." *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 316–17 (7th Cir. 2012); *see also Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010) ("A derivative action is

an extraordinary process where courts permit 'a shareholder to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own.'").

Thus, while there are "stringent conditions for bringing such a suit," *Quinn*, 620 F.3d at 1012, derivative suits serve an important role in protecting a corporation's interests when the board fails to do so. For example, corporate governance reforms, such as amending corporate charters and bylaws, increasing oversight and monitoring of business units, and increasing reporting from business units, are often sought as relief in derivative suits. In addition to the Wells Fargo suit, *see supra* note 4 & accompanying text, derivative suits have been successful in achieving substantial relief in other instances of corporate misconduct. *See, e.g.*, *Emps. Ret. Sys. of the City of St. Louis v. Jones*, 2022 WL 14160253, at *1 (S.D. Ohio Aug. 23, 2022) (approving settlement of a derivative action alleging claims under Section 14(a) against certain directors and officers of FirstEnergy Corp. for "their roles in orchestrating the 'HB6 scandal'—a large bribery, racketeering, and pay-to-play scheme with Ohio politicians—at substantial cost to the Company's long-term interests"; settlement included a large payment

from the insurer and a series of corporate governance reforms); *In re Pinterest Derivative Litig.*, 2022 WL 484961, at *2, *4 (N.D. Cal. Feb. 16, 2022) (granting preliminary approval of a settlement of a Section 14(a) derivative claim arising from allegations of widespread race and sex discrimination; noting that the settlement will benefit the company and its company by, among other things, promoting pay transparency, encouraging equitable hiring practices, and requiring regular internal audits and reports to the board on the progress of the reforms); Jonathan Stempel, *BofA director settlement over Merrill Lynch triples of $62.5 mln*, Reuters, Jan. 11, 2013 (describing settlement in derivative action resulting in corporate governance reforms and payment "to the bank, not to shareholders").

In sum, derivative suits provide an important avenue for holding officers and directors accountable for violations of federal law. In a suit like this one, if the forum clause is enforceable, "checkmate for defendants." *Seafarers* 23 F.4th at 720. That outcome would impede corporate accountability and violate Section 29(a) of the Exchange Act.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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November 14, 2022

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29-2(c)(3) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 5,613 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

November 14, 2022

/s/ Allison M. Zieve
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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