FOR PUBLICATION

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; THE GAP, INC., Nominal Defendant, *Defendants-Appellees.*	No. 21-15923 D.C. No. 3:20-cv-06163-SK OPINION

Appeal from the United States District Court
for the Northern District of California
Sallie Kim, Magistrate Judge, Presiding

Argued and Submitted En Banc December 12, 2022
Pasadena, California

Filed June 1, 2023

Before: Mary H. Murguia, Chief Judge, and Sidney R. Thomas, Sandra S. Ikuta, Jacqueline H. Nguyen, Michelle T. Friedland, Ryan D. Nelson, Bridget S. Bade, Daniel A. Bress, Danielle J. Forrest, Patrick J. Bumatay and Salvador Mendoza, Jr., Circuit Judges.

Opinion by Judge Ikuta;
Dissent by Judge S.R. Thomas

SUMMARY*

Securities Exchange Act of 1934

The en banc court affirmed the district court's judgment dismissing, on forum non conveniens grounds, Noelle Lee's putative derivative action alleging that The Gap, Inc. and Gap's directors (collectively "Gap") violated § 14(a) of the Securities Exchange Act of 1934 (the Exchange Act) and Securities and Exchange Commission (SEC) Rule 14a-9 by making false or misleading statements to shareholders about its commitment to diversity.

Gap's bylaws contain a forum-selection clause stating that the Delaware Court of Chancery "shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation." Lee, a Gap shareholder, brought the putative derivative action in a California district court.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Lee first argued that the forum-selection clause in Gap's bylaws is void because it violates the Exchange Act's antiwaiver provision, § 29(a), 15 U.S.C. § 78cc(a), which 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." The en banc court disagreed, because Lee can enforce Gap's compliance with the substantive obligations of § 14(a) by bringing a direct action in federal court. The en banc court rejected Lee's argument that her right to bring a derivative § 14(a) action is stymied by Gap's forum-selection clause, which alone amounts to Gap "waiv[ing] compliance with [a] provision of [the Exchange Act] or of any rule or regulation thereunder." The en banc court explained that the Supreme Court made clear in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), that §29(a) forbids only the waiver of substantive obligations imposed by the Exchange Act, not the waiver of a particular procedure for enforcing such duties. *McMahon* also disposes of Lee's argument that Gap's forum-selection clause is void under § 29(a) because it waives compliance with § 27(a) of the Exchange Act, which gives federal courts exclusive jurisdiction over § 14(a) claims.

Lee next argued that Gap's forum-selection clause is unenforceable under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), because enforcement would violate the federal forum's strong public policy of allowing a shareholder to bring a § 14(a) derivative action. The linchpin of Lee's argument was the Supreme Court's decision in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), which first implied a private right of action allowing a shareholder to bring a "federal cause of action" to redress the injury caused by a proxy statement alleged to contain false

and misleading statements violative of § 14(a) of the Exchange Act. A close look at *Borak* in its historical context and in light of subsequent Supreme Court developments, however, compels the conclusion that *Borak* does not establish a strong public policy to allow shareholders to bring § 14(a) claims as derivative actions. The en banc court also rejected Lee's argument that the forum-selection clause conflicts with the federal forum's strong public policy of giving federal courts exclusive jurisdiction over Exchange Act claims under § 27(a). The en banc court concluded that Lee did not carry her heavy burden of showing the sort of exceptional circumstances that would justify disregarding a forum-selection clause.

Lee next argued that Gap's forum-selection clause is invalid as a matter of Delaware law under Section 115 of the Delaware General Corporation Law (DGCL). Because the effect of Section 115 is important to the en banc court's decision here, it elected to exercise its discretion to decide the issue, notwithstanding that the three-judge panel deemed the Section 115 issue waived. Because the Delaware Supreme Court has indicated that federal claims like Lee's derivative § 14(a) action are not "internal corporate claims" as defined in Section 115, and because no language in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), Section 115, or the official synopsis that accompanies Section 115, operates to limit the scope of what constitutes a permissible forum-selection bylaw under Section 109(b) of the DGCL, the en banc court concluded that Gap's forum-selection clause is valid under Delaware law.

The en banc court acknowledged that its decision creates a circuit split with the Seventh Circuit, *see Seafarers Pension*

Plan ex rel. Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022), and did not do so lightly.

Judge S.R. Thomas, joined by Chief Judge Murguia, Nguyen, Friedland, and Mendoza, dissented. Judge Thomas wrote that Gap's forum-selection bylaw requires that any derivative actions brought pursuant to the Exchange Act be adjudicated in the Delaware Court of Chancery. But state courts lack jurisdiction to hear Exchange Act claims, so the bylaw provision is a litigation bridge to nowhere, depriving shareholders of any forum in which to pursue derivative claims. Judge Thomas wrote that a judge-made federal policy in favor of enforcing forum-selection clauses cannot supersede the clear antiwaiver provision enacted by Congress in the Exchange Act, which voids such a provision. He wrote that the majority's conclusion that Gap's bylaw is both valid and enforceable conflicts with the plain language of the Exchange Act.

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OPINION

IKUTA, Circuit Judge:

Noelle Lee brought an action against The Gap, Inc. and its directors, "derivatively on behalf of Gap."[1] Lee's action alleged that Gap violated § 14(a) of the Securities Exchange Act of 1934 (the Exchange Act) and Securities and Exchange Commission (SEC) Rule 14a-9 by making false or misleading statements to shareholders about its commitment to diversity. Gap's bylaws contain a forum-selection clause stating that the Delaware Court of Chancery "shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation." Lee nevertheless brought her putative derivative action in a California district court. The district court granted Gap's motion to dismiss Lee's complaint on forum non conveniens grounds. Lee's appeal raises three questions: (1) whether Gap's forum-selection clause is void because it violates the Exchange Act's antiwaiver provision, § 29(a), 15 U.S.C. § 78cc(a); (2) whether the forum-selection clause is unenforceable under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), because enforcement would violate a strong public policy of the federal forum; and (3) whether Gap's bylaw is invalid because it is contrary to Delaware law. We answer "no" to each question and affirm the district court.

[1] We refer to the defendants collectively as Gap, but sometimes also refer to the corporation individually as Gap, where appropriate in context.

I

The Exchange Act, 15 U.S.C. §§ 78a–78qq, regulates the trading of securities on national stock exchanges, and includes a range of prohibitions aimed at "promot[ing] honest practices in the securities markets." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018). The Exchange Act "and its companion legislative enactments embrace a 'fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.'" *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (citing *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 186 (1963) (footnote omitted).

The Exchange Act provision that forms the basis for Lee's federal claim is § 14(a), which states: "It shall be unlawful for any person, . . . in contravention of such rules and regulations as the [SEC] may prescribe[,] . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security." 15 U.S.C. § 78n(a)(1). Rule 14a-9, one of the regulations promulgated by the SEC to implement § 14(a), provides that "[n]o solicitation subject to this regulation shall be made by means of any proxy statement, . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact." 17 C.F.R. § 240.14a-9(a).

The Exchange Act prohibits a range of other deceptive actions, including price manipulation, §§ 9, 15 U.S.C. §§ 78i, "short-swing trading" by corporate insiders, 16, 78p, and making false or misleading statements in reports or documents filed with the SEC, 18, 78r. Each of these

provisions includes an express private right of action allowing a shareholder to bring an action against a person who violates these prohibitions. *See* §§ 9(c), 15 U.S.C. §§ 78i(f), 16(b), 78p(b), and 18(a), 78r(a). Unlike these prohibitions, the Exchange Act "makes no provision for private recovery for a violation of § 14(a)," *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391 (1970), although the Supreme Court has permitted shareholders to bring such actions, *see J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

The Exchange Act also includes various provisions that govern its implementation, including antiwaiver and jurisdictional provisions. Section 29(a) of the Exchange Act 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, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a). In addition, § 27(a) of the Exchange Act gives federal 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" the Act. *Id*. § 78aa(a).

II

We now turn to the facts of this case. Gap, a clothing retailer headquartered in San Francisco, is incorporated in Delaware, and therefore governed by Delaware law. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987). Pursuant to Section 109(b) of the Delaware General Corporation Law (DGCL),[2] Gap adopted bylaws setting

[2] Section 109(b) of the DGCL broadly authorizes corporations to adopt bylaws that "contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation,

forth the rules by which it conducts its corporate business. Gap's bylaws include a forum-selection clause, which states in part: "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 . . . any derivative action or proceeding brought on behalf of the Corporation . . . ."

Gap's inclusion of a forum-selection clause in its bylaws is consistent with a modern corporate trend. *See* Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. Rev. 485, 500–04 (2016). In the first decade of the 2000s, there was an increase in litigation, *id.*, "brought by dispersed stockholders in different forums, directly or derivatively, to challenge a single corporate action," *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013). Because multiforum litigation could impose high costs and hurt investors, *id.*, many corporations adopted forum-selection clauses in response, *see KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 759 (Del. 2019); *see also* Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split But Never Reversed: Borak and Federal Derivative Litigation* (forthcoming 2023) (manuscript, at 11–12), online at https://ssrn.com/abstract=4274616.

Notwithstanding Gap's forum-selection clause, Lee, a Gap shareholder, filed a complaint in a California district court asserting claims "derivatively on behalf of Gap" against 15 current and former Gap directors. The complaint alleged a violation of § 14(a) of the Exchange Act and SEC Rule 14a-9, as well as state-law claims for breach of

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the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." 8 Del. C. § 109(b).

fiduciary duty, aiding and abetting a breach of fiduciary duty, abuse of control, and unjust enrichment. The gravamen of Lee's complaint is that Gap filed proxy statements with the SEC in 2019 and 2020 that contained misstatements about Gap's corporate governance, including its failure to consider diversity in nominating directors and hiring executives. According to the complaint, "[d]espite [Gap's] supposed 'imperative' to be inclusive, Gap has failed to create any meaningful diversity at the very top of the Company," and has in fact "deceived stockholders . . . by repeatedly making false assertions about [its] commitment to diversity." The complaint alleged that Gap's false statements denied Gap's shareholders the right to a fully informed vote. According to the complaint, had Gap's proxy statements been truthful about its discriminatory hiring and compensation practices and its lack of high-level diversity, then "shareholders would not have voted to reelect Board members, approve executive compensation packages, and reject an independent Board chairman." As a remedy for this alleged "interfere[nce] with [her] voting rights and choices at the 2019 and 2020 annual meetings," Lee sought injunctive and equitable relief "on behalf of" Gap. Lee did "not seek any monetary damages for the proxy law violations."

Lee's complaint is consistent with another modern trend, in which plaintiffs frame corporate mismanagement claims that normally arise under state law (including challenges to corporate policies relating to "ESG [environmental, social, and governance] issues . . . such as environmentalism, racial and gender equity, and economic inequality") as proxy nondisclosure claims under § 14(a), in order to invoke exclusive federal jurisdiction and avoid any forum-selection

clause pointing to a state forum. Robert L. Haig, 8 Bus. & Com. Litig. Fed. Cts. § 97:14 (5th ed. 2022).

Gap moved to dismiss Lee's complaint, and the district court granted Gap's motion on grounds of forum non conveniens, based on Lee's decision to file her derivative suit in a California federal court rather than the Delaware Court of Chancery, as mandated by Gap's forum-selection clause.[3] After Lee appealed, a three-judge panel affirmed the district court. *Lee v. Fisher*, 34 F.4th 777 (9th Cir.), *reh'g en banc granted, opinion vacated sub nom. Lee ex rel. The Gap, Inc. v. Fisher*, 54 F.4th 608 (9th Cir. 2022). We decided to rehear this case en banc to consider whether a forum-selection clause in a corporate bylaw can require that all derivative actions be brought in a state court in the state of incorporation, effectively prohibiting a § 14(a) derivative action from being brought in any forum.

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's dismissal of a complaint for failure to comply with a forum-selection clause for abuse of discretion, *see Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018), and we review questions of law de novo, including whether the antiwaiver provisions of federal securities laws void a forum-selection clause, *see Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc).

III

On appeal, Lee argues that the forum-selection clause in Gap's bylaws is void because it violates § 29(a), the

[3] In granting Gap's motion, the district court dismissed Lee's claims without prejudice to refiling.

antiwaiver provision of the Exchange Act. She also argues that the district court erred in dismissing her complaint on forum non conveniens grounds, because enforcing the forum-selection clause would violate a strong public policy of the federal forum. Finally, she argues that Gap's forum-selection clause is invalid as a matter of Delaware law under Section 115 of the DGCL. 8 Del. C. § 115. We address these arguments in turn.

A

We begin with Lee's argument that Gap's forum-selection clause is void under the Exchange Act's antiwaiver provision, § 29(a), which 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 Supreme Court has interpreted § 29(a) as prohibiting "only . . . waiver of the substantive obligations imposed by the Exchange Act." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 228 (1987). We have held that § 29(a) "applies only to express waivers of non-compliance" with the provisions of the Exchange Act. *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) (cleaned up).

Applying these interpretations, we must determine whether the requirement in Gap's bylaws that "the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation" authorizes Gap to waive compliance with the substantive obligation imposed by § 14(a) and Rule 14a-9, which is the obligation not to make a false or misleading statement in a proxy statement. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444

(1976); *see also Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000). In interpreting Gap's forum-selection clause, we apply Delaware's rules of contract interpretation, because "[c]orporate charters and bylaws are contracts among a corporation's shareholders." *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010); *see also Hill Int'l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 38 (Del. 2015).[4] Under these rules of interpretation, the "[w]ords and phrases used in a bylaw are to be given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used." *Airgas*, 8 A.3d at 1188 (citation and internal quotation marks omitted).

On its face, Gap's forum-selection clause does not constitute an "express waiver[] of non-compliance," because the clause does not expressly state that Gap need not comply with § 14(a) or Rule 14a-9 or the substantive obligations they impose. *Facebook,* 640 F.3d at 1041. Nevertheless, Lee argues that Gap's forum-selection clause functionally waives compliance with § 14(a) and Rule 14a-9, even if it does not do so expressly. She reasons that Gap's forum-selection clause requires her to bring a derivative § 14(a) action in the Court of Chancery. Because § 27(a) of the Exchange Act provides that federal courts have "exclusive jurisdiction of violations" of the Exchange Act, 15 U.S.C.

[4] The bylaws are not only a contract among stockholders, but are also considered "part of a binding broader contract among the directors, officers and stockholders formed within the statutory framework of the Delaware General Corporation Law," *Hill Int'l*, 119 A.3d at 38, because "the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations," *Boilermakers*, 73 A.3d at 940.

§ 78aa(a), enforcing the clause would mandate that the Court of Chancery dismiss her derivative § 14(a) action. Thus, if Gap's forum-selection clause is enforceable, Lee would be precluded from bringing a derivative § 14(a) action in any forum. According to Lee, this means that Gap, its shareholders, directors, and officers have agreed to waive compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9.

We disagree, because Lee can enforce Gap's compliance with the substantive obligations of § 14(a) by bringing a direct action in federal court.[5] The forum-selection clause makes the Court of Chancery the exclusive forum only as to a "derivative action or proceeding." But it does not impose any limitation on direct actions, and Lee can still bring her action against Gap under § 14(a) and Rule 14a-9 as a direct action.

We reach the conclusion that Lee can bring her action as a direct action in federal court for the following reasons. The terms "derivative action" and "direct action" in the forum-selection clause must be defined according to Delaware

[5] Lee can also enforce the substantive obligation to refrain from making false or misleading statements in a proxy statement under Delaware law. It is a "well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action," *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992), and this "duty of full disclosure [applies] in assessing the adequacy of proxy materials," *id.* at 86; *see also Appel v. Berkman*, 180 A.3d 1055, 1057 (Del. 2018). This Delaware nondisclosure claim aligns with the "broad remedial purpose" of Rule 14a-9, which is "to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice." *TSC Indus.*, 426 U.S. at 448.

law.[6] *See Airgas*, 8 A.3d at 1188. Under Delaware law, the classification of an action as direct or derivative is "based solely on the following questions: Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). Under this test, a "derivative action" is one brought "on behalf of the corporation for harm done to the corporation," while a "direct action" is one where "the stockholder has demonstrated that . . . she has suffered an injury that is not dependent on an injury to the corporation." *Id.* at 1036. The "[p]laintiffs' classification of the suit is not binding," *id.* at 1035 (citation omitted), but rather a court must "independently examine the nature of the wrong alleged and any potential relief to make its own determination of the suit's classification," *id.* Lee can bring her action against Gap under § 14(a) and Rule 14a-9 as a direct action under the *Tooley* test, because her complaint is based on the theory that Gap's shareholders were denied the right to a fully informed vote at the 2019 and 2020 annual meetings. Lee and other shareholders suffered the alleged harm—a proxy nondisclosure injury in violation of § 14(a) that interfered with their voting rights and choices—and would receive the benefit of the remedy—the equitable or injunctive relief sought in the complaint. This conclusion is confirmed by the

[6] We apply Delaware law not only because we review the forum-selection clause according to Delaware's rules of contract interpretation, but also because we have held that "[t]he characterization of a claim as direct or derivative is governed by the law of the state of incorporation." *N.Y.C. Emps. Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010), *overruled on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (en banc).

Delaware Supreme Court's statement "that where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006); *see also Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1263 n.39 (Del. 2021) ("An example of harm unique to the stockholders would be a board failing to disclose all material information when seeking stockholder action.").[7] We have also recognized that a claim that "shareholders were deprived of the right to a fully informed vote . . . is a direct claim" under Delaware law. *Jobs*, 593 F.3d at 1022–23.

Lee does not cite any federal rule or case that would prevent her from suing Gap directly, rather than derivatively, under § 14(a) in federal court. To the contrary, under our caselaw, Lee can sue Gap directly under § 14(a) in two different ways, "either individually or as [a] representative of [a] class," *Yamamoto v. Omiya*, 564 F.2d 1319, 1323 (9th Cir. 1977), which is consistent with Delaware Supreme Court precedent, *see Kramer v. W. Pac. Indus., Inc.*, 546

[7] Lee asserts that she must bring her § 14(a) action as a derivative, rather than a direct, action in part because it "does not allege that [Gap's] conduct harmed shareholders by impacting the stock price." But under the *Tooley* test, such an allegation is neither necessary nor sufficient to qualify an action as direct. 845 A.2d at 1035. To the contrary, "[w]ithholding information from shareholders violates their rights even if" doing so obtains a "highly profitable[] result," because "[t]o hold otherwise would be to state that a corporation may request consent from its shareholders, withhold relevant information, and only be liable for damages in those situations in which it appears *ex post* that the company has suffered financial damages." *In re Tyson Foods, Inc.*, 919 A.2d 563, 602 (Del. Ch. 2007). "This cannot be, and is not, the law of Delaware." *Id.*; *see also In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 1001 n.82 (Del. Ch. 2007).

A.2d 348, 351 (Del. 1998) (holding that a shareholder may bring a direct action as an individual or as part of "a class [of shareholders], for injuries done to them in their individual capacities by corporate fiduciaries" (citation and emphasis omitted)).

Therefore, because Lee's action to enforce the substantive obligations imposed by § 14(a) and Rule 14a-9 can be brought as a direct action, there is no basis for her argument that Gap's forum-selection clause (which, by its terms, has no impact on direct actions) effects a functional waiver of compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9.[8]

Lee raises a second argument as to why the forum-selection clause conflicts with § 29(a)'s antiwaiver provision: that regardless whether she can bring a *direct* § 14(a) action against Gap, her right to bring a *derivative* § 14(a) action is stymied by Gap's forum-selection clause,

[8] The dissent argues that because we conclude that Lee can bring her § 14(a) action as a direct action, Gap's forum-selection clause has no effect (because it applies only to derivative actions), and thus her action "must remain in federal court." Dissent 62 n.2. This argument is meritless. Although Lee could have brought her § 14(a) action as a direct action, she has not done so, nor has she asked us to recharacterize her current complaint as raising a direct action. Indeed, Lee has steadfastly asserted in her briefs and at oral argument that her complaint brings only a derivative § 14(a) action. Lee "is the master of h[er] complaint, and [s]he owns the allegations that have landed" her within the scope of Gap's forum-selection clause. *Greene v. Harley-Davidson, Inc.*, 965 F.3d 767, 774 (9th Cir. 2020). Therefore, our statement that Lee's § 14(a) action would be categorized as direct under Delaware law merely points out that Lee could enforce Gap's compliance with § 14(a) in a direct action in federal court, and cannot show that the forum-selection clause effects an express or implied waiver of the substantive obligations imposed by § 14(a), such as would violate § 29(a)'s antiwaiver provision.

which alone amounts to Gap "waiv[ing] compliance with [a] provision of [the Exchange Act] or of any rule or regulation thereunder." 15 U.S.C. § 78cc(a).

This argument fails because, as the Supreme Court made clear in *McMahon*, § 29(a) forbids only the "waiver of the substantive obligations imposed by the Exchange Act," not the waiver of a particular procedure for enforcing such duties. 482 U.S. at 228. In *McMahon*, investors argued that an arbitration agreement in a brokerage contract was unenforceable under § 29(a), on the ground that the "arbitration agreement effect[ed] an impermissible waiver of the substantive protections of the Exchange Act." *Id.* at 229. The Court rejected this argument, because the investors could still raise their substantive Exchange Act claims in the arbitral forum, which "provide[d] an adequate means of enforcing" them. *Id*. Therefore, the Court concluded that the arbitration agreement would not "weaken[] [the investors'] ability to recover under the [Exchange] Act." *Id.* at 229–30 (citation omitted).

The same reasoning is applicable here. Like the arbitration clause in *McMahon*, Gap's forum-selection clause does not waive Gap's compliance with any substantive obligation (meaning any "statutory duty," *id*. at 230) imposed by the Exchange Act. A shareholder can enforce Gap's statutory duty to comply with § 14(a) by means of a direct action in federal court, just as the investors in *McMahon* could enforce compliance with Exchange Act duties in an arbitral forum. An agreement to use a particular procedure for bringing a claim—arbitration instead of litigation, or a direct action instead of a derivative action—does not constitute a waiver of a substantive obligation for purposes of § 29(a). *See id*. at 232 (stating that arbitration's "streamlined procedures . . . do not entail any consequential

restriction on substantive rights"). Nor does a provision that functionally requires the use of a direct action to enforce Gap's disclosure obligations "weaken[] [Lee's] ability to recover under the [Exchange] Act." *Id.* at 230. Lee does not explain how a direct action would be harder to prosecute than a derivative § 14(a) action in this context. To the contrary, "[t]he exacting procedural prerequisites to the prosecution of a derivative action create incentives for plaintiffs to characterize their claims as 'direct' or 'individual.'"[9] *Agostino v. Hicks*, 845 A.2d 1110, 1117 (Del. Ch. 2004). The dissent likewise fails to explain how the forum-selection clause would foreclose or otherwise impair Lee's ability to bring her § 14(a) action.

McMahon also disposes of Lee's argument that Gap's forum-selection clause is void under § 29(a) because it waives compliance with § 27(a), which gives federal courts exclusive jurisdiction over § 14(a) claims. This same argument was raised in *McMahon*, in which the investors claimed that the requirement that claims be heard in an arbitral forum constituted a waiver of § 27(a)'s grant of exclusive jurisdiction to federal courts. 482 U.S. at 227–28. The Supreme Court rejected this argument, holding that, "[b]y its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act," and "[b]ecause § 27 does not impose any statutory duties, its

[9] A plaintiff asserting a derivative action in federal court must file a verified complaint alleging that: (1) "the plaintiff was a shareholder . . . at the time of the transaction complained of"; (2) "the action is not a collusive one to confer jurisdiction that the court would otherwise lack"; and (3) "state with particularity (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority . . . ; and (B) the reasons for not obtaining the action or not making the effort." Fed R. Civ. P. 23.1(b).

waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)." *Id.* at 228. Under *McMahon*, therefore, § 29(a) does not prohibit waiver of § 27(a). *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 482 (1989) (confirming *McMahon*'s holding that § 29(a) does not prohibit waiver of jurisdictional provisions such as § 27(a)). Lee attempts to distinguish *McMahon* on the ground that it "concerned the enforceability of a predispute *arbitration agreement*, not [a] forum-selection clause." This argument is unavailing, because "[a]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

We also reject the dissent's argument that the forum-selection clause is unenforceable because Gap's shareholders —whether they are "sophisticated parties" or not, Dissent 66—did not "consent" to its inclusion in the corporate bylaws, Dissent 65, and had "no opportunity to negotiate the content of the bylaws or alter terms not to their liking." Dissent 66. This argument fails as a matter of both federal and Delaware law. The Supreme Court has expressly rejected the "determination that a nonnegotiated forum-selection clause in a . . . contract is never enforceable simply because it is not the subject of bargaining." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991). We have likewise held that "a differential in power or education on a non-negotiated contract will not vitiate a forum selection clause." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1141 (9th Cir. 2004). And because "state law governs the validity of a forum-selection clause just like any other contract clause," *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 963–64 (9th Cir.), *cert. denied*, 143 S. Ct. 536 (2022), it is even more significant that

Delaware courts have not agreed with the dissent's reasoning. In *Boilermakers*, the court rejected the plaintiff's claim that "forum selection bylaws by their nature are different and cannot be adopted by the board unilaterally," 73 A.3d at 954, and stated that, "[u]nlike cruise ship passengers, who have no mechanism by which to change their tickets' terms and conditions, stockholders retain the right to modify the corporation's bylaws," *id*. at 957–58 (discussing *Carnival Cruise Lines*, 499 U.S. at 594–95). As a result, *Boilermakers* held that, "[l]ike any other bylaw, which may be unilaterally adopted by the board and subsequently modified by stockholders, [forum-selection] bylaws are enforced according to their terms." *Id.* at 958. Thus, contrary to the dissent, the fact that Gap's forum-selection clause is located in Gap's bylaws does not render it "nonconsensual" and therefore void. Dissent 67.

Because Gap's forum-selection clause does not waive Gap's compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9, we conclude that the clause is not void under § 29(a).[10]

[10] The dissent has failed to identify any § 14(a) claim that cannot be brought as a direct action, and therefore has failed to show that the unavailability of a derivative § 14(a) action precludes enforcement of any substantive obligation arising under § 14(a). Accordingly, the dissent's observation that "[d]irect and derivative suits are not interchangeable," Dissent 60, is irrelevant here. Because § 29(a)'s antiwaiver provision is concerned only with waiver of the substantive obligations imposed by the Exchange Act, the availability of any particular method of enforcing those obligations is not material. *See McMahon*, 482 U.S. at 228.

B

We now turn to Lee's argument that Gap's forum-selection clause cannot be enforced under the doctrine of forum non conveniens because doing so would violate the federal forum's strong public policy of allowing a shareholder to bring a § 14(a) derivative action.

"[T]he enforceability of a forum-selection clause in a federal court is a well-established matter of federal law . . . ." *DePuy Synthes Sales*, 28 F.4th at 962 (emphasis omitted). Because § 29(a) does not void Gap's forum-selection clause, it is enforceable "through the doctrine of forum non conveniens" unless an exception applies. *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 60 (2013). "When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Id.* at 62. There is a narrow exception to this general rule if the plaintiff can demonstrate "extraordinary circumstances unrelated to the convenience of the parties [that] clearly disfavor a transfer." *Id*. at 52. One such extraordinary circumstance arises when the plaintiff makes a strong showing that "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *M/S Bremen*, 407 U.S. at 15.[11] The plaintiff bears the burden of showing why the court should

[11] The other exceptions to the general rule arise when the plaintiff makes a strong showing that the clause is invalid due to "fraud or overreaching," *M/S Bremen*, 407 U.S. at 15, or that "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court," *id.* at 18.

not transfer the case to the forum identified in the forum-selection clause. *Atl. Marine*, 571 U.S. at 64.

Lee argues that an extraordinary circumstance is present here. She claims that enforcing Gap's forum-selection clause would violate the federal forum's strong public policy, declared both by the Exchange Act and by judicial decision, "of the shareholders' right . . . to bring a derivative [§ 14(a)] action," which can be brought only in federal court. Her argument proceeds as follows. Lee first asserts that Congress placed high importance on corporate compliance with the Exchange Act, as evidenced by the fact that Congress prohibited the waiver of the Exchange Act's substantive obligations, *see* § 29(a), and conferred exclusive federal jurisdiction over Exchange Act claims, *see* § 27(a). Although the Exchange Act itself does not provide a private right of action to enforce § 14(a), *see Mills*, 396 U.S. at 391, Lee next contends that the Supreme Court's decision in *Borak* was intended to further Congress's policy goals by allowing for "[p]rivate enforcement of the proxy rules" under § 14(a) as "a necessary supplement to [SEC] action," 377 U.S. at 432. She then claims that *Borak* reflects a strong public policy to give shareholders a right to bring both a direct and a derivative action to enforce § 14(a). Lee concludes by asserting that enforcing Gap's forum-selection clause would contravene this policy.

1

The linchpin of Lee's argument is the Supreme Court's decision in *Borak*, which first implied a private right of action allowing a shareholder to bring a "federal cause of action" to redress the injury caused by a "proxy statement alleged to contain false and misleading statements violative of § 14(a) of the [Exchange] Act." 377 U.S. at 428. A close

look at *Borak* in its historical context and in light of subsequent Supreme Court developments, however, compels the conclusion that *Borak* does not establish a strong public policy to allow shareholders to bring § 14(a) claims as derivative actions.

In *Borak*, a shareholder brought a direct § 14(a) action against the directors of a corporation, alleging that the directors had circulated materially misleading proxy statements in order to secure approval of a merger. 377 U.S. at 427. The shareholder alleged that "the merger would not have been approved but for the false and misleading statements in the proxy solicitation material; and that [the] stockholders were damaged thereby." *Id.* at 430. In considering this claim, *Borak* examined Congress's policy goals in enacting § 14(a), and concluded that Congress intended § 14(a) "to prevent the recurrence of abuses which had frustrated the free exercise of the voting rights of stockholders," because Congress understood that "fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange." *Id*. at 431 (cleaned up). *Borak* therefore ruled that the shareholders could bring their action under § 14(a), because such an implied private right of action was necessary in order to ensure that shareholders do not receive "deceptive or inadequate disclosure[s] in proxy solicitation[s]" so that they can make informed votes on corporate matters requiring their approval. *Id*. Because the SEC did not have the resources to evaluate every proxy statement and enforce the requirements of § 14(a) on its own, "[p]rivate enforcement of the proxy rules [would] provide[] a necessary supplement to [SEC] action." *Id.* at 432.

After holding that a shareholder had the right to bring a direct action under § 14(a), *Borak* appended a less well-

reasoned statement that a shareholder could also bring a derivative § 14(a) action. Even though the shareholder in *Borak* "contend[ed] that his . . . claim [wa]s not a derivative one," the Court stated that it believed "a right of action exists as to both derivative and direct causes." *Id.* at 431. The Court reasoned that "[t]he injury which 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," and explained that this was because "[t]he damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group." *Id.* at 432. The Court concluded that "[t]o hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief." *Id.*

Even at the time *Borak* was decided, these statements did not square with the Supreme Court's jurisprudence regarding derivative actions. Nor did *Borak* attempt to harmonize its statements on derivative actions with the Court's precedent.

Some background on the history of derivative actions is instructive. A derivative action is a judge-made legal mechanism first developed by the English Court of Chancery to give shareholders the ability to address alleged wrongs committed by those in control of the corporation. *See* Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 Buff. L. Rev. 837, 842, 848 (2013). Judicial understanding of this mechanism evolved over time. Early state-court cases sometimes characterized such suits as representative actions, in which one shareholder was permitted to represent all other shareholders in pursuing a remedy when corporate managers engaged in

fraud, self-dealing, or other misconduct. *See, e.g.*, *Peabody v. Flint*, 88 Mass. 52, 56–57 (1863); *see also Allen v. Curtis*, 26 Conn. 456, 459–62 (1857); *Hersey v. Veazie*, 24 Me. 9, 11–12 (1844). But long before *Borak* was decided, this type of action was generally characterized in federal court as a suit by a shareholder raising a corporation's legal claims, on the corporation's behalf, when the corporation failed to do so. *See, e.g.*, *Hawes v. City of Oakland*, 104 U.S. 450, 454 (1881) (recognizing a category of lawsuits that "permits the stockholder in [a] corporation[] to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation"). Subsequent Supreme Court cases confirmed that "the term derivative action . . . appl[ied] only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529 (1984); *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548 (1949). Soon after *Hawes*, the Supreme Court codified this understanding of derivative actions, first in Equity Rule 94 (1882), next in Equity Rule 27 (1912), and then in Rule 23(b) of the Federal Rules of Civil Procedure (1937). *See Daily Income Fund*, 464 U.S. at 530 n.5. By 1966, the procedural rules for a derivative action were adopted in Rule 23.1 of the Federal Rules of Civil Procedure, where they remain in substantially the same form today. Fed. R. Civ. P. 23.1.[12]

[12] Rule 23.1"applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce." Fed. R. Civ. P. 23.1(a).

Borak's statement about the availability of derivative actions is unsupported by reasoning or explanation regarding how a derivative § 14(a) action fit into this established judicial framework. Most important, although *Borak* recognized that § 14(a) protected a shareholder's right to receive accurate proxy statements, and that such a right was necessary for "the free exercise of the voting rights of stockholders," 377 U.S. at 431, it failed to explain how a corporation would itself have a right to bring a § 14(a) claim that it could enforce in court, which was the basis for a derivative action under the prevailing caselaw. Instead, *Borak*'s statement that the shareholder's injury flows "from the deceit practiced on the stockholders as a group," *id.* at 432, seems to hark back to the earlier view of a derivative action as a representative action that allowed one shareholder to represent all other shareholders in pursuing a remedy for improper actions by corporate managers. Nor did *Borak* explain how the lack of a derivative action was "tantamount to a denial of private relief," *id.*, given that a shareholder could bring a direct action under § 14(a), including in a representative action. Finally, *Borak* failed to explain how the availability of a derivative action would apply to the shareholder in that case, who explicitly brought only a direct action. *Id*. at 431. Thus, the Court's discussion regarding derivative actions was "unnecessary to the announcement or application of the rule [*Borak*] established," and therefore dicta. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 738 (2007).

Perhaps because *Borak*'s discussion of a derivative § 14(a) action was not well-explained or well-reasoned, or because *Borak* did not explain how such an action was consistent with then-current Supreme Court rules and

precedent, subsequent Supreme Court cases did not further address or develop the availability of this sort of remedy. No Supreme Court decision since *Borak* has expressly addressed this issue. In *Mills*, the Court observed that the plaintiff "asserted the right to complain of th[e] alleged [§ 14(a)] violation both derivatively on behalf of [the corporation] and as representatives of the class of all its minority shareholders," but did not classify the plaintiff's action as one or the other, nor set forth a legal framework for doing so.[13] 396 U.S. at 378. The two other post-*Borak* Supreme Court cases involving a § 14(a) action did not specify whether the action was direct or derivative. *See TSC Indus.*, 426 U.S. at 440–43; *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 (1991) ("[*Borak*] did not itself . . . define the class of plaintiffs eligible to sue under § 14(a). But its general holding [was]. . . that a private cause of action was available to *some shareholder class*[.]" (emphasis added)).

Therefore, *Borak*'s statement that a shareholder could bring a derivative § 14(a) action, which was not necessary to decide that case, and not addressed in subsequent Supreme Court cases, does not establish a strong public policy in favor of such actions.

2

Two developments in Supreme Court jurisprudence since *Borak* further undermine that case's reasoning, and

[13] *Mills* stated that the plaintiff had a "derivative right to invoke [the corporation's] status as a party to the [challenged merger] agreement" at issue under § 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b), but it did not address whether a derivative action was available under § 14(a). 396 U.S. at 388 (cleaned up).

thus further vitiate Lee's assertion that there is a strong public policy of the federal forum allowing shareholders to bring derivative § 14(a) actions.

First, in stating that there was an implied right to bring a derivative § 14(a) action as a matter of federal common law, *Borak* failed to consider the role of state law in governing the permissible scope of corporate conduct. After *Borak* was decided, the Supreme Court held that federal courts are to "presum[e] that state law should be incorporated into federal common law," particularly in areas like corporation law, "in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). Absent contrary congressional intent, "gaps in [federal] statutes bearing on the allocation of governing power within the corporation should be filled with state law 'unless the state law permits action prohibited by the Acts, or unless its application would be inconsistent with the federal policy underlying the cause of action.'" *Id*. at 99 (cleaned up) (quoting *Burks v. Lasker*, 441 U.S. 471, 479 (1979)). Because derivative suits involve the allocation of power between shareholders and directors, *see Kamen*, 500 U.S. at 98, federal courts must ordinarily look to the law of the state of incorporation to determine both the authority of directors to control derivative actions, *see Burks*, 441 U.S. at 479, and the procedures for bringing such actions, even when they arise under federal law, *see Kamen*, 500 U.S. at 99.

Because gaps in federal securities statutes are generally filled with state law, *see Kamen*, 500 U.S. at 98, 108, Delaware law is relevant for determining whether shareholders may bring a derivative action to enforce a claim under § 14(a). *Borak*'s statement that a § 14(a) action could

be brought as a derivative action on behalf of a corporation has been displaced by current developments in Delaware law. *See supra* Section III.A. The Delaware Supreme Court has held that a shareholder may bring a derivative action on behalf of the corporation only if the corporation suffered the alleged harm and the corporation would receive the benefit of the recovery or other remedy. *See Tooley*, 845 A.2d at 1039.[14] Applying this rule, the Delaware Supreme Court has concluded that an action asserting that "a duty of disclosure violation impaired the stockholders' right to cast an informed vote" is a direct action. *In re J.P. Morgan Chase*, 906 A.2d at 772. Therefore, the injury caused by a violation of § 14(a) gives rise to a direct action under Delaware law, not a derivative action. Nor is this application of the Delaware rule "inconsistent with the federal policy underlying the cause of action." *Kamen*, 500 U.S. at 99. Rather, because a direct § 14(a) action will satisfy the policy goal identified in *Borak*—to ensure that private parties can supplement SEC enforcement actions—the application of Delaware's rule is entirely consistent with the federal policy underlying the implied § 14(a) cause of action. *See id*. Therefore, Delaware's rule as stated in *Tooley* supersedes the federal common law rule proclaimed in *Borak*. *Id*. This development further undermines Lee's claim that there is a strong public policy of the federal forum to give shareholders a derivative § 14(a) action in this context.

[14] In reaching this conclusion, *Tooley* explained that an action is not considered derivative under Delaware law merely because "the injury falls equally upon all stockholders." 845 A.2d at 1037. This ruling is directly contrary to *Borak*'s reasoning that a § 14(a) action should be classified as derivative if the damage to the corporation flowed "from the deceit practiced on the stockholders as a group." 337 U.S. at 432.

3

A second development undermining *Borak*'s reasoning is the Supreme Court's shift away from implying private rights of action. As the Supreme Court explained, *Borak* was decided during a time when the prevailing law "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Borak*, 377 U.S. at 433). But the Court has since "adopted a far more cautious course before finding implied causes of action," clarifying that, "when deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent," *id*. (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)), and that "[i]f the statute does not itself" provide that "Congress intended to create the private right of action asserted," no such action will "be created through judicial mandate," *id*. at 1856 (internal citation removed). In the specific context of § 14(a) actions, the Court has also expressed second thoughts as to the propriety of establishing an implied private right of action, noting that it "would have trouble inferring any congressional urgency to depend on implied private actions to deter violations of § 14(a), when Congress expressly provided private rights of action in §§ 9(e), 16(b), and 18(a) of the same Act." *Va. Bankshares,* 501 U.S. at 1104; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("[W]hen Congress wished to provide a private damage remedy [in the Exchange Act], it knew how to do so and did so expressly.").

Consistent with these reservations about implying private rights of action, the Supreme Court has suggested that private actions under § 14(a) should be interpreted narrowly. In *Piper v Chris-Craft Industries, Inc.*, the Court considered an action brought under § 14(e) of the Exchange

Act, 15 U.S.C. § 78n(e), a provision which is similar to § 14(a) in that it prohibits misleading information in tender offers to shareholders. 430 U.S. 1, 24 (1977). The Court held that because the "sole purpose" of § 14(e) is to protect shareholders, *id*. at 35, Congress did not intend to create a remedy in favor of parties other than shareholders, such as defeated tender offerors, *id*. at 35–36. The dissent argued that this ruling was contrary to *Borak*, because "the primary beneficiaries" of § 14(a) are also individual shareholders, and yet *Borak* held that they could bring a derivative suit on behalf of the corporation. *Id*. at 66 (Stevens, J., dissenting). In response, the Court held that the dissent was "misreading" *Borak*. *Id*. at 32 n.21. As interpreted by *Piper*, *Borak* was "focusing on all stockholders[,] the owners of the corporation[,] as the beneficiaries of § 14(a)," and provided a remedy for "[s]tockholders as a class," *id*., who were "the direct and intended beneficiaries of the legislation," *id*. at 32. Thus, *Piper* suggests that *Borak* should be interpreted as fashioning a remedy analogous to a shareholder representative action or a class action, rather than a derivative action on behalf of a corporation to enforce a corporate right.

In a subsequent decision, the Court likewise refused to give an implied right of action under § 14(a) to individuals whose votes were not required by law to authorize a transaction. *See Va. Bankshares*, 501 U.S. at 1087. In that case, minority shareholders purported to bring a § 14(a) action challenging a merger, even though their votes were not required by law or by the corporation's bylaws to authorize the merger. *Id*. at 1088, 1099. The Supreme Court declined to "enlarge the scope" of the private right of action recognized in *Borak* for shareholders whose votes were unnecessary to approve the transaction that was the subject

of the proxy solicitation, and concluded that the minority shareholders lacked standing to bring a § 14(a) claim. *Id*. at 1102–03, 1104 n.11.

Although *Virginia Bankshares* was careful to state that it did not "question the holding" of *Borak*, *id.* at 1104 n.11, the implication of its ruling is clear. Under *Virginia Bankshares*, a person whose vote is not "legally required to authorize the [corporate] action proposed" lacks standing to bring a § 14(a) claim. *Id*. at 1102. Because the shareholders, not the corporation itself, vote to approve corporate transactions, this rule implies that the corporation lacks standing to sue under § 14(a) for a misleading proxy statement it has issued to its own shareholders.[15] *See* Manesh & Grundfest (manuscript, at 60–61). If a corporation cannot bring such a § 14(a) claim, then a shareholder cannot "enforce a right that the corporation or association may properly assert but has failed to enforce," as required by Rule 23.1 for all derivative actions brought in federal court. Fed. R. Civ. P. 23.1(a). Because the express terms of Rule 23.1 supersede *Borak*'s "federal common lawmaking" for derivative actions, *Kamen*, 500 U.S. at 100 n.6, *Virginia Bankshares* casts grave doubt on whether a shareholder can bring a derivative § 14(a) action on behalf of a corporation.

[15] It also appears unlikely that a corporation has standing to sue for a proxy nondisclosure violation under Delaware law, because "[a] proxy is evidence of an agent's authority to vote shares owned by another," *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999) (per curiam), but "a corporation may not vote its own shares," *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 250 A.3d 1016, 1031 (Del. Ch. 2020); *see also* 8 Del. C. § 160(c)(1) ("Shares of a corporation's capital stock shall neither be entitled to vote nor be counted for quorum purposes if such shares belong to [t]he corporation.").

4

In sum, after the decision in *Borak*, the Supreme Court's jurisprudence has evolved in a way that calls into question *Borak*'s statement about derivative § 14(a) actions. First, the Court now looks to state law rather than federal common law to fill in gaps relating to federal securities claims, and under Delaware law, a § 14(a) action is direct, not derivative. Second, the Court now views implied private rights of action with disapproval, construing them narrowly, and casting doubt on the viability of a corporation's standing to bring a § 14(a) action. These jurisprudential shifts undermine any claim that there is a strong public policy favoring *Borak*'s dictum that shareholders can bring a derivative § 14(a) action. While *Borak*'s approval of implied direct § 14(a) actions to ensure shareholders' informed voting rights may survive, there is no concomitant public policy supporting a right to bring such actions derivatively.[16] Accordingly, *Borak* does not help Lee make a strong showing that enforcement of Gap's forum-selection clause "would contravene a strong public policy" of the federal forum. *M/S Bremen*, 407 U.S. at 15.

[16] In stating that "[t]he majority goes to great lengths to assert that *Borak* is no longer good law," Dissent 70, the dissent appears to have overlooked our entire analysis. We acknowledge that the Supreme Court has not "question[ed] the holding" of *Borak*. *See supra* 34 (quoting *Va. Bankshares*, 501 U.S. at 1104 n.11). Rather, we explain that the Supreme Court's subsequent decisions have called into question *Borak*'s dicta that a shareholder has a right to bring a derivative § 14(a) action, which supports our conclusion that there is no strong public policy in favor of such actions. *See supra* 34–35. The dissent fails to address this analysis or otherwise explain why there is some basis for a strong public policy in favor of derivative § 14(a) actions after *Kamen* and *Virginia Bankshares*.

C

Lee points to a second federal policy that she claims creates the requisite "extraordinary circumstances" sufficient to preclude enforcement of Gap's forum-selection clause. *Atl. Marine*, 571 U.S. at 52. According to Lee, the forum-selection clause conflicts with the federal forum's strong public policy of giving federal courts exclusive jurisdiction over Exchange Act claims under § 27(a). This argument also fails.

First, the Supreme Court has indicated that there was "no specific purpose on the part of Congress in enacting § 27." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 383 (1996). At most, the Court has "presume[d] . . . that Congress intended § 27 to serve . . . the general purposes underlying most grants of exclusive jurisdiction: 'to achieve greater uniformity of construction and more effective and expert application of that law.'" *Id.* (quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985)). Because enforcing Gap's forum-selection clause would require Lee to bring her derivative action in the Court of Chancery, which would lead to its dismissal for lack of jurisdiction, "[t]here is no danger that state court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder," and "the uniform construction of the Act [will be] unaffected . . . because the state court [will] not adjudicate the Exchange Act claims." *Id.* And because enforcing Gap's forum-selection clause does not threaten the presumed policies embedded in § 27(a), there is no conflict with § 27(a) that constitutes an extraordinary circumstance requiring non-enforcement of Gap's forum-selection clause.

Second, Lee argues that, in light of § 27(a), Gap's forum-selection clause constitutes a waiver of her right to pursue "statutory remedies" under § 14(a), which is contrary to public policy. She relies on a footnote from the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which considered the argument that two clauses in a sales agreement—one providing for arbitration before a foreign tribunal, and the other providing that the agreement would be governed by foreign law—would "wholly . . . displace" American antitrust law. 473 U.S. 614, 637 n.19 (1985). Because the plaintiff, a foreign corporation, conceded that American law applied to the antitrust claims, the Court rejected this argument, but stated in a footnote that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [it] would have little hesitation in condemning the agreement as against public policy."[17] *Id.*

[17] We clarify that the statement in *Sun* that "the strong federal policy in favor of enforcing forum-selection clauses would supersede antiwaiver provisions in state statutes as well as federal statutes," 901 F.3d at 1090, is subject to the caveat in *Mitsubishi Motors*—that a forum-selection clause that purports to override an express federal statutory remedy or a non-waivable statutory right would fail as being "against public policy," 473 U.S. at 637 n.19. Thus, to the extent that enforcing a forum-selection clause would conflict with an applicable federal antiwaiver provision, a court is bound to enforce the statute, notwithstanding the strong policy in favor of enforcing forum-selection clauses. *See Atl. Marine*, 571 U.S. at 63. This is consistent with the well-established principles that federal courts "have no license to depart from the plain language" of statutes, *United States v. Rutherford*, 442 U.S. 544, 555 (1979), and that "policy concerns cannot trump the best interpretation of the statutory text," *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022). In any event, because § 29(a) does not void Gap's forum-selection clause, *see supra* Section III.A, our decision does not raise any concern about elevating "a judge-made

Reading the *Mitsubishi Motors* footnote together with § 27(a)'s grant of exclusive federal jurisdiction for claims brought under § 14(a), Lee argues that enforcing Gap's forum-selection clause would be an unlawful "prospective waiver" of her right to pursue a statutory remedy in federal court.

Lee's argument is unavailing.[18] First, unlike *Mitsubishi Motors*, where a forum-selection clause and choice-of-law provision had the potential to "wholly . . . displace" federal antitrust law, and thus prevent a party to a sales agreement from bringing a statutory antitrust claim, the forum-selection clause and exclusive jurisdiction provision at issue here have no such potential effect. To the contrary, as we have explained, a shareholder may bring a § 14(a) claim against Gap as a direct action in federal court despite Gap's forum-selection clause. Moreover, while Congress gave private individuals a statutory right to bring a private antitrust action, *see* 15 U.S.C. § 15(a), Congress did not provide such a statutory remedy for a derivative § 14(a) action, contrary to Lee's assertion that "[a] derivative claim for [a] violation of § 14(a) is . . . a substantive provision of the Exchange Act." Nor did *Borak* hold that Congress intended to provide such a remedy. *See Va. Bankshares*, 501 U.S. at 1103 ("*Borak*'s probe of the congressional mind . . . never focused

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federal policy" over "the plain language of the Exchange Act." Dissent 56.

[18] We have already rejected en banc a similar attempt to overstate the meaning of the *Mitsubishi Motors* footnote in a manner that would override *M/S Bremen*. *See Richards*, 135 F.3d at 1295 ("[W]e do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in [*M/S Bremen* and its progeny] on the validity of clauses specifying the forum and applicable law.").

squarely on private rights of action, as distinct from the substantive objects of the legislation . . . ."). Therefore, the Supreme Court's statements in *Mitsubishi Motors* suggesting the existence of a strong public policy to protect a party's right to a statutory antitrust remedy (comments that were not necessary to the case before it) are inapposite here.

Because we reject each of Lee's arguments that a strong public policy of the federal forum would be violated by enforcement of Gap's forum-selection clause, we conclude that Lee has "not carried [he]r heavy burden of showing the sort of exceptional circumstances that would justify disregarding a forum-selection clause." *Sun*, 901 F.3d at 1084.

D

We now turn to the question whether Gap's forum-selection clause is invalid as a matter of Delaware law under Section 115 of the DGCL.

1

We begin with some background. The Delaware General Assembly enacted Section 115 in 2015 to authorize forum-selection clauses. As explained, in the early 2010s, corporations began adopting forum-selection clauses in their bylaws as a response to a steep rise in multiforum litigation. ***See supra*** **Section II**. In 2013, the Court of Chancery upheld, under Delaware law, the statutory and contractual validity of forum-selection clauses "providing that litigation relating to [corporations'] internal affairs should be conducted in Delaware." *Boilermakers*, 73 A.3d at 937–39. *Boilermakers* held that the forum-selection clauses at issue were authorized by "the broad subjects that [Section] 109(b) [of the DGCL] permits bylaws to address," *id*. at 950, which

are those "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees," 8 Del. C. § 109(b). *Boilermakers* reasoned that the bylaws of Delaware corporations "typically . . . direct how the corporation, the board, and its stockholders may take certain actions," 73 A.3d at 951, and that the forum-selection bylaws at issue "fit this description" because they were "process-oriented" and "regulate[d] *where* stockholders may file suit," *id*. at 951–52. The Court of Chancery also rejected the plaintiffs' argument that the bylaws were contractually invalid because they were adopted unilaterally by the directors without a shareholder vote, concluding "that forum-selection bylaws are, as a facial matter of law, contractually binding." *Id*. at 957–58.

While *Boilermakers* did not address "situations when the forum-selection bylaws . . . could somehow preclude a plaintiff from bringing a claim that must be brought exclusively in a federal court," *id*. at 961, it discussed a hypothetical question, raised by the plaintiffs, as to whether a forum-selection clause would be invalid if a Rule 14a-9 claim were brought against a corporation in federal court and the defendants moved to dismiss the complaint because of a forum-selection clause, *id*. at 962. But the Court of Chancery expressly "decline[d] to wade deeper into imagined situations involving multiple 'ifs,'" *id*. at 962, and left questions regarding the enforceability of forum-selection clauses "in some future situation" to be resolved another day, *id*. at 963.

Two years later, the Delaware legislature enacted Section 115 as part of its 2015 amendments to the DGCL, which "were intended, in part, to codify *Boilermakers*." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 117 (Del. 2020);

see also Solak v. Sarowitz, 153 A.3d 729, 732 (Del. Ch. 2016). Section 115 states in relevant part that a corporation's "bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. C. § 115.[19] It defines "internal corporate claims" as "including claims in the right of the corporation," which means claims "that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity," as well as claims "as to which [the DGCL] confers jurisdiction." *Id.* Section 115 prohibits bylaws that forbid a plaintiff from bringing such internal corporate claims in Delaware courts. *Id.*

An official synopsis accompanies Section 115 and the other 2015 amendments to the DGCL. *See* S.B. 75, 148th Gen. Assembly, Regular Session (Del. 2015) (synopsis). Although, under Delaware law, "[a] synopsis is a proper source for ascertaining legislative intent," the Delaware

[19] Section 115 of the DGCL provides in full:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.

Supreme Court considers the synopsis only if it "finds that the statutory language is ambiguous and requires interpretation." *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.3d 326, 332 (Del. 2012). The portion of the synopsis pertaining to Section 115 summarizes that section and provides certain clarifications. In addition to stating that Section 115 is intended to codify the holding of *Boilermakers*, the synopsis interprets the term "internal corporate claims" as "claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation." S.B. 75 (synopsis). The synopsis also provides a list of what Section 115 is not intended to do; among other things, the section is "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction." *Id.*

In 2020, the Delaware Supreme Court addressed the scope of Section 115 in *Salzberg*. *Salzberg* analyzed forum-selection clauses that required certain claims to be brought in federal court (referred to as federal forum provisions, or FFPs), and held that such clauses were not prohibited by Section 115. 227 A.3d at 109, 120. *Salzberg* based this conclusion in part on its interpretation of the phrase "internal corporate claims" in Section 115 as "likely . . . intended to address claims requiring the application of Delaware corporate law as opposed to federal law." *Id*. at 120 n.79. The Delaware Supreme Court did "not think the General Assembly intended to encompass federal claims within the definition of internal corporate claims[,]" and thus concluded that "Section 115 [wa]s not implicated" by the FFPs at issue. *Id.* *Salzberg*'s interpretation of the term "internal corporate claims" was integral to the Delaware Supreme Court's reasoning and outcome, because, as the

court acknowledged, if the term "internal corporate claims" encompassed federal claims, "then arguably, [the FFPs] would run afoul of Section 115's requirement that 'no provision of the certificate of incorporation or the bylaws may prohibit bringing such [internal corporate] claims in the courts of this State.'" *Id.* at 133 n.146 (quoting 8 Del. C. § 115). In other words, because FFPs prohibit plaintiffs from bringing certain federal claims in Delaware courts, the FFPs would conflict with Section 115, which requires corporate bylaws to allow *all* internal corporate claims to be brought in Delaware courts. *See* 8 Del. C. § 115. But since federal claims are not "internal corporate claims" under Section 115, *Salzberg* dictates that courts "must look elsewhere . . . to determine whether [a forum-selection bylaw] is permissible," because "Section 115, read fairly, does not address the propriety of forum-selection provisions applicable to other types of claims." 227 A.3d at 119.

Salzberg also made clear that Section 115 is a permissive, rather than restrictive, statute. The Delaware Supreme Court explained that "Section 115 simply clarifies that *for certain claims*, Delaware courts may be the only forum, but they cannot be excluded as a forum." *Id*. at 118. Thus, Section 115, as interpreted by *Salzberg*, permits the use of specified forum-selection clauses, but does not implicitly forbid other such clauses unless they prevent a plaintiff from bringing state-law claims in Delaware courts. Indeed, *Salzberg* rejected the argument "that a forum-selection provision not expressly permitted by Section 115 . . . is implicitly prohibited." *Id.* at 119–20. Rather, *Salzberg* reiterated "that forum-selection clauses are presumptively valid and enforceable under Delaware law." *Id*. at 132. *Salzberg* based its analysis in part on the broad scope of Section 109(b) of the DGCL, *see* 227 A.3d at 122–23, which

authorizes a corporation to enact any bylaw "not inconsistent with law or with the certificate of incorporation," as long as it relates to the "rights or powers" of the corporation's main stakeholders, 8 Del. C. § 109(b). Thus, according to *Salzberg*, Section 115's "permissive provision [did not] define[] the whole universe of permitted forum-selection provisions." 227 A.3d at 120. *Salzberg* likewise made clear that *Boilermakers*, which was codified by Section 115, "did not establish the outer limit of what is permissible under . . . Section 109(b)." *Id*. at 123.

2

Before addressing the effect of Section 115 on Gap's forum-selection clause, we must first determine whether we should exercise our discretion to do so. Lee failed to identify Section 115 in her opening brief before the panel, which was filed before the Seventh Circuit issued its opinion in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway,* striking down a materially similar forum-selection clause to Gap's as invalid under Section 115. 23 F.4th 714 (7th Cir. 2022). Following *Seafarers*, Lee raised arguments under Section 115 for the first time in her reply brief. After we voted to rehear this case en banc, Gap moved to file supplemental briefing on certain issues, and Lee cross-moved for supplemental briefing on the application of Section 115. We granted in part the parties' cross-motions and ordered supplemental briefing on, among other topics, "the application of 8 Del. Code § 115." Accordingly, the Section 115 issue is fully briefed by both parties.

We have long held that we may exercise our discretion to address significant questions presented to the en banc panel that were not considered by the three-judge panel. *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1159–

60 (9th Cir. 2014) (en banc). Thus, we have discretion to consider the Section 115 issue, which is of sufficient importance that we ordered the parties to address it in supplemental briefing. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) (en banc). The party-presentation principle is not implicated here because the parties themselves have "frame[d] the issue for decision." *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). When we rehear a case en banc, we do "not review the original panel decision, nor [do we] overrule the original panel decision," but rather we "act[] as if we were hearing the case on appeal for the first time," and can thus consider new issues that have been "unquestionably raised . . . before the *en banc* court." *Socop-Gonzalez*, 272 F.3d at 1186 n.8. Therefore, although the three-judge panel deemed the Section 115 issue to be waived, *see Lee*, 34 F.4th at 782, we are not obliged to follow suit.

We conclude that the effect of Section 115 is important to our decision here. Federal courts generally defer to the law of the state of incorporation for issues involving "a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Accordingly, "[state] law controls the legal issue on the validity of the challenged by-law." *Groves v. Prickett*, 420 F.2d 1119, 1122 (9th Cir. 1970). If Gap's bylaw is invalid under Delaware law, as Lee now claims, then the district court erred in enforcing it. If we fail to address this issue, then our analysis of whether Gap's forum-selection clause can validly prevent Lee from bringing a derivative § 14(a) action in federal court would be incomplete. We therefore elect "to

exercise our discretion to decide the issue *en banc*." *Hernandez-Estrada*, 749 F.3d at 1160.

3

We now turn to the question whether Gap's forum-selection clause is invalid under Section 115 of the DGCL.

On its face, Section 115 is inapplicable here, because it does not address the validity of a forum-selection clause's effect on federal claims. Section 115 provides that a corporation's bylaws "may require . . . that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. C. § 115. According to *Salzberg*, the phrase "internal corporate claims" in Section 115 refers to "claims requiring the application of Delaware corporate law, as opposed to federal law." 227 A.3d at 120 n.79. The official synopsis to the 2015 amendments to the DGCL, which included Section 115 and on which Lee relies, is consistent with this interpretation, stating that the term "internal corporate claims" means "claims arising under the DGCL." S.B. 75 (synopsis). By its terms, this language does not prevent a forum-selection clause from requiring that a *federal claim*, which is not an internal corporate claim, be brought in Delaware state court.

Lee mentions *Salzberg* only in passing and does not address *Salzberg*'s interpretation of the phrase "internal corporate claims" as referring to claims brought under Delaware law, rather than federal law. Instead, Lee argues that the text of Section 115, when read together with the synopsis and the Delaware Supreme Court's statements in *Boilermakers*, raises the strong inference that Section 115 precludes a forum-selection clause from requiring a federal claim such as § 14(a) to be brought in state court, when the

state court would be obliged to dismiss it for lack of jurisdiction. Specifically, Lee asserts that Section 115 states that a forum-selection clause must be "consistent with applicable jurisdictional requirements," and the synopsis warns that Section 115 is "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction." Because Gap's forum-selection clause eliminates federal jurisdiction over her derivative § 14(a) claim, Lee contends, it is not consistent with applicable jurisdictional requirements and does exactly what § 115 was "not intended to authorize." Lee further notes that *Boilermakers* recognized that a forum-selection clause that precluded federal jurisdiction over a Rule 14a-9 action could raise jurisdictional issues, and she argues that the language in *Boilermakers* about how a corporation invoking a forum-selection clause against such a claim might have "trouble," 73 A.3d at 962, further indicates that such a clause would be disfavored.

We reject Lee's arguments regarding Section 115. First, *Salzberg* makes clear that "internal corporate claims," as defined in Section 115, refers only to claims brought under Delaware, rather than federal, law. 227 A.3d at 120 n.79. Given *Salzberg*'s authoritative interpretation of Section 115, we must read that section as addressing only state-law claims and authorizing them to be brought in "any or all" state courts, "consistent with applicable jurisdictional requirements." 8 Del. C. § 115. Under this approach, Section 115 is silent on whether or not bylaws may require federal claims to be brought in state courts or whether forum-selection clauses governing federal claims must be consistent with applicable jurisdictional requirements. Moreover, because *Salzberg* makes clear that Section 115 is a permissive, rather than restrictive, statute, we may not

interpret its silence on the issue of federal claims as prohibiting the application of forum-selection clauses to such claims. *See* 227 A.3d at 120 (rejecting the notion that "Section 115's permissive provision defines the whole universe of permitted forum-selection provisions"). Again, Lee misinterprets Section 115 as a restrictive statute that sets the outer limit of allowable forum-selection clauses, rather than a merely permissive one, as explained by *Salzberg*.

Lee's reliance on the official synopsis accompanying the 2015 amendments to the DGCL is also misplaced. Applying the Delaware Supreme Court's interpretative framework characterizing Section 115 as permissive, the synopsis's warning that "Section 115 is . . . not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction," S.B. 75 (synopsis), means only that Section 115 does not create a legislative safe-harbor for forum-selection clauses that requires claims to be brought in forums that lack jurisdiction over them. By their terms, these statements in the synopsis neither authorize nor prohibit a forum-selection clause that would preclude bringing an action in federal court. *See Salzberg,* 227 A.3d at 120–21. We also reject Lee's argument that the forum-selection clause was not authorized by Section 109(b) because Section 115 is a more specific statute, and thus supersedes Section 109(b), which is more general. This argument is contrary to *Salzberg*, which held that "[f]orum provisions were valid [under Section 109(b)] prior to Section 115's enactment," *id.* at 120, and Section 115 "did not establish the outer limit of what is permissible under . . . Section 109(b)," *id.* at 123. Therefore, *Salzberg* concluded, Section 109(b) was broad enough to authorize the forum-selection clause at issue, notwithstanding Section

115. *Salzberg*'s reasoning applies with equal force to authorize Gap's forum-selection clause.

Boilermakers is not to the contrary. There, the Court of Chancery held that forum-selection clauses "providing that litigation relating to [corporations'] internal affairs should be conducted in Delaware," 73 A.3d at 937, were statutorily and contractually valid under Delaware law, *id.* at 963, and the court did not place conditions on their use. Years later, *Salzberg* confirmed that *Boilermakers* did not place limitations on the scope of forum-selection clauses. *See* 227 A.3d at 119, 122–23. Following (and codifying) *Boilermakers*, Section 115 thus approves forum-selection clauses "consistent with applicable jurisdictional requirements," without imposing any specific carve-outs or restrictions for the hypothetical scenarios considered in *Boilermakers*, other than clarifying that Delaware state courts cannot be excluded as a forum for state-law "internal corporate claims." 8 Del. C. § 115.

Accordingly, because the Delaware Supreme Court has indicated that federal claims like Lee's derivative § 14(a) action are not "internal corporate claims" as defined in Section 115, and because no language in *Boilermakers*, Section 115, or the official synopsis operates to limit the scope of what constitutes a permissible forum-selection bylaw under Section 109(b), we conclude that Gap's forum-selection clause is valid under Delaware law.

E

In reaching this conclusion, we part ways with the Seventh Circuit's decision in *Seafarers*. 23 F.4th 714. In that case, the plaintiff filed a "derivative suit on behalf of Boeing under [§] 14(a) . . . alleg[ing] that Boeing officers and board members made materially false and misleading

public statements about the development and operation of the 737 MAX in Boeing's 2017, 2018, and 2019 proxy materials." *Id*. at 717. The district court, in reliance on Boeing's forum-selection clause, dismissed the action on forum non conveniens grounds. *Id*. at 718.[20]

The Seventh Circuit reversed, holding that "[t]he most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act." *Id*. at 719. In holding that Boeing's forum-selection clause violated Section 115, the Seventh Circuit reasoned that a derivative § 14(a) action qualified as an "internal corporate claim," and Section 115 required forum-selection clauses applying to internal corporate claims to be "consistent with applicable jurisdictional requirements." *Id.* at 720. According to the Seventh Circuit, Boeing's forum-selection clause was not consistent with Section 115's requirement because the clause violated the applicable jurisdictional requirement imposed by § 27(a), which gives federal courts exclusive jurisdiction over a § 14(a) claim. *Id*. Relying on the synopsis, *Seafarers* stated that "Section 115 does not

[20] Boeing's forum-selection clause provided in relevant part:

> With respect to any action arising out of any act or omission occurring after the adoption of this By-Law, 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 . . . any derivative action or proceeding brought on behalf of the Corporation . . . .

Seafarers, 23 F.4th at 718 (alterations in original).

authorize use of a forum-selection bylaw to avoid what should be exclusive federal jurisdiction over a case, particularly under the Exchange Act." *Id.* at 721. Rather, the Seventh Circuit explained, "[b]y eliminating federal jurisdiction over the [plaintiff]'s exclusively federal derivative claims, Boeing's forum bylaw forecloses suit in a federal court based on federal jurisdiction," and "[t]hat's exactly what Section 115 was 'not intended to authorize.'" *Id*. at 720 (quoting S.B. 75 (synopsis)). The Seventh Circuit rejected the argument that the forum-selection clause was authorized by Section 109(b), because it deemed that section to be superseded by the more specific provisions in Section 115, *id*. at 721–22, and held that *Salzberg* did not apply to claims brought under the Exchange Act, *id*. at 722. According to the Seventh Circuit, the statements in *Boilermakers* addressing "hypothetical situations where the challenged bylaws would operate" to preclude plaintiffs from bringing derivative § 14(a) actions made clear that *Boilermakers* did not "authorize enforcement of a forum-selection provision like the Boeing forum bylaw in a case like this one," *id.* at 723, and "that Delaware is not inclined to enable corporations to close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction," *id.* at 724.

As to federal law, the Seventh Circuit concluded that the ability to bring a derivative § 14(a) action was a non-waivable statutory right under the Exchange Act. *Id*. at 719, 725; *see also id*. at 728 (warning "against using choice-of-forum and choice-of-law clauses to attempt prospective waivers of federal statutory remedies"). The Seventh Circuit stated that enforcing Boeing's forum-selection clause would be "difficult to reconcile with [§] 29(a)" because the clause required the plaintiff to bring a derivative § 14(a) action in

the Delaware Court of Chancery, which lacked jurisdiction to hear it—and thus effectively "checkmate for defendants." *Id*. at 720. The Seventh Circuit also gave *Borak* an expansive reading, reasoning that enforcing Boeing's forum-selection clause would run contrary to "*Borak*'s recognition of derivative claims under [§] 14(a)." *Id*. at 728.

For the reasons we have explained above, we disagree with *Seafarers*'s interpretation of both state and federal law. First, the Seventh Circuit's analysis of Delaware law is flawed because the court failed to consider and apply *Salzberg*'s reasoning and conclusions. The Seventh Circuit ignored *Salzberg*'s statement that Section 115's reference to "internal corporate claims" does not include federal claims, and thus that Section 115 is "not implicated" by a forum-selection clause governing federal claims. 227 A.3d at 120 n.79. By failing to recognize *Salzberg*'s interpretation of "internal corporate claims," the Seventh Circuit mistakenly asserted that *Salzberg* would not "allow application of the forum bylaw to a case" requiring derivative actions to be brought in Delaware courts because "it would effectively bar [a] plaintiff from bringing its derivative claims under the [Exchange] Act in *any* forum." 23 F.4th at 722. To the contrary, as we have explained, *Salzberg* made clear that Section 115 has no application to actions brought under federal law. 227 A.3d at 120 n.79.

For the same reason, the Seventh Circuit erred in stating that "[n]othing in *Salzberg* suggests it would extend Section 109 . . . to allow application of the forum bylaw to a case like this one." *Seafarers*, 23 F.4th at 722. In fact, *Salzberg* stated that its prior cases had not limited the scope of Section 109(b). 227 A.3d at 122–23. Further, the Seventh Circuit failed to recognize *Salzberg*'s interpretation of Section 115 and Section 109(b) as being permissive statutes, rather than

restrictive statutes defining "the outer limit of what is permissible" or otherwise precluding federal claims. *Id.* at 124.

Salzberg also confirmed that *Boilermakers* held that a forum-selection bylaw is valid so long as it "regulate[s] *where* stockholders may file suit," and "plainly relate[s] to the 'business of the corporation[],' the 'conduct of [its] affairs,' and regulate[s] the 'rights and powers of [its] stockholders.'" *Id*. at 115 n.51 (quoting *Boilermakers*, 73 A.3d at 939, 950–52). Contrary to *Seafarers*, 23 F.4th at 722, *Salzberg*'s statements regarding the applicability of Section 109(b), 227 A.3d at 122–23, were not limited to Securities Act claims, but applied to any forum-selection clause, regardless of the type of federal claims it covered. The Seventh Circuit also erred in relying on statements in *Boilermakers* about a hypothetical situation involving a § 14(a) action as "signal[ing] clearly enough that Delaware law would not look kindly" on enforcement of the forum-selection clause at issue. *Seafarers*, 23 F.4th at 724. To the contrary, *Boilermakers* made clear that it would not "render [an] advisory opinion[] about hypothetical situations that may not occur," and that there was no "principled basis to complete the law school hypotheticals posed by the plaintiffs." 73 A.3d at 959.

Because the Seventh Circuit's reliance on Section 115 and *Boilermakers* to invalidate the forum-selection clause at issue runs contrary to the Delaware Supreme Court's reasoning in *Salzberg*, we reject it. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the state's highest court with respect to state law are binding on the federal courts.").

The Seventh Circuit's application of federal law was also mistaken. In stating that enforcing the bylaw at issue would serve as "checkmate for defendants" by preventing the plaintiff from bringing a derivative § 14(a) action in any forum, and thus effect an invalid waiver under § 29(a), *Seafarers* failed to recognize the availability of a direct § 14(a) action. 23 F.4th at 720. The *Seafarers* majority did not mention the possibility of a direct § 14(a) action, even though Judge Easterbrook's well-reasoned dissent pointed out this flaw, explaining that "[n]othing in Boeing's bylaw strips plaintiff, as a recipient of proxy materials, of the ability to file a direct § 14(a) action in federal court[,]" and therefore "it is hard to see how [plaintiff] has been deprived of a right to enforce § 14(a)." *Id.* at 729 (Easterbrook, J., dissenting).

The Seventh Circuit also misread *Borak* by implying that it empowers plaintiffs to bring "derivative actions asserting rights of a corporation harmed by a violation" of § 14(a). *Id.* at 719; *see also id.* at 728. In reaching this conclusion, the Seventh Circuit overlooked both the absence of Supreme Court support for such a policy in subsequent caselaw, as well as the post-*Borak* developments in the Supreme Court's jurisprudence described above. The Seventh Circuit did not consider the effect of Delaware law on the classification of a claim as direct or derivative, as required by *Burks* and *Kamen*, it made no mention of the oft-repeated Supreme Court instruction to construe implied private rights of action narrowly, and it failed to reckon with the impact of *Virginia Bankshares* on a corporation's ability to assert a derivative § 14(a) action. Accordingly, the Seventh Circuit's implication that *Borak* created a strong public policy of the federal forum to allow derivative § 14(a) actions lacks any persuasive support.

Finally, *Seafarers* erred by placing decisive weight on *Mitsubishi Motors*'s statement that a party cannot prospectively waive a federal statutory remedy as weighing against allowing forum-selection clauses to "foreclose entirely [a] plaintiff's derivative [§] 14(a) claims." 23 F.4th at 725. As we have explained, Congress did not give shareholders any statutory remedy in § 14(a), and in any event, a plaintiff may vindicate shareholder rights under § 14(a) by bringing the claim as a direct action in federal court.

Because *Seafarers* failed to apply *Salzberg* correctly, and did not consider the implications of the availability of a direct § 14(a) action, *Seafarers*'s analysis is flawed. We therefore decline to follow *Seafarers*.

IV

In conclusion, we hold that Gap's forum-selection clause is not void as an invalid waiver under § 29(a) nor unenforceable under *M/S Bremen* due to violation of the federal forum's strong public policy. We also hold that Gap's bylaw is not contrary to Delaware law. "We acknowledge that our decision creates a circuit split [with the Seventh Circuit], and we do not do this lightly." *In re Penrod*, 611 F.3d 1158, 1161 (9th Cir. 2010). Nonetheless, for the foregoing reasons, we affirm the district court's dismissal of Lee's case on forum non conveniens grounds.

AFFIRMED.

S.R. THOMAS, Circuit Judge, with whom MURGUIA, Chief Judge, and NGUYEN, FRIEDLAND, and MENDOZA, Circuit Judges, join, dissenting:

The Gap Inc.'s ("Gap") forum-selection bylaw requires that any derivative actions brought pursuant to the Securities Exchange Act of 1934 (the "Exchange Act") be adjudicated in the Delaware Court of Chancery. But state courts lack jurisdiction to hear Exchange Act claims, so the bylaw provision is a litigation bridge to nowhere, depriving shareholders of any forum in which to pursue derivative claims. The majority concludes that Gap's bylaw is both valid and enforceable. However, a judge-made federal policy in favor of enforcing forum-selection clauses cannot supersede the clear antiwaiver provision enacted by Congress in the Exchange Act, which voids such a provision. The majority's conclusion conflicts with the plain language of the Exchange Act. Therefore, for this and other reasons, I respectfully dissent.

I

The Exchange Act serves "to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 390 (2014) (citation omitted). Section 27(a) of the Exchange Act provides federal courts with exclusive jurisdiction over claims resulting from "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(a). The Supreme Court has stated that "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." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996).

Additionally, Section 29(a) of the Act contains a forceful antiwaiver provision that voids any private agreement endeavoring to waive compliance with the statute: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a).

"[T]he first question" is "whether § [29(a)] itself controls [Gap's] request to give effect to the parties' contractual choice of venue." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *see DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 961–65 (9th Cir.), *cert. denied*, 143 S. Ct. 536 (2022). Thus, because any analysis of a forum-selection clause's enforceability "presupposes a contractually valid forum-selection clause," *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 62 n.5 (2013), we must first determine whether Gap's bylaw is valid.

Contrary to the majority's conclusion, Gap's bylaw is invalid under federal law. The antiwaiver provision of the Exchange Act voids Gap's forum-selection bylaw because the bylaw deprives Plaintiff-Appellant Noelle Lee of the ability to bring her derivative claim under § 14(a) of the Exchange Act in any forum—thereby resulting in complete waiver of the claim.

A

The Supreme Court has held that the antiwaiver provision "prohibits waiver of the substantive obligations imposed by the Exchange Act." *Shearson/Am. Exp., Inc. v.*

McMahon, 482 U.S. 220, 228 (1987). An agreement waives substantive rights if it "weaken[s] [the parties'] ability to recover under the [Exchange] Act;" indeed, such an effect "is grounds for voiding the agreement under § 29(a)." *Id.* at 230–31 (citation omitted).

By rerouting Exchange Act claims to the Delaware Court of Chancery, a forum that lacks any power to adjudicate them, Gap's forum-selection clause does not merely "weaken" the substantive right to recover under the Act, but eliminates it altogether. Accordingly, enforcement of Gap's forum-selection clause deprives investors of "an adequate means of enforcing the provisions of the Exchange Act." *Id.* at 229.

Gap concedes that enforcing the forum-selection clause results in dismissal of all derivative claims. Thus, the forum-selection clause violates the antiwaiver provision by "defeat[ing] the claim[] entirely." *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) (noting "that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

The fact that the forum-selection clause eviscerates derivative actions should end the analysis under the Exchange Act's antiwaiver provision. However, Gap contends that its forum-selection clause does not violate any substantive obligations of the Exchange Act for two reasons: (1) Because Lee could theoretically bring a direct action, the Exchange Act's antiwaiver provision does not prohibit the

waiver of a derivative suit, and (2) judicially created preferences for enforcing forum-selection clauses trump the plain language of the Exchange Act's antiwaiver provision.

But Gap—and the majority—are wrong on both counts.

1

Gap's argument that its forum-selection bylaw does not waive compliance with the Exchange Act because Lee could bring a direct, rather than derivative, claim is contrary to the plain language of the Exchange Act and binding precedent.

First, the Exchange Act requirements are clear. The antiwaiver provision voids "*[a]ny* condition, stipulation, or provision" that serves "to waive compliance with *any* provision of this chapter." 15 U.S.C. § 78cc(a) (emphases added). The statute does not include the qualification "unless there are alternate remedies available." When the statutory language is plain, courts "have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States v. Temple*, 105 U.S. 97, 99 (1881); *see also United States v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002) ("[A] court should not read words into a statute that are not there."); *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (noting that the Supreme Court has instructed this Court that we lack the power to "read into the statute words not explicitly inserted by Congress"). There is no provision in the Exchange Act that limits the scope of the antiwaiver language.

Second, direct and derivative stockholder actions are distinct, with different purposes and different remedies. In a direct action, the plaintiff shareholder—on behalf of herself and typically a class of shareholders—seeks damages,

usually as compensation for loss in stock value, based on securities law violations, fraud, or other causes of action. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 263–65 (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 Indus. 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.

Direct and derivative suits are not interchangeable: The derivative suit was "[d]evised as a suit in equity . . . 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 v. Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991) (internal quotation marks and citation omitted). Under Delaware law, the determination of 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 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).

Perhaps, in a sense, every injury to a corporation also injures the shareholders, at least to the extent that it undermines the corporation's business and reduces its value. But Delaware law identifies the key question for direct actions as "whether the stockholder has demonstrated that he or she has suffered an injury that is not dependent on an injury to the corporation." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1263 (Del. 2021). And unlike in direct suits, the remedies available through derivative

actions, such as corporate-governance reforms and any payment, "flow[] only to the corporation." *Tooley*, 845 A.2d at 1036.

Derivative suits provide an important and distinct avenue for holding officers and directors accountable for violations of federal law, and future challengers may be able to assert only derivative claims because of the type of harm at issue. In such cases, Gap's forum-selection clause would "be tantamount to a denial of private relief." *J.I. Case Co. v. Borak*, 377 U.S 426, 432 (1964). Here, Lee seeks to "protect the interests of the corporation from the misfeasance and malfeasance of faithless directors and managers." *Kamen*, 500 U.S. at 95 (internal quotation marks and citation omitted). That goal cannot be achieved through a direct action. Lee cannot "effectively . . . vindicate [her] statutory cause of action" in the bylaw's forum (i.e., the Delaware Court of Chancery) because that forum lacks jurisdiction over her § 14(a) claim. *McMahon*, 482 U.S. at 240 (citation omitted).[1]

Unlike the plaintiffs in *McMahon*, who retained the right to assert their Exchange Act claims in arbitration, Lee faces a "consequential restriction on [her] substantive right[]" to bring a derivative § 14(a) claim, *id.* at 232, which *Borak* recognized was vital to "effective . . . enforcement" of the

[1] The majority suggests that forum-selection clauses such as Gap's "functionally require[] the use of a direct action to enforce" § 14(a), Op. 20, implying that all § 14(a) claims must be brought as direct actions, and any future derivative § 14(a) actions can be foreclosed altogether. If true, this assertion would violate the Exchange Act's antiwaiver provision because the right to enforce § 14(a) violations "exists as to both derivative and direct causes." *J.I. Case Co. v. Borak*, 377 U.S 426, 431 (1964).

Exchange Act's proxy requirements, 377 U.S. at 432. Thus, because the bylaw's designated forum is "inadequate to enforce the statutory rights created by [the Act]," *McMahon*, 420 U.S. at 229, the bylaw's complete waiver of derivative actions under the Exchange Act violates Section 29(a).[2]

Third, Gap is incorrect that the forum-selection clause's waiver of Lee's *right to sue* under the Exchange Act falls outside the antiwaiver provision because it does not waive Gap's duty to comply with Rule 14a-9 or Delaware law. *Borak* implied a private right of action precisely because those substantive duties are inextricably linked to the right to judicial enforcement. *See* 377 U.S. at 431–32. In *Borak*, the Supreme Court affirmed both the existence and significance of a private right of action to bring a derivative claim for a violation of § 14(a). *Id.* at 432. *Borak*'s implied right of derivative action remains good law.

2

The argument that a judge-made policy in favor of forum-selection clauses supersedes the Exchange Act's antiwaiver provision fares no better. We have been cautioned against judicial "decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution." *Wyeth v. Levine*, 555 U.S. 555, 604

[2] If the majority is correct that, under Delaware law, Lee's action would be re-categorized as a direct action because it "claim[s] that a duty of disclosure violation impaired the stockholders' right to cast an informed vote," *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 772 (Del. 2006); *see* Op. 15-18, then the forum-selection bylaw has no effect because, as the majority notes, the bylaw "has no impact on direct actions." Op. 18. Thus, if true, the lawsuit could not be dismissed and must remain in federal court. *See* 15 U.S.C. § 78aa(a).

(2009) (Thomas, J., concurring). At its core, the theory that judicially created policies always supersede clear statutory language is not viable.

Gap relies on *McMahon* for the proposition that the Supreme Court has permitted private agreements that eliminate one or more of the procedural mechanisms available for enforcing the Exchange Act, so long as other mechanisms remain viable. In *McMahon*, the Court approved a contract that required arbitration of private Exchange Act claims, blocking shareholders from bringing those claims in court. The Court emphasized that arbitration there "provide[d] an adequate means ofin enforcing the provisions of the Exchange Act." *McMahon*, 482 U.S. at 229. Accordingly, the Court indicated that the antiwaiver provision would be violated "only" in the case where arbitration was "inadequate to protect the substantive rights at issue." *Id*.

But Gap's discussion of *McMahon* elides two critical components of the Court's analysis, which rested on its conclusions that (1) the Federal Arbitration Act ("FAA") authorizes agreements to arbitrate Exchange Act and other statutory claims, *id.* at 225–27, and (2) 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.* at 228, so long as "arbitration is adequate to vindicate Exchange Act rights," *id.* at 238. In other words, arbitration agreements generally do not violate Section 29(a) because they are an exercise of "a broader right to select the forum for resolving disputes," rather than a means of waiving claims altogether. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483 (1989).

By contrast, Gap's forum-selection bylaw accomplishes the opposite: rather than facilitating the resolution of Exchange Act disputes, it forecloses all derivative claims under the Act. *McMahon* cannot be construed to hold that a bylaw relegating Exchange Act claims to a forum that lacks authority to adjudicate them is enforceable. Instead, under *McMahon*, such a bylaw violates Section 29(a) because the specified forum is "inadequate to enforce the statutory rights created by [the Act]." 482 U.S. at 228–29.

Gap also leans heavily on *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018), and *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (en banc), as demonstrating that the Exchange Act's antiwaiver provision cannot void Gap's forum-selection bylaw. But *Sun* involved state-law claims, not federal statutory rights. Accordingly, its overbroad language—namely, 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," *Sun*, 901 F.3d at 1089–90—is dicta confined to its facts. Moreover, enforcement of the forum-selection clause there did not result in the waiver of the substantive state-law rights because the court conditioned the dismissal on the requirement that the defendants "could not argue that California securities laws do not apply to the disputed transaction," and defendants also "committed to refraining from raising any argument" that Washington securities laws were inapplicable in California. *Id.* at 1085–86, 1092 (internal quotation marks omitted). Specifically, the agreement 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.

In *Richards*, our 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. Unlike *Richards*, which involved a forum-selection clause in an international agreement that was negotiated at arm's length by sophisticated parties, Gap's bylaw applies to domestic transactions and is not the product of negotiation. *See Seafarers*, 23 F.4th at 726–27.

Finally, neither *Atlantic Marine* nor *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), enforced a forum-selection clause that would have required the plaintiff to surrender a federal statutory claim. *Atlantic Marine* concerned a clause requiring transfer between federal courts in different states, which the plaintiff resisted on grounds of convenience and the relative expertise of federal judges in different states with respect to state-law claims. *See* 571 U.S. at 67–68. *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.

Moreover, both cases consistently emphasized the importance of consent. *Atlantic Marine*, for instance, 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." 571 U.S. at 63. The *Atlantic Marine* Court underscored that "[t]he

'enforcement of valid forum-selection clauses, *bargained for by the parties*, protects their legitimate expectations and furthers vital interests of the justice system.'" *Id.* (emphasis added) (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)). Similarly, *Bremen* stressed 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.

The present case differs from *Atlantic Marine* and *Bremen* in three important respects. The first is that the plaintiffs in those cases primarily opposed the selected forum because of concerns related to convenience for the plaintiff and the costs of litigation. The forum-selection bylaw here, by contrast, presents the concern that such bylaws enable a corporation to opt out of substantive federal claims by selecting a forum in which such claims cannot be brought. Second, neither case involved a forum-selection clause that had been inserted via corporate bylaw. 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 terms not to their liking. They did not agree to the forum-selection provision "in exchange for other binding promises by the defendant," nor does the provision represent "their legitimate expectations." *Atlantic Marine*, 571 U.S. at 63 (citation omitted). And third, the stakes are raised when a forum-selection clause operates to bar a federal statutory claim. Under the Supremacy Clause, the plaintiff's right to pursue such a claim supersedes other policy considerations. *See* U.S. Const. art. VI, cl. 2.

In sum, the cases cited by Gap do not control the outcome in this case because none involved the complete, nonconsensual waiver of an exclusive federal statutory claim.

II

Gap's forum-selection bylaw is not only invalid; it is also unenforceable because it violates a strong public policy of the federal forum. The Supreme Court has held that a forum-selection clause is generally enforceable under the *forum non conveniens* doctrine unless there are "extraordinary circumstances unrelated to the convenience of the parties" that "clearly disfavor a transfer." *Atlantic Marine*, 571 U.S. at 52. As relevant here, a forum-selection clause is unenforceable where "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15; *see Sun*, 901 F.3d at 1088.

Lee points to two relevant public policies of the federal forum: (A) Section 29(a)'s antiwaiver requirement, 15 U.S.C. § 78cc(a), and (B) Section 27(a)'s exclusive-jurisdiction provision, 15 U.S.C. § 78aa(a), which precludes transfer to a state forum.[3]

[3] Amici in support of Lee identify an additional federal statutory policy:§ 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.'" And *Borak*'s implied private right of action generally reflects a judgment that such "remedy is necessary or at least helpful to the accomplishment of the statutory purpose." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 & n.35 (1979) (citing *Borak* as an example).

A

The Exchange Act's antiwaiver provision announces a strong public policy of the federal forum. The majority's extension of *Sun* and *Richards* to domestic investments and state-law remedies in this context "undermine[s] 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. Both federal securities acts contain antiwaiver provisions that prevent parties from opting out of the federal laws in favor of state law, regardless of how similar or strong the state-law rights and remedies are. *See* 15 U.S.C. §§ 77n, 78cc(a).

As the Seventh Circuit held in *Seafarers*, "[n]on-waiver is woven into the public policy of the federal securities laws because it is the express statutory law." 23 F.4th at 727. "And that law is binding," particularly where there "are no countervailing international policy interests at stake." *Id.* Here, enforcement of Gap's forum-selection clause, which points to a domestic forum, thwarts federal law by blocking any adjudication of derivative § 14(a) claims.

The majority cites *Sun*, which construed *Richards* as holding that "an antiwaiver provision, without more, does not supersede the strong federal policy of enforcing forum-selection clauses." 901 F.3d at 1090; *cf. 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" based on the contrived distinction that the Idaho statute actually uses the words "public policy"). *Sun* also stated that the "strong federal policy in favor of enforcing forum-selection clauses would supersede antiwaiver provisions in state statutes as well as

federal statutes." 901 F.3d at 1090. But these "holdings" are more accurately characterized as dicta because the *Sun* court did not have before it a conflict between an antiwaiver provision and a forum-selection clause. *See* Op. 37–38 n.17. Nor did it discuss how a federal common-law policy favoring forum-selection clauses could "supersede" a contrary federal statutory imperative. *Id.*

Unlike *McMahon*, which required the Supreme Court to reconcile the FAA's "federal policy favoring arbitration" and the Exchange Act's antiwaiver provision, 482 U.S. at 226 (citation omitted), the "strong federal policy in favor of enforcing forum-selection clauses" articulated in *Sun*, 901 F.3d at 1090, does not derive from a competing federal statute. Instead, it is a matter of federal common law. That judge-made policy must yield—in the absence of comity principles favoring enforcement—when it contravenes a federal statutory right. *See* U.S. Const. Art. VI, cl. 2; *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) ("[I]t is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.").

The Supreme Court's decision in *Borak* provides strong support for the primacy of the Exchange Act over federal common law. *Borak* emphasized that "[p]rivate enforcement of the proxy rules" under § 14(a) supplies "a necessary supplement to [SEC] action." 377 U.S. at 432. In *Borak*, the question presented was whether there was an implied right of action under § 14(a) and whether that right should extend to derivative actions. *Id.* at 431–35. The Supreme Court affirmed that there exists a private right of action to enforce § 14(a) violations and that the right "exists as to both derivative and direct causes." *Id.* at 431. *Borak* underscores the Exchange Act's strong public policy of an

exclusive federal forum in which to litigate Exchange Act claims.

The majority goes to great lengths to assert that *Borak* is no longer good law. It claims that *Borak* was not well reasoned, conflicted with Supreme Court precedent on derivative actions, and was not well explained. *See* Op. 24–35. But the majority also concedes that "[n]o Supreme Court decision since *Borak* has expressly addressed this issue." Op. 29. Criticisms of a Supreme Court decision do not mean that the decision is not binding on us. Such an assertion would fly in the face of the rule of law and upend the supremacy of Supreme Court decisions. We are not free to overrule Supreme Court precedent. *Borak* has not been overruled by the Supreme Court. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1104 n.11 (1991) (stating that "[t]he object of [the Court's] enquiry does not extend further to question the holding of [*Borak*]"). It remains good law and is binding on us.

B

The Exchange Act's exclusive-jurisdiction provision indicates a legislative concern for greater federal control over the adjudication of particular federal claims. *See Matsushita*, 516 U.S. at 383 (holding that the Exchange Act's exclusive-jurisdiction provision sought "to achieve greater uniformity of construction and more effective and expert application of that law" (citation omitted)); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483–84 (1981) ("The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include . . . the assumed greater hospitality of federal courts to peculiarly federal claims."). That concern is amplified by the presence of the Exchange Act's antiwaiver provision.

The joint operation of the Exchange Act's exclusive-jurisdiction provision, which precludes state courts from hearing Exchange Act claims, and that Act's antiwaiver provision, which invalidates any agreement to waive an Exchange Act claim, reflects a strong public policy of ensuring federal control over Exchange Act claims. Enforcing a forum-selection clause such as Gap's would ensure that no federal court could ever adjudicate the merits of a derivative Section 14(a) claim brought against a company whose bylaws include such a clause. This result would be inconsistent with ensuring greater federal control over the adjudication of such claims—a goal Congress communicated by including both an exclusive-jurisdiction provision and an antiwaiver provision in the Exchange Act. Thus, because bylaws such as Gap's have the effect of transforming Exchange Act derivative actions into state-law derivative actions and depriving plaintiffs of any forum for such actions, enforcement of Gap's bylaw contravenes a strong federal public policy.

III

In short, the Exchange Act voids Gap's forum-selection bylaw, and it is rendered unenforceable by the strong public policy expressed by Congress in the Exchange Act's antiwaiver and exclusive-jurisdiction provisions. The majority's contrary conclusion renders the Exchange Act's protections meaningless, effectively prohibiting Lee's properly asserted derivative claim from being adjudicated in any forum. That was not the intent of Congress.

Therefore, I respectfully dissent.

ABANDONED AND SPLIT BUT NEVER REVERSED: *BORAK* AND FEDERAL COURT DERIVATIVE LITIGATION

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Abstract

J.I. Case Company v. Borak is perhaps unique in contemporary Supreme Court jurisprudence. Although the Court has "abandoned" the 1964 precedent, *Borak* has never been formally reversed, and it continues to generate Circuit splits, most recently concerning the enforceability of a forum selection clause. The split boils down to a basic legal question: may a corporation cutback against wasteful, duplicative shareholder litigation through a forum selection provision in its governing documents, specifically one that requires all derivative lawsuits to be brought in the state courts where the corporation is chartered? Because it would preclude derivative shareholder lawsuits asserting the federal private right of action implied by *Borak*, the Seventh Circuit ruled that such a provision is unenforceable, as a matter of both federal securities law and the state corporate law of Delaware. Only five months later, the Ninth Circuit, evaluating an identical forum provision, disagreed.

The resulting circuit split offers an opportunity to reexamine *Borak* in light of six subsequent decades of Supreme Court precedent. A sober assessment of the Court's post-*Borak* decisions suggests that at minimum, a corporate forum provision waiving derivative *Borak* claims is valid and enforceable. More forcefully, it suggests that the derivative standing recognized in *Borak* does not survive the Court's subsequent decisions. Ultimately, it suggests that should the Supreme Court ever resolve the circuit split, it might well take the opportunity to revisit *Borak* and squarely overrule it.

In all cases, it also suggests that the Seventh Circuit's reliance on *Borak* was clearly mistaken. Where shareholders are able to bring (i) the same *Borak* claim as a direct or class action to recover any damage they suffered personally and (ii) a derivative action under state corporate law to recover any damage suffered by the corporation, then a third lawsuit, making a derivative *Borak* claim, does nothing to benefit the corporation, its shareholders, or society more broadly.

Contents

I. INTRODUCTION

J.I. Case Company v. Borak[1] is perhaps unique in contemporary Supreme Court jurisprudence. Although the Court has "abandoned" the 1964 precedent,[2] *Borak* has never been formally reversed,[3] and it continues to generate Circuit splits.[4]

Borak held that shareholders enjoy a private right of action under Section 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act").[5] Section 14(a),[6] as implemented by Rule 14a-9,[7] broadly prohibits any material misrepresentation or omission in connection with the solicitation of proxy

[1] 377 U.S. 426 (1964).

[2] *See* Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (describing *Borak* as part of an "acien regime" that the Court has subsequently "abandoned" and "not returned to since"); Correctional Services Corp. v. Malesko 534 U.S. 61, 67 n.3, (2001) ("Just last Term it was noted that we 'abandoned' the view of *Borak* decades ago….").

[3] C. Steven Bradford, *The Possible Future of Private Rights of Action for Proxy Fraud: The Parallel Between Borak and Wilko*, 70 NEB. L. REV. 306, 308 (1991) ("[T]he Court has treated *Borak* as a historical anomaly, regretfully wrong but nevertheless valid."); Riley T. Svikhart, *Dead Precedents*, 93 NOTRE DAME L. REV. ONLINE 1, 3-4 (2017) ("*Borak* has never been squarely overruled…. On the contrary, it has been left to wither on the precedential vine by a long line of cases that have signaled its fate loudly and clearly.").

[4] Tasked with defining the contours of the private right of action created by *Borak*, the lower courts have diverged on a number of issues, including (i) whether liability under Section 14(a) requires scienter or mere negligence, *see infra* note 73, (ii) whether the particularized pleading standards of the Private Securities Litigation Reform Act apply to negligence-based claims brought under Section 14(a), *see infra* note 75, (iii) whether a corporation whose shareholder are solicited has standing under Section 14(a), *see infra* note 308, and (iv) whether shareholders' standing under Section 14(a) extends to derivative claims, *see infra* note 327-328.

[5] *Id.* at 432.

[6] 15 U.S.C. § 78n(a) ("It shall be unlawful for any person, …. in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit … any proxy or consent or authorization in respect of any security….").

[7] 17 CFR § 240.14a-9 ("No solicitation … shall be made by means of any proxy statement… containing any statement which … is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading….").

votes from public company shareholders.[8] However, neither the statutory provision nor its implementing rule expressly empowers shareholders to enforce the ban on false or misleading proxy solicitations.[9] Nonetheless, *Borak* held a private right of action is implied.[10] Importantly, *Borak* explained that a shareholder lawsuit under Section 14(a) may be brought as either a *direct* action, on behalf of individual shareholders, or a *derivative* action, on behalf of the corporation.[11] As the *Borak* Court stridently asserted,

> The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done to the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief.[12]

[8] As the Court has explained, "the purpose of [Section] 14(a) is to prevent [a company's incumbent] management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.. *Borak*, 377 U.S. at 431. "[B]y ensuring that proxies would be solicited with 'explanation to … stockholder[s] of the real nature of the questions for which authority to cast [their] vote is sought" Section 14(a) thus "promote[s] 'the free exercise of the voting rights of stockholders." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970); *see also id.* at 382 (explaining that Section 14(a) reflect "the congressional purpose of ensuring full and fair disclosure to shareholders"); *id.* at 385 (explaining that Section 14(a) implements a "congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions").

[9] *Mills*, 396 U.S. at 391 ("The [Exchange] Act makes no provision for private recovery for a violation of s 14(a)…."); *Borak*, 377 U.S. at 432 ("[The] language [of Section 14(a)] makes no specific reference to a private right of action.").

[10] *Borak*, 377 U.S. at 432.

[11] *Id.* at 431 ("[W]e believe that a right of action exists as to both derivative and direct causes [under Section 14(a)].").

[12] *Id.* at 432.

Suffice it to say that *Borak* has not gracefully aged.[13] In the six decades since, the Court has repeatedly distanced itself from *Borak*, even making it explicit that the case would be decided differently today.[14] Still, despite chipping away at its doctrinal foundations, the Court has never had the occasion to expressly overrule the beleaguered precedent.[15]

Surprisingly then, despite its "derelict" status,[16] the Seventh Circuit Court of Appeals recently relied on *Borak* in ruling that a corporation may not cutback against wasteful, frequently meritless shareholder litigation through a forum selection provision in its governing documents, specifically one that requires all derivative lawsuits to be brought in the state courts where the corporation is chartered. In *Seafarers Pension Plan v. Bradway*, the Seventh Circuit reasoned that because federal courts enjoy exclusive jurisdiction over all Exchange Act claims, limiting derivative lawsuits to state court would effectively bar shareholders from bringing a derivative *Borak* claim.[17] Consequently, the Seventh Circuit held that the enforcement of a corporate forum provision to preclude derivative *Borak* claims would violate shareholders' rights under the Exchange Act and the underlying state corporate law authorizing forum provisions.[18]

Only five months later, a Ninth Circuit panel in *Lee v. Fisher*[19] arrived at the opposite conclusion. Evaluating an identical corporate forum provision,

[13] *See*, *e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 469 n.5 (2008) (Thomas, J., dissenting) (describing *Borak* as an "erroneous precedent" whose holding the Court has "refused to extend" and logic has been "abandoned"); Cannon v. Univ. of Chicago, 441 U.S. 677, 735-36 (1979) (Powell, J., dissenting) (describing *Borak* as an "aberrant" decision, "unprecedented and incomprehensible as a matter of policy").

[14] *See infra* Part IV.A.

[15] *See* Bradford, *supra* note 3, at 320 ("*Borak*'s holding rests only on the two rationales thoroughly discredited in [*Touche Ross & Co. v. Redington*].... In short, *Borak's* holding has no basis in current law, but it has not yet been overruled.").

[16] Seafarers Pension Plan v. Bradway, 23 F.4th 714, 730 (7th Cir. 2022) (Easterbrook, J., dissenting).

[17] *See id*. 717-18.

[18] *See id*. 718-28.

[19] 34 F.4th 777 (9th Cir. 2022).

Lee pointed to federal law's strong presumption in favor of enforcing contractual forum selection clauses.[20] That presumption means that a corporate forum provision is enforceable as applied to *Borak* claims, the *Lee* court reasoned, even if enforcement would effectively preclude shareholders from bringing such claims in a derivative capacity.[21]

While *Lee* is pending *en banc* review, it seems certain that the legal questions presented in both *Lee* and *Seafarers* will be raised in other circuits. Those legal questions, in turn, point to a more basic policy question: whose interest are served by preserving derivative *Borak* claims? In practice, it is seldom the interests of a corporation's shareholders,[22] the intended beneficiary of federal proxy regulation. Instead, *Borak* suits, like other types of representative shareholder litigation, are dominated by plaintiff's attorneys, frequently bringing strike suits that can be settled for nuisance value and, of course, a payout of the attorney's fees.[23]

[20] *See id*. at 780-81 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) and Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49 (2013)).

[21] *See id*. at 781-82.

[22] *See* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1803 (2010) [hereinafter Erickson, *Corporate Governance*] ("Mounting empirical evidence reveals that the vast majority of shareholder derivative suits do not benefit the corporations on whose behalf the suits are brought.... The chief beneficiaries … are law firms, which receive hundreds of thousands or even millions of dollars in attorneys' fees.").

[23] *See, e.g.*, Joy v. North, 692 F.2d 880, 887 (2d Cir. 1982) ("The real incentive to bring derivative actions is usually not the hope of return to the corporation but the hope of handsome fees to be recovered by plaintiffs' counsel."); *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 891–92 (Del. Ch. 2016) ("[F]ar too often [shareholder] litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints . . . and settling quickly on terms that yield no monetary compensation to the stockholders"); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–78 (1986) ("[I]n the context of class and derivative actions, it is well understood that the actual client generally has only a nominal stake in the outcome of the litigation. Empirical studies have shown this, and courts, when dissatisfied with the performance of plaintiff's attorneys, are prone to emphasize that the plaintiff's attorney has no 'true' identifiable client."); Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 WASH. & LEE L. REV. 1131, 1138-40 (2020) [hereinafter Erickson, *Lost Lessons*] ("Shareholder litigation … is primarily

In recent years, as the state courts of Delaware—the jurisdiction in which most public companies are incorporated—have clamped down on meritless shareholder lawsuits targeting public corporations, plaintiff's attorneys have increasingly sought refuge in the federal courts, relying on *Borak* in particular.[24] Indeed, the lawsuits in both *Seafarers* and *Lee* exemplify this trend.

In *Seafarers*, the plaintiff's derivative suit alleged failures by the board of the aerospace manufacturer, The Boeing Company, in overseeing the design and production of the company's 737 MAX airliner.[25] In *Lee*, the plaintiff's lawsuit lodged a similar derivative complaint, alleging failures by the board of the apparel retailer, The Gap, to improve racial diversity within the company's management ranks.[26] Thus, in both cases, the essence of the plaintiffs' claims was that corporate harm was caused by the boards' mismanagement. But rather than litigate a state law breach of fiduciary duty claim in the courts of Delaware, where both Boeing and The Gap happen to be incorporated, both suits repackage the allegations into federal proxy claims under Section 14(a).[27] Because federal courts have exclusive jurisdiction over all Exchange Act claims,[28] doing so enables the suit to sidestep the scrutiny of the Delaware bench, whose specialized judges have

representative litigation, which means … plaintiffs' attorneys often hav[e] a far greater investment in the litigation than the representative plaintiffs…. Without significant control by their clients, plaintiffs' attorneys can make decisions that benefit themselves at the expense of these clients….”); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 148 (2004) (“Plaintiffs' lawyers are the dominant players in representative shareholder litigation, whether derivative actions, securities fraud class actions, or state acquisition-oriented class actions.”).

[24] *See infra* Part II.B.

[25] *See* Complaint at 6-14, Seafarers Pension Plan v. Bradway, 2020 WL 3246326 (N.D. Ill. June 8, 2020), 19-cv-08095 (summarizing the complaint).

[26] *See* Complaint at 4-12, Lee v. Fisher, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021), 20-cv-06163-SK (summarizing the complaint).

[27] *See* Complaint at 215-17, Seafarers Pension Plan v. Bradway, 2020 WL 3246326 (N.D. Ill. June 8, 2020), 19-cv-08095 (alleging violations of Section 14(a)); Complaint at 81-83, Lee v. Fisher, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021), 20-cv-06163-SK (same).

[28] *See* 15 U.S.C. § 78aa(a).

long experience in dispatching meritless shareholder litigation.[29] The result has been a new wave of dubious attorney-driven suits in federal courts, replacing the wave that the Delaware courts only recently abated.[30]

Given this context, policy considerations caution a healthy skepticism against *Borak* claims under Section 14(a), particularly where such claims are brought as a derivative action against a corporation's management.[31] Such skepticism only reinforces this Article's principal legal claim: nothing in either state corporate law or federal securities law prohibits a corporate forum provision that would preclude derivative *Borak* claims. As such, *Seafarers* was wrongly decided and should be disregarded. *Lee* was correct and should be affirmed *en banc* by the Ninth Circuit. And it should be followed by other circuits.

First, applying the corporate law of Delaware, a corporate forum provision governing derivative *Borak* claims is valid and lawful.[32] The Delaware Supreme Court's recent decision in *Salzberg v. Sciabacucchi*[33] makes this point clear.[34] Conceiving of a corporation's charter and bylaws as a contract between the corporation and its shareholders, *Salzberg* held that a forum provision in the corporate contract is enforceable against shareholders, even if the provision governs a federal securities law claim.[35] Moreover, the

[29] *See infra* notes 43, 44, 70 and accompanying text.

[30] *See infra* Part II.B.

[31] *See* Jessica Erickson, *The (Un)changing Derivative Suit*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 58, 58 (Sean Griffith, et al. eds., 2018) ("Over seventy years of studies have consistently found that derivative suits face deep and systematic problems… Few … end with monetary settlements. Instead, most derivative suits end with the plaintiff corporation agreeing to make fairly insignificant changes to its corporate governance practices…. Despite their modest benefits, these suits remain profitable for plaintiffs' attorneys…."); Jessica M. Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49, 54 (2011) [hereinafter Erickson, *Overlitigating*] (providing empirical evidence).

[32] *See infra* Part III.

[33] 227 A.3d 102 (Del. 2020).

[34] *See infra* Part III.A.

[35] *See infra* Part III.B.

equitable constraints that *Salzberg* recognized might limit the enforceability of corporate forum provisions are inapplicable to a provision that waives derivative *Borak* claims. After all, such a provision would still permit shareholders to bring direct *Borak* claims in federal court, individually or as a class action, as well as derivative state corporate law claims in the courts of Delaware.[36] Given these alternatives, there is no equitable reason to deny the enforceability of an otherwise lawful forum provision precluding derivative *Borak* claims.

Second, as a matter of federal securities law, even assuming that the implied right of action created by *Borak* in 1964 survives as good law today, the Supreme Court's subsequent precedents have discredited the notion that right can be brought as a derivative claim.[37] Instead, those precedents establish that *Borak* must be narrowly interpreted,[38] that the right of action implied by *Borak* belongs to only shareholders,[39] and that shareholder standing to assert that right is limited to direct, not derivative, actions.[40] In each instance, the implication is the same: A corporate forum provision precluding derivative actions in federal courts does not violate the rights of shareholders under Section 14(a).

Thus, the present circuit split offers an opportunity to reexamine *Borak* in light of the subsequent six decades of Supreme Court precedent. A sober assessment of the Court's post-*Borak* decisions suggests that at minimum, a corporate forum provision waiving derivative *Borak* claims is valid and enforceable, notwithstanding the Exchange Act's anti-waiver provision. More forcefully, it suggests that the derivative standing recognized in *Borak* does not survive the Court's subsequent decisions. Ultimately, it suggests that should the Supreme Court ever resolve the circuit split, it might well take the opportunity to revisit *Borak* and squarely overrule it.

[36] *See infra* Part III.C.

[37] *See infra* Part IV.B.

[38] *See infra* Part IV.B.1

[39] *See infra* Part IV.B.2

[40] *See infra* Part IV.B.3.

In all cases, it also suggests that the Seventh Circuit's reliance on *Borak* was fundamentally mistaken. Where shareholders are able to bring (i) the same *Borak* claim as a direct or class action to recover any damage they suffered personally and (ii) a derivative action under state corporate law to recover any damage suffered by the corporation, then a third lawsuit, making a derivative *Borak* claim, does nothing to benefit the corporation, its shareholders, or society more broadly. Instead, it only opens the door to wasteful, attorney-driven litigation.

The remainder of this Article proceeds in four parts. Part II describes the context in which corporate forum provisions first emerged and the divergent treatment of the identical forum provisions at issue in *Seafarers* and *Lee*. Given this context, Parts III and IV then evaluate those decisions against the relevant state corporate law and federal securities law.

Part III demonstrates that the Seventh Circuit in *Seafarers* erred in its application of Delaware law governing corporate forum provisions. Under the Delaware Supreme Court's *Salzberg* decision, a forum provision precluding derivative *Borak* claims is both valid and enforceable against shareholders.

Part IV then turns to the federal law issues and makes two observations. First, the Supreme Court's post-*Borak* precedents has undercut the notion that *Borak* claims may be brought as a derivative action. Second, even if derivative *Borak* claims survive the post-*Borak* precedents, those precedents caution that *Borak* must be narrowly interpreted. In either case, the Court's post-*Borak* decisions mean that a corporate forum provision waiving derivative *Borak* claims does not run afoul of the Exchange Act's anti-waiver provision.

Finally, Part V offers a brief conclusion.

II. THE CIRCUIT SPLIT OVER CORPORATE FORUM PROVISIONS

The fact that a circuit split concerning corporate forum provisions has only now surfaced reflects, in part, the novelty of such provisions. Although commercial and consumer contracts have long included forum selection clauses, stipulating the forum in which any dispute between the contract

parties must be litigated, the use of such clauses in a corporation's governing documents is a relatively recent innovation.[41]

Part A describes the context in which corporate forum provisions first emerged. Part B then connects that emergence to the recent surge in shareholder lawsuits in federal courts making *Borak* claims. Finally, Part C explains the divergent treatment of corporate forum provisions as applied to *Borak* claims by the Seventh and Ninth Circuits.

A. The Rise of Corporate Forum Provisions

Corporate forum provisions emerged only in the last decade as a response to the proliferation of meritless shareholder lawsuits targeting Delaware corporations, but brought by enterprising plaintiff's lawyers in courts outside of Delaware.[42] Although these lawsuits asserted Delaware corporate law claims, plaintiff's attorneys aimed to avoid the perceived hostility of the Delaware courts by filing suit out-of-state.[43] Bringing suit out-of-state, in a

[41] *See* Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 486, 487 (2016).

[42] *See* Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 373–78 (2012) (describing corporate forum selection provisions as a response to the migration of lawsuits out of Delaware); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1665–66 (2016) (same); *see also* John Armour, et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1353-1364 (2012) (documenting the migration of lawsuits out of Delaware and offering reasons for the migration); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 480-483 (2014) (documenting the prevalence of lawsuits filed outside of Delaware).

[43] *See* Armour, et al., *supra* note 42, at 1367-70 (identifying "the Delaware courts' increasingly skeptical view of the plaintiffs' bar" as a primary cause of "the out-of-Delaware [litigation] trend"); Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 340-41 (2013) (describing the perceived hostility of Delaware courts against the plaintiff's bar); Andrew Holt, *Protecting Delaware Corporate Law: Section 115 and Its Underlying Ramifications*, 5 AM. U. BUS. L. REV. 209, 220 (2016) ("Plaintiffs' lawyers know that a claim … that might otherwise be dismissed by the [Delaware] Court of Chancery may gain traction in a non-Delaware forum."); Myers, *supra* note 42, at 494 ("Delaware courts have been accused of hostility toward shareholder claims, and pressing a claim in courts that are more hospitable may make the claims more valuable…."); Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 143 (2011) ("The out-of-Delaware litigation strategy appears to be, first, an effort by plaintiffs' counsel to

court unfamiliar with the corporate law of Delaware, could increase leverage over corporate defendants to extract a nuisance value settlement.[44] Worse yet, corporate defendants frequently faced multiple lawsuits making essentially identical allegations, but filed in different jurisdictions by competing plaintiff's lawyers, each seeking to wrest control of the litigation and a piece of any settlement.[45] According to judicial and academic assessments, the resulting dynamic principally benefitted the plaintiff's bar at the expense of corporate defendants and, ultimately, shareholders, whose interest the plaintiff's bar are purportedly protecting.[46]

skirt attempts by the Delaware judiciary to more closely monitor agency costs associated with shareholder lawsuits….").

[44] *See* Armour, et al., *supra* note 42, at 1365 (quoting a practitioner's perspective that "corporate lawsuits have 'greater settlement value outside of Delaware' due to greater variation in possible outcomes"); Grundfest & Savelle, *supra* note 43, 342 (describing the plaintiff bar's "desire to secure a tactical advantage . . . by having a case resolved before a [non-Delaware] judge less familiar with the relevant law so as to generate increased delay or uncertainty that can be used to gain leverage in settlement negotiations"); Holt, *supra* note 43, at 220 ("One of the primary reasons for filing outside of Delaware—even when a corporation is incorporated in Delaware—is to avoid the experienced corporate oversight of the [Delaware] Court of Chancery. Thus, a foreign court unfamiliar with Delaware law may permit a plaintiff's case to continue even though it would have been tossed out by an experienced corporate law judge in Delaware."); Myers, *supra* note 42, at 495 ("An inexperienced court might … be more likely to approve a large fee award or misapply incorporation state law….These effects would increase the value of the claims to a plaintiff's attorney."); Quinn, *supra* 43, at 145 ("[T]he prospect that a state court judge unfamiliar with the application of Delaware's corporate code may fail to dismiss weak claims at an early stage of the litigation creates potential settlement value for plaintiff counsel.").

[45] *See, e.g.*, *Boilermakers* Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 943-44 (Del. Ch. 2013) (describing the growing problem of multi-forum intra-corporate litigation); *In re* Allion Healthcare Inc. S'holders Litig., 2011 WL 1135016, at *4-*5 (Del. Ch. Mar. 29, 2011) (same); Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 620-21 [hereinafter Cain et al., *The Shifting Tides*] (2018) (reporting frequency of multi-forum deal litigation); Grundfest & Savelle, *supra* note 43, 341-42 ("[P]laintiffs' counsel may file multiple lawsuits as part of a rational business model designed to get a seat at the table ... because it gives them a better shot at the action and better leverage in terms of fees."); Myers, *supra* note 42, at 484-88 (documenting the prevalence of multi-forum litigation in both merger and option backdating cases); Quinn, *supra* 43, at 146 ("By controlling foreign litigation, plaintiffs' counsel place themselves in a position to assert leadership positions in settlement discussions and thus secure access to attorneys' fees.").

[46] *See* Grundfest & Savelle, *supra* note 43, 346-47 ("[T]he trend toward litigating intra-corporate claims in foreign forums imposes clear costs on corporations and their stockholders.

To address this growing problem, starting in 2010, several public corporations added a forum selection provision to their corporate bylaws or charter.[47] These provisions aimed to ensure that any shareholder lawsuits making Delaware law-based claims would be brought exclusively in the state courts of Delaware. Doing so would have several salutary effects. First, channeling all shareholder lawsuits into the Delaware courts would curb the inefficiencies of multi-forum litigation.[48] Second, it would ensure that the forum with the greatest interest and expertise in the substantive law underlying the shareholder's claims would be the forum adjudicating the case.[49] Finally, it would enable the Delaware courts to retain control over the interpretation, application, and development of the state's corporate law and, thus, regulatory oversight of the corporations that the state had chartered.[50]

Only plaintiffs' counsel appear to benefit systematically from the complexities generated by foreign-filed intra-corporate litigation."); Myers, *supra* note 42, at 471, 500 ("Multi-forum litigation promises shareholders no benefits and threatens them with considerable costs … Plaintiffs' attorneys—not shareholders—select where to file fiduciary claims … and the interests of plaintiffs' attorneys can diverge substantially from the interests of shareholders."); Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 13 (2013) (inveighing against multi-forum litigation as a "systemic failure endangering the ability of representative shareholder litigation to produce net benefits to investors").

[47] *See* Fisch, *supra* note 42, at 1666; Grundfest, *supra* note 42, at 336-41, 358-59.

[48] *See* Grundfest & Savelle, *supra* note 43, 351-52.

[49] *See* Grundfest & Savelle, *supra* note 43, at 352-54; Holt, *supra* note 43, at 218; Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1950-51 (2013); *see also* In re Topps Co. S'holders Litig., 924 A.2d 951, 958-59 (Del. Ch. 2007) ("[A] state has a compelling interest in ensuring the consistent interpretation and enforcement of its corporation law.… [which is] endangered if … decisions are instead routinely made by a variety of [out-of-]state and federal judges who only deal episodically with our law.") (Strine, V.C.).

[50] *See* Grundfest & Savelle, *supra* note 43, at 352-54; Holt, *supra* note 43, at 218; Thomas *supra* note 49, at 1951; *see also* In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 118 (Del. Ch. 2009) ("This case … raises important issues regarding the standards governing directors and officers of Delaware corporations, and Delaware has an ongoing interest in applying our law to director conduct in the context of current market conditions—conditions which change rapidly and pose new challenges for directors and officers of Delaware corporations.") (Chandler, C.); In re Topps Co. S'holders Litig., 924 A.2d 951, 958 (Del. Ch. 2007) ("Venerable authority recognizes that a chartering state's interest in promoting an efficient and predictable corporation law can be undercut if other states do not show comity by deferring to the courts of the chartering state when a case is presented that involves the application of the chartering state's corporation law.") (Strine, V.C.); Ryan v. Gifford, 918 A.2d

When these newly-adopted forum provisions were first challenged in 2013, the Delaware Court of Chancery had little difficulty upholding them.[51] In the seminal decision *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, the court explained that a corporation's charter and bylaws together constitute a "binding broader contract among the directors, officers, and stockholders."[52] Consequently, the court held that a forum selection clause in the corporate contract "is valid and enforceable under Delaware law to the same extent as other contractual forum selection clauses."[53]

Two years later, in 2015, the Delaware General Assembly codified the chancery court's decision.[54] Amending the Delaware General Corporation Law (DGCL), the state legislature added a new Section 115 expressly authorizing the corporate forum provisions that were upheld in *Boilermakers*.[55] Specifically, the statutory section stipulates that a corporation's "certificate of incorporation or [] bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate

341, 349–50 (Del. Ch. 2007) ("Delaware courts have a significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations. This interest increases greatly in actions addressing novel issues.") (Chandler, C.).

[51] *See* Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 950-51 (Del. Ch. 2013) (ruling that "[a]s a matter or easy linguistics" Delaware forum provision for "internal affairs" lawsuits are permissible under DGCL 109(b)).

[52] *Id*. at 939.

[53] *Id*. at 939-40; *see also* Mohsen Manesh & Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration,* at Part II.A (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214943 (describing *Boilermakers'* emphasis on contractual rhetoric).

[54] *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 117 (Del. 2020) ("The 2015 amendments were intended, in part, to codify *Boilermakers*….").

[55] *See* 2015 Del. Laws 40 Synopsis ("New Section 115 confirms, as held in *Boilermakers*…, that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty … must be brought only in the courts (including the federal court) in this State.").

claims shall be brought solely and exclusively in any or all of the courts in this State."[56]

Since *Boilermakers* and its subsequent codification, forum provisions have become a common feature in corporate bylaws and charters.[57] Moreover, such provisions have been enforced by nearly every state and federal court that has confronted them (with the Seventh Circuit's *Seafarers* decision now standing as the conspicuous exception).[58]

All of that should be unsurprising. After all, as noted above, sound policy considerations support the use and enforcement of forum provisions to regulate shareholder litigation. Such provisions avoid the wasteful inefficiencies created when plaintiffs' lawyers file duplicative shareholder suits in multiple jurisdictions.[59] Moreover, by channeling these suits into a court that is likely to be the most expert in the substantive law underlying the shareholders' claims—namely, the state courts of Delaware—corporate forum provisions make it more likely that meritorious claims prevail while unmeritorious claims are dismissed.[60] Doing so focuses the energies of plaintiff's bar on the merits of shareholder lawsuits, rather than on

[56] *See* Act of June 24, 2015, 2015 Del. Laws 40 § 5 *codified at* DEL. CODE ANN. tit. 8, § 115.

[57] *See* Fisch, *supra* note 42, at 1667 ("Since the *Boilermakers* decision, the popularity of exclusive forum bylaws has increased dramatically."); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL L. STUDIES 31, 44-46 (2017) (demonstrating that after *Boilermakers* "corporate adoptions of exclusive forum bylaws rapidly accelerated").

[58] *See, e.g.,* In re Stamps.com Inc. S'holder Deriv. Litig., 2020 WL 3866898 (C.D. Cal. July 8, 2020); Drulias v. 1st Century Bancshares, Inc., 30 Cal. App. 5th 696 (2018); KBR Inc. v. Blount, 106 F. Supp. 3d 833, 844 (S.D. Tex. 2015); Petit-Frere v. Office Depot, Inc., 2015 WL 10521805, at *6 (Fla.Cir.Ct. May 15, 2015); Roberts v. TriQuint Semiconductor, Inc., 364 P.3d 328 (Or. 2015); North v. McNamara, 47 F. Supp. 3d 635, 648 (S.D. Ohio 2014); Hemg Inc v. Aspen University, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 04, 2013); In re MetroPCS Commc'ns., Inc., 391 S.W.3d 329 (Tex. App. 2013).

[59] *See supra* notes 42-48 and accompanying text.

[60] *See* Grundfest & Savelle, *supra* note 43, 352-54.

procedural maneuvers aimed at maximizing their fees.[61] The result ultimately benefits corporations and, consequently, their shareholders.[62]

B. The Consequent Surge in *Borak* Claims

Once widely embraced, corporate forum provisions initially accomplished their intended aim. Unable to shop for a favorable forum outside of Delaware, the plaintiff's bar retreated.[63] Meritorious shareholder lawsuits continued to be filed in Delaware,[64] but the volume of meritless litigation filed out-of-state diminished.[65]

This retreat was short-lived, however.[66] Forced to litigate state corporate law claims before Delaware courts, where strike suits stood little chance of profit, many plaintiff's attorneys changed their litigation tactics.[67] Relying on

[61] *See id*. at 356.

[62] *See id*. at 351 ("[Corporate forum] provisions … cause intra-corporate litigation to be aggregated in the chartering state's courts in a manner that protects stockholder rights."); Quinn, *supra* note 43, at 163 ("Because [a corporate forum] provision reduces the incentive for plaintiffs' counsel to engage in forum shopping, it is likely a value-enhancing charter amendment.").

[63] *See* Matthew D. Cain et al., *Mootness Fees*, 72 VAND. L. REV. 1777, 1787 (2019) [hereinafter Cain, et al., *Mootness Fees*] (showing a drop in corporate deals attracting litigation from a high of 96% in 2013 to 73% in 2016).

[64] *See id*. at 1797 (citing evidence showing that "plaintiffs are still willing to file higher-quality deal cases in Delaware").

[65] *See id*. at 1787-1788 (showing a drop in corporate deals attracting litigation in state court outside of Delaware from 83% in 2013 to 18% in 2018 and explaining that the drop "likely resulted from the increasing prevalence of forum selection bylaws").

[66] *See id*. at 178 (showing corporate deals attracting litigation rebounded from 74% in 2016 to 83% in 2018).

[67] *See* Cain et al., *The Shifting Tides*, *supra* note 45, at 631-32 ("When Delaware law changed to reduce the likelihood of success in M&A cases, plaintiffs' counsel reacted by filing fewer deal cases in Delaware. ..[L]awsuits that … might have once been filed … in Delaware have instead been initiated in federal court … brought as Rule 14a-9 disclosure cases."); Cain et al., *Mootness Fees*, *supra* note 63, at 1780 ("Delaware's crackdown … resulted the flight of merger litigation … from Delaware to federal courts [where] suits repackaged state-law fiduciary duty-based claims into antifraud actions under Section 14A and Rule 14a-9 thereunder."); Erickson, *Lost Lessons*, *supra* note 23, at 1146 ("Plaintiffs' attorneys changed their strategies to circumvent these new hurdles. For example, they filed their claims outside of Delaware …

Borak in particular, plaintiff's attorneys increasingly repackaged their state corporate law claims into federal securities law claims brought under Section 14(a).[68]

Drafting a complaint to make a federal *Borak* claim offers a plaintiff's attorney a number of advantages. First and foremost, because federal courts enjoy exclusive jurisdiction over all Exchange Act lawsuits,[69] a *Borak* claim avoids the scrutiny of the Delaware bench.[70]

by packaging their claims as federal securities class actions, which are not covered by many board-adopted forum selection clauses.").

[68] *See* Cain et al., *The Shifting Tides*, *supra* note 45, at 621, 631–32 (showing an increase in corporate deals attracting litigation in federal court from 32% in 2013 to 87% in 2017 and explaining that "[i]n federal court, these cases are brought as Rule 14a-9 disclosure cases"); Cain et al., *Mootness Fees*, *supra* note 63, at 1787 (showing a further increase in corporate deals attracting litigation in federal court from 87% in 2017 to 92% in 2018 and explaining that in federal court, these suits are brought as "antifraud actions under section 24A [sic] and Rule 14a-9"); Erickson, *Lost Lessons*, *supra* note 23, at 1158 ("As shareholders fled to federal court…, they also repackaged their claims as federal securities claims rather than breach of fiduciary duty claims, skirting traditional choice of law rules.").

[69] *See* 15 U.S.C. § 78aa(a).

[70] *See, e.g.*, ROBERT L. HAIG, 9 BUS. & COM. LITIG. FED. CTS. § 99:22 (5th ed.) ("[P]laintiffs, as a tactical maneuver, have recently begun to bring claims under Section 14(a) in order to establish jurisdiction in federal court in cases that might otherwise need be brought exclusively in state court pursuant to exclusive forum provisions"); Cain et al., *The Shifting Tides*, *supra* note 45, at 607 (explaining that corporate forum provisions "do not prevent plaintiffs from bringing federal suits alleging disclosure violations under Rule 14a-9, the federal prohibition against proxy fraud"); Cain et al., *Mootness Fees*, *supra* note 63, at 1788 ("As Delaware clamped down on deal litigation … and forum selection bylaws began to limit the ability of plaintiffs to file in other state courts, filings shifted noticeably to federal courts, a shift that is not generally prevented by forum selection bylaws."); Erickson, *Lost Lessons*, *supra* note 23, at 1158-57 ("The fallout from [Delaware's crackdown] was swift and dramatic, with plaintiffs in merger class actions immediately leaving Delaware for other jurisdictions ….By rejecting both Delaware's courts and its law, shareholders were able to avoid Delaware's scrutiny altogether."); Brian Lutz & Michael Kahn, *2 New Defenses To Federal Shareholder Derivative Claims*, https://www.gibsondunn.com/wp-content/uploads/2022/06/Lutz-Kahn-2-New-Defenses-To-Federal-Shareholder-Derivative-Claims-Law360-06-15-2022.pdf ("Plaintiffs … appear to be pursuing federal claims in derivative cases in an attempt to avoid forum selection provisions in corporate charters and bylaws, which frequently designate the Delaware Court of Chancery as the exclusive forum for derivative actions.").

Second, unlike the more typical federal securities lawsuit brought under Exchange Act Rule 10b-5,[71] a plaintiff making a *Borak* claim need not show that the defendant acted with *scienter*.[72] In most circuits, mere negligence suffices.[73] Better yet, the heightened pleading standards erected by Congress as part of the Private Securities Litigation Reform Act of 1995 ("PSLRA") to reign in plaintiff-side abuses in securities class actions[74] are inapplicable to *Borak* claims, at least in some jurisdictions.[75] These differences mean that, as

[71] 17 C.F.R. § 240.10b–5.

[72] *Compare* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193(1976) (holding that liability under Rule 10b-5 requires a showing of scienter), *with* Beck v. Dobrowski, 559 F.3d 680, 682 (7th Cir. 2009) (holding that liability under Section 14(a) may be found upon a showing of negligence).

[73] *See Beck*, 559 F.3d at 682 (applying a negligence standard); Wilson v. Great Am. Indus., Inc., 855 F.2d 987, 995 (2d Cir. 1988) (same); Gerstle v. Gamble–Skogmo, Inc., 478 F.2d 1281, 1300–01 (2d Cir. 1973) (same); Herskowitz v. Nutri/System, 857 F.2d 179, 190 (3d Cir. 1988) (same); Knurr v. Orbital ATK Inc., 276 F. Supp. 3d 527, 539–40 (E.D. Va. 2017) (same). *But see* SEC v. Shanahan, 646 F.3d 536, 547 (8th Cir. 2011) (requiring scienter); Adams v. Standard Knitting Mills, Inc., 623 F.2d 422, 428 (6th Cir. 1980) (requiring scienter for "private suits under the proxy provisions as they apply to outside accountants").

For the similar reasons, plaintiffs might prefer derivative 14(a) claim over state law breach of fiduciary duty claims, which typically require a showing of disloyalty or bad faith to establish liability. *See* Lutz & Kahn, *supra* note 70 ("Plaintiffs presumably are bringing Section 14(a) derivative claims because, unlike many breach of fiduciary duty claims, they typically only require proof of negligence, not scienter.").

[74] Pub. L. No. 104-67, 109 Stat. 737 (1995) §101(b) *codified at* 15 U.S.C. § 78u-4(b)(2)(A) (requiring a complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"); Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) ("As a check against abusive litigation by private parties, Congress enacted the [PSLRA]. Exacting pleading requirements are among the control measures Congress included in the PSLRA.").

[75] *See Beck*, 559 F.3d 680, 682 (7th Cir. 2009) (holding that because negligence is not a "state of mind" the PSLRA particularized pleading requirements with respect to "state of mind" are inapplicable to a Section 14(a) claim); Enzo Biochem, Inc. v. Harbert Discovery Fund, LP, 2021 WL 4443258, at *8 (S.D.N.Y. Sept. 27, 2021) (same); In re Willis Towers Watson Plc Proxy Litig., 439 F. Supp. 3d 704, 715 (E.D. Va. 2020) (same); Jaroslawicz v. M&T Bank Corp., C.A. No. 15-897-RGA, 2017 WL 1197716, at *3 (D. Del. Mar. 30, 2017); In re Heckmann Corp. Sec. Litig., 869 F. Supp. 2d 519, 538 (D. Del. 2012) (same); In re Bank of Am. Corp., 757 F. Supp. 2d 260, 321–22 (S.D.N.Y. 2010) (same). *But see* Little Gem Life Sciences LLC v. Orphan Medical, Inc., 537 F.3d 913, 917 (8th Cir. 2008) (holding that PSLRA particularized pleading requirements apply to a Section 14(a) claim); Knollenberg v. Harmonic, Inc., 152 Fed.Appx. 674, 682 (9th Cir. 2005) (same).

compared to a Rule 10b-5 claim, a *Borak*-based claim is more likely to survive a defendant's motion to dismiss.

Finally, where a plaintiff's attorney is unable or unlikely to be appointed lead counsel in a federal securities class action, a *Borak* claim brought as a derivative action offers the fee-seeking attorney an alternative path to gaining a seat at the table for settlement negotiations.[76] That is because although the PSLRA requires competing securities class actions concerning the same facts or events to be consolidated and led by a single plaintiff,[77] those reforms are inapplicable to a copycat derivative action based on the very same facts or events.[78] Thus, where a corporate defendant already faces a Rule 10b-5 class action, a parallel *Borak* suit, brought as a derivative action, provides a plaintiff's attorney who was shut out as lead counsel in the class action a sort of "back-up" option.[79]

Given these advantages, it is unsurprising that once corporate forum provisions effectively channeled state corporate law claims into the courts of

[76] *See* Armour, et al., *supra* note 42, at 1378 (explaining that "a firm that did not have a lead role in a securities class action" may "launch a parallel derivative suit … to get a piece of an expected overall global settlement of both cases"); Erickson, *Corporate Governance*, *supra* note 22, at 1769 (providing evidence to support the conclusion that "derivative suits may serve as a launching pad for firms that aspire to the more lucrative practice of securities class actions").

[77] *See* 15 U.S.C. § 78u–4(a)(3)(B)(ii).

[78] *See id*. § 78u–4(a)(1) (limiting to the scope of the PLSRA reforms to lawsuits brought as a "plaintiff *class action* pursuant to the Federal Rules of Civil Procedure") (emphasis added); *see also* Erickson, *Corporate Governance*, *supra* note 22, at 1778-79 (explaining that the increased prevalence of derivative lawsuits in federal courts may well be an attempt by the plaintiff's bar to circumvent the PSLRA limitations on class actions).

Moreover, while the PSLRA requires that the lead plaintiff in a class action to be the investor with "largest financial interest", there is no similar requirement in a derivative action, meaning a shareholder with only a nominal stake in the target corporation could serve as plaintiff in a derivative *Borak* action. Erickson, *Corporate Governance*, *supra* note 22, at 1766.

[79] *See* Ann Lipton, *And the* Salzberg v. Sciabacucchi *fallout begins*, BUS. L. PROF BLOG (June 11, 2020), https://lawprofessors.typepad.com/business_law/2020/06/and-the-sciabacucchi-v-*Salzberg*-fallout-begins.html (explaining the motive for filing a derivative federal securities lawsuits).

Delaware, the plaintiff's bar would turn to *Borak* instead.[80] The result has been a surge in federal proxy lawsuits concerning matters that are traditionally litigated as state corporate law claims.[81]

Consider, for example, one recent hotbed of *Borak* lawsuits: deal litigation.[82] Traditionally, shareholder suits challenging a pending merger or acquisition were brought in state courts, making state corporate law claims.[83] In 2016, however, as Delaware courts began to clampdown on meritless deal litigation, plaintiff's attorneys retreated to federal courts, repackaging their state corporate law claims as federal *Borak* claims.[84] To illustrate, in 2014, plaintiffs filed only 12 *Borak*-based suits in federal courts challenging a proxy disclosure made in connection with a proposed corporate merger or acquisition.[85] By 2017, that number mushroomed to 198 *Borak*-based suits,[86]

[80] *See* Lutz & Kahn, *supra* note 70 ("Plaintiffs increasingly are bringing Section 14(a) claims in derivative suits because they perceive these claims have advantages compared to traditional fiduciary duty claims.").

[81] *See supra* notes 67-68 and accompanying text.

[82] *See* In re Walgreen Co. Stockholder Litig., 832 F.3d 718, 721 (7th Cir. 2016) ("In merger litigation the terms 'strike suit' and 'deal litigation' refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel."); In re Trulia, Inc. S'holder Litig., 129 A.3d 884, 895–96 (Del. Ch. 2016) (explaining the reasons for the "rapid proliferation and current ubiquity of deal litigation" in the 2010s); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 475-484 (2015) (documenting the rise in deal litigation).

[83] *See* Myers, *supra* note 42, at 480-83 (showing that the 1180 class actions filed against the largest mergers in 2009-2011 made state law fiduciary duty claims and were overwhelmingly filed in state courts); Quinn, *supra* note 43, at 146 (explaining that in deal litigation "lawsuits are typically state-law fiduciary duty claims"); *see also* Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 TEX. L. REV. 557, 563 (2015) ("State court merger litigation is premised upon the traditional fiduciary duties that target-company officers and directors owe to the company's shareholders.").

[84] *See supra* notes 67-68 and accompanying text.

[85] *See Securities Class Action Filings, 2021 Year in Review*, CORNERSTONE RESEARCH 4 fig. 3 (*hereinafter* "CORNERSTONE 2021"), at https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf.

with a handful of plaintiff's firms accounting for the vast majority of those filings.[87] Despite the changed venue and legal theory, the prospects of these dubious lawsuits has remained largely unchanged. Between 2011-20, over 800 *Borak* claims were filed challenging corporate transactions; all but 8% were dismissed.[88]

But the rise in *Borak* claims has not been limited to deal litigation.[89] As *Seafarers* and *Lee* illustrate, the plaintiff's bar has in recent years brought *Borak* lawsuits as *derivative* actions challenging all aspects of corporate management[90]—ranging from executive compensation,[91] to board oversight of

[86] CORNERSTONE 2021, *supra* note 85, at 4 fig. 3; Cain et al., *Mootness Fees*, *supra* note 63, at 1793 (reporting a similar increase based upon a different data set).

[87] *See Securities Class Action Filings, 2020 Year in Review*, CORNERSTONE RESEARCH 16 (*hereinafter* "CORNERSTONE 2020"), at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review; Cain et al., *Mootness Fees*, *supra* note 63, at 1798 (providing data to support the conclusion that "[t]he six most active plaintiffs' law firms in merger litigation filed a disproportionate percentage of the federal cases").

[88] *See* CORNERSTONE 2021, *supra* note 85, at 4 fig. 3. Perhaps heeding these defeats, *Borak*-based actions challenging corporate transactions have abated, particularly since 2020. *Id.* A large number of these claims, however, may have been voluntarily dismissed in exchange for a mootness fee paid to the plaintiff's lawyer. *See* Cain et al., *Mootness Fees*, *supra* note 63, at 1793.

[89] *See* HAIG, *supra* note 70, at § 99:22 ("[C]ommonly raised themes in proxy litigation often tend to run in cycles depending on what the 'hot button' issues of the day are for investors, regulators, and the business press."); *cf.* Erickson, *Corporate Governance*, *supra* note 22, at 1761 ("A significant number of derivative suits [filed in federal courts] are … episodic, reflecting the financial crisis du jour.").

[90] *See, e.g.*, HAIG, *supra* note 70, at § 97:14 ("As ESG issues have taken center stage in recent years, they have brought a new wave of non-traditional activist shareholders…concerned with … issues, such as environmentalism, racial and gender equity, and economic inequality. These types of shareholders have … increasingly turned to federal litigation to advance their goals, including by bringing shareholder derivative lawsuits in federal court against directors and officers of companies alleging, among other things, violations of Section 14(a)."); Lutz & Kahn, *supra* note 70 (noting the trend of plaintiffs bringing derivative Section 14(a) claims in place of traditional state law breach of fiduciary duties claims).

[91] *See, e.g.*, City of Birmingham Relief & Ret. Sys. v. Hastings, 2019 WL 3815722, at *1 (N.D. Cal. Feb. 13, 2019) (dismissing derivative Section 14(a) claim concerning executive compensation); Raul v. Rynd, 929 F. Supp. 2d 333, 347 (D. Del. 2013) (same); Swanson v. Weil, 2012 WL 4442795, at *9 (D. Colo. Sept. 26, 2012) (same).

regulatory compliance,[92] including workplace safety,[93] product safety,[94] and sexual impropriety and discrimination,[95] to corporate policies concerning diversity, equity and inclusion.[96]

As derivative claims, these lawsuits allege that the corporation was somehow harmed by mismanagement at the hands of the corporation's directors or officers.[97] Stated differently, these derivative suits concern

[92] *See, e.g.*, In re Wells Fargo & Co. S'holder Derivative Litig., 2022 WL 345066 (N.D. Cal. Feb. 4, 2022) (dismissing derivative Section 14(a) claim concerning corporate compliance practices); Smith on behalf of Zion Oil & Gas, Inc. v. Carrillo, 2019 WL 6328033, at *6 (D. Del. Nov. 26, 2019) (same).

[93] *See, e.g.*, City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource Inc. v. Hamrock, 2021 WL 877720, at *7 (D. Del. Mar. 9, 2021) (dismissing derivative Section 14(a) claim concerning workplace safety and compliance practices).

[94] *See, e.g.*, Seafarers Pension Plan v. Bradway, 2020 WL 3246326, at *4 (N.D. Ill. June 8, 2020) (dismissing derivative Section 14(a) claim concerning managerial oversight of product safety, regulatory compliance, and risk management practices) *rev'd* 23 F.4th 714 (7th Cir. 2022).

[95] *See, e.g.*, Pickett v. Gorevic, 2021 WL 4927061 (S.D.N.Y. Mar. 26, 2021) (dismissing derivative Section 14(a) claim concerning improper workplace relationship); In re Wynn Resorts, Ltd. Derivative Litig., 2019 WL 1429526 (D. Nev. Mar. 29, 2019) (staying derivative Section 14(a) claim concerning sexual misconduct in the workplace in favor of a direct class action making similar Rule 10b-5 claims).

[96] *See, e.g.*, City of Pontiac Police & Fire Ret. Sys. v. Jamison, 2022 WL 884618, at *15 (M.D. Tenn. Mar. 24, 2022) (dismissing derivative Section 14(a) claim concerning corporate policies to diversity, equity and inclusion); Kiger v. Mollenkopf, 2021 WL 5299581 (D. Del. Nov. 15, 2021) (same); Lee v. Frost, 2021 WL 3912651 (S.D. Fla. Sept. 1, 2021) (same); EllieMaria Toronto Esa v. NortonLifeLock Inc., 2021 WL 3861434 (N.D. Cal. Aug. 30, 2021) (same); Ocegueda on behalf of Facebook v. Zuckerberg, 526 F. Supp. 3d 637, 644 (N.D. Cal. 2021) (same); In re Danaher Corp. S'holder Derivative Litig., 2021 WL 2652367 (D.D.C. June 28, 2021) (same); Klein v. Ellison, 2021 WL 2075591 (N.D. Cal. May 24, 2021) (same); Falat v. Sacks, 2021 WL 1558940 (C.D. Cal. Apr. 8, 2021) (same).

[97] Notably, derivative *Borak* claims are fundamentally different than the "tag-along" derivative suits that shareholders have always brought in connection with an alleged federal securities law violation. *See* Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1136 (Del. 2016) (describing the typical tag-along derivative suit); Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 961-62 (Del. Ch. 2013) (same). A typical "tag-along" suit is filed in *state court* and makes a *state corporate law* claim: that corporate managers breached their state law fiduciary duty by permitting the corporate entity to violate federal securities law. *See Boilermakers*, 73 A.3d at 961-62. By contrast, a *derivative Borak suit* is filed in federal court and makes a *federal securities law* claim—that the corporate managers violated section 14(a).

internal corporate affairs—matters that are typically governed by state corporate law and, therefore, more sensibly litigated in state courts, most commonly in Delaware.[98] But rather than simply claiming a managerial breach of state law fiduciary duties owed to the corporation, these suits also make the more tortured argument that the alleged corporate harm was a result *of the shareholders being misled* by the company's proxy statement.[99] By bootstrapping a federal *Borak* claim onto state corporate law claims, these derivative lawsuits transparently aim to establish federal court jurisdiction and, thereby, avoid the likely fate that such suits would face before a

[98] *See* Erickson, *Lost Lessons*, *supra* note 23, at 1180 ("Scholars and commentators long assumed that … [c]orporate lawsuits—i.e., those filed under state corporate law such as … derivative suits—were filed in state court, with public company suits primarily in Delaware. In contrast, securities suits—i.e., those filed under the federal securities laws—stayed in federal court."); Grundfest, *supra* note 42, at 350 ("[L]itigants—plaintiffs and defendants alike—expected that the state of incorporation's courts would resolve intra-corporate disputes. This expectation was fulfilled by the consistent decisions of plaintiff counsel to file actions alleging intra-corporate disputes almost exclusively in the state of incorporation.").

Tellingly, it is common for derivative plaintiffs challenging managerial conduct in federal court on the basis of a federal *Borak* claim to also make state law breach of fiduciary duties claims alongside their *Borak* claim. *See, e.g.*, In re Wells Fargo & Co. S'holder Derivative Litig., 2022 WL 345066, at *2 (N.D. Cal. Feb. 4, 2022) (shareholder derivative suit making Section 14(a) claims alongside state law breach of fiduciary duty claims); Ocegueda on behalf of Facebook v. Zuckerberg, 526 F. Supp. 3d 637, 644 (N.D. Cal. 2021) (same); In re Wynn Resorts, Limited Derivative Litigation, 2019 WL 1429526 (D. Nev. 2019 Mar. 29, 2019); City of Birmingham Relief & Ret. Sys. v. Hastings, 2019 WL 3815722, at *1 (N.D. Cal. Feb. 13, 2019).

Other times, however, a derivative *Borak* lawsuit filed in federal court is merely duplicative of an existing fiduciary duty lawsuit filed in state court challenging the very same managerial conduct. *See* Lutz & Kahn, *supra* note 70 (explaining that with rise of derivative *Borak* claims "defendants may be subject to duplicative litigation challenging the same alleged misconduct: federal court actions asserting Section 14(a) claims and Delaware Chancery actions asserting breach of fiduciary duty claims"); *see also infra* notes 194-195 and accompanying text (describing the duplicative derivative lawsuits that Boeing's managers faced in state and federal court).

In either case, whether *Borak* claims are brought alongside state corporate law fiduciary duty claims in the same derivative lawsuit or brought in a separate, duplicative lawsuit, the fact that derivative *Borak* claims are used to challenge the very same conduct that is already subject to state corporate law fiduciary duties confirms the underlying point that the federal derivative claims concern internal corporate affairs.

[99] *See* Thornton v. Bernard Techs., Inc., 2009 WL 426179, at *3 (Del. Ch. Feb. 20, 2009) ("When [plaintiff-shareholders] assert that bad things happened to [the corporation] (i.e., financial disaster) because they were induced into voting for allegedly inept directors, the Plaintiffs have done nothing more than painted derivative claims with a disclosure coating.").

skeptical Delaware jurist.[100] Even so, like their deal litigation counterparts, these internal affairs claims seldom fare better in the federal courts than in Delaware courts.[101]

Nevertheless, the surge in federal proxy lawsuits targeting internal corporate affairs has raised a range of novel questions regarding the interaction between federal securities law and state corporate law.[102] Among them is whether a forum provision in a corporation's bylaws or charter may, by stipulating that all derivative lawsuits must be filed in state court, effectively preclude derivative *Borak* claims. That is the question that divided the circuit courts in *Seafarers* and *Lee*.

C. The Circuit Split

The essential facts in *Seafarers* and *Lee* are strikingly similar. In both cases, a plaintiff-shareholder brought a derivative *Borak* lawsuit in federal

[100] *See* Erickson, *Lost Lessons*, *supra* note 28, at 1165-66 ("Delaware courts may often have a more skeptical eye than their federal counterparts, causing plaintiffs with weaker claims … to file their derivative claims in federal court.").

[101] *See* HAIG, *supra* note 70, at § 97.14 ("The federal courts have dismissed a number of these cases on the grounds that challenged statements were inactionable puffery or that the shareholder failed to show demand futility."); Erickson, *Corporate Governance*, *supra* note 22, at 1766 (finding dismissal rates in derivative suits filed in federal courts to be "much higher than the comparable figures in civil litigation more generally").

[102] For example, several lower courts have recently ruled that a provision in a corporate charter exculpating directors and officers for negligence or gross negligence, which is authorized under Delaware corporate law, may *also* eliminate liability in derivative *Borak* lawsuits for negligence-based violations of Section 14(a). *See* Gupta v Sonim Technologies, 2022 WL 3991041, at *3 (D. Del. Mar. 29, 2022); In re Wells Fargo & Co. S'holder Derivative Litig., 2022 WL 345066, *4-5 (N.D. Cal. Feb. 04, 2022); City of Detroit Police & Fire Ret. Sys. on Behalf of NiSource Inc. v. Hamrock, 2021 WL 877720, at *5 (D. Del. Mar. 9, 2021); Smith on behalf of Zion Oil & Gas, Inc. v. Carrillo, 2019 WL 6328033, at *8 (D. Del. Nov. 26, 2019); City of Birmingham Relief & Ret. Sys. v. Hastings, 2019 WL 3815722, at *9 (N.D. Cal. Feb. 13, 2019).

By ruling that a state-law authorized charter provision permits exculpation for violations of federal law, these courts interpret Delaware law in manner that arguably conflicts with the anti-waiver provision of the Exchange Act.

district court.[103] And in both cases, the target corporation sought to dismiss the plaintiff's suit by invoking the forum provision set forth in the corporation's bylaws.[104] Indeed, the cases' similarities include the specific language of the forum provisions at issue.[105] In both cases, the forum provision used identical language to the provision that was affirmed by *Boilermakers*[106]—language that is now standard in the forum provisions of myriad public companies.[107] That language simply provides that the Delaware Court of Chancery "shall be the sole and exclusive forum for … *any derivative action or proceeding* brought on behalf of the Corporation."[108]

Relying on that language, the defendant corporations in both cases straightforwardly argued that the forum provision required the plaintiff to file any derivative lawsuits in the Delaware Chancery Court, even if that requirement would entirely foreclose the plaintiff's derivative *Borak* claim.[109] And in both cases, the federal district courts agreed, enforcing the forum

[103] *See* Lee v. Fisher, 2021 WL 1659842, *1 (N.D. Cal. Apr. 27, 2021); Seafarers Pension Plan v. Bradway, 2020 WL 3246326, at *1 (N.D. Ill. June 8, 2020).

[104] *See Lee*, 2021 WL 1659842, *2; *Seafarers*, 2020 WL 3246326, at *1.

[105] Lee v. Fisher, 34 F.4th 777, 782 (9th Cir. 2022) (noting that The Gap's corporate forum provision was "identical" to Boeing's).

[106] *See* Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942 (Del. Ch. 2013) (quoting Chevron's forum provision).

[107] *See* Grundfest, *supra* note 42, at 380-81 (reporting that over 90% of corporate forum selection provisions surveyed copy the standard language). When the standard language was challenged in Boilermakers by shareholders of Chevron and FedEx, respectively, Chevron (but not FedEx) amended its bylaws to permit litigation in "any state or federal courts in the State of Delaware" rather than just the "Delaware Court of Chancery." *Id.* at 364. Unlike the original language, this change would permit a derivative *Borak* suit to be filed in federal district court in Delaware. *See Boilermakers*, 73 A.3d at 961. A study of 112 corporate forum provisions adopted in the four months immediately following *Boilermakers*, 43 percent continued to stipulate the Delaware Court of Chancery as the exclusive forum. *See* Claudia H. Allen, *Trends in Exclusive Forum Bylaws* 4 (Jan. 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411715.

[108] *See Lee*, 2021 WL 1659842, at *1 n.1 (quoting The Gap's forum provision); *Seafarers*, 23 F.4th at 718 (quoting Boeing's forum provision).

[109] *See Lee*, 34 F.4th at 779–80 ("Gap acknowledges that if its forum-selection clause is enforced, Lee will not be able to bring her derivative Section 14(a) claim in *780 the Delaware Court of Chancery.); *Seafarers*, 23 F.4th at 718 ("The defendants conceded that enforcement of the forum bylaw would foreclose the [plaintiff]'s federal derivative suit entirely.").

provision and dismissing the plaintiff's lawsuit.[110] On appeal, however, the two cases would diverge.

1. The Seventh Circuit's Decision in Seafarers

In *Seafarers*, the plaintiff-shareholder brought a derivative *Borak* lawsuit against Boeing's directors and officers following 346 lives lost in two separate accidents involving Boeing's new 737 MAX aircraft and the subsequent grounding of 737 MAX planes worldwide.[111] Specifically, the plaintiff claimed that Boeing's proxy statements had made materially false or misleading statements concerning the directors' and officers' oversight of the 737 MAX's design and manufacturing.[112] As a derivative claim, the lawsuit alleged "the false and misleading proxy statements caused harm to Boeing by enabling the improper re-election of directors who had for years tolerated poor oversight of passenger safety, regulatory compliance, and risk management during the development of the 737 MAX airliner."[113]

In denying Boeing's motion to dismiss, a divided Seventh Circuit panel reasoned that enforcing Boeing's forum provision "would mean that plaintiff's derivative [*Borak*] action may not be heard in any forum."[114] That result, the court held, would be "contrary to Delaware corporate law and federal securities law."[115]

First, with respect to Delaware law, the Seventh Circuit explained that Boeing's "forum bylaw is unenforceable as applied to [the plaintiff's derivative *Borak* claim] because its application would violate Section 115 of

[110] *Lee*, 2021 WL 1659842, at *6; *Seafarers*, 2020 WL 3246326, at *4.

[111] *Seafarers*, 23 F.4th at 717; *see also* David Gelles, *Boeing 737 Max: What's Happened After the 2 Deadly Crashes*, N.Y. TIMES (Oct. 28, 2019).

[112] Complaint at 6-14, 215-17, Seafarers Pension Plan v. Bradway, 2020 WL 3246326 (N.D. Ill. June 8, 2020), 19-cv-08095 (summarizing the complaint and alleging violations of Section 14(a)).

[113] *Seafarers*, 23 F.4th at 719-20.

[114] *Id.* at 717.

[115] *Id.*

the [DGCL]."[116] Recall, DGCL Section 115 authorizes forum provisions in corporate charters and bylaws, but only to the extent that such a provision is "consistent with applicable jurisdictional requirements."[117] Because federal courts have exclusive jurisdiction over Exchange Act lawsuits, the Seventh Circuit reasoned, enforcing Boeing's forum provision against the plaintiff's derivative claim would violate this facet of the Delaware statute.[118] Thus, the circuit court ruled that "Section 115 does not authorize application of Boeing's forum bylaw" to "close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction."[119]

Turning next to federal law, the Seventh Circuit held that enforcement of Boeing's forum bylaw against the plaintiff's derivative *Borak* lawsuit would also violate Exchange Act Section 29(a),[120] which invalidates any contract term that would waive rights arising under the statute.[121] Pointing to this anti-waiver provision, the court distinguished other precedents enforcing contractual forum selection clauses,[122] most significantly *M/S Bremen v. Zapata Off-Shore Co.*, in which the Supreme Court established a strong presumption in favor of enforcing such clauses.[123] "*Bremen* differs from this case most importantly in that it involved a purely private contractual dispute. It did not involve any claim under a federal statute, let alone a

[116] *Id.* at 718

[117] *See supra* note 56 and accompanying text.

[118] *Seafarers*, 23 F.4th at 717, 720.

[119] *Id.* at 720 ("The statutory language shows that Section 115 does not authorize application of Boeing's forum bylaw to close all courthouse doors to this derivative action."); *id.* at 724 ("[N]ew Section 115 ... signal[s] clearly that Delaware is not inclined to enable corporations to close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction.").

[120] *See id.* 717-18 ("Applying the forum bylaw to this case is contrary to … federal securities law [because it fails to] respect[] the non-waiver provision in Section 29(a) of the federal Exchange Act.").

[121] *See* 15 U.S.C. § 78cc(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder … shall be void.").

[122] *Id.* at 724-27.

[123] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

federal statute with a non-waiver provision like Section 29(a) of the Exchange Act."[124] This distinction proved critical for the circuit court. "While the Supreme Court has generally been receptive to enforcing contractually valid forum-selection clauses, neither *Bremen* nor other decisions have endorsed such clauses as paths to avoid otherwise applicable federal statutes."[125]

The *Seafarers* decision is particularly notable because the court's ruling came over a dissent by Judge Easterbrook,[126] an immensely influential jurist who also happens to be the most cited American corporate law scholar.[127] In dissent, Judge Easterbrook challenged various facets of the majority's reasoning and argued that the correct outcome should be to enforce Boeing's forum provision and allow the plaintiff's derivative *Borak* suit to be adjudicated before the Delaware chancery court.[128] The panel majority dismissed this idea outright, noting that "a state court would have to be bold indeed to adopt that solution and to exercise jurisdiction over this derivative claim despite Section 29(a) [and] the lack of support from either side in this lawsuit…." [129]

Aside from a pointed dissent by a venerable corporate law expert, the *Seafarers* opinion bears another dubious distinction: since *Boilermakers* first affirmed the validity of corporate forum provisions for shareholder litigation,

[124] *Seafarers*, 23 F.4th at 725.

[125] *Id.*

[126] *See id.* at 728-31 (Easterbrook, J., dissenting).

[127] *See* Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602-03 (2021); HEINONLINE, *ScholarRank* at https://home.heinonline.org/tools/author-profile-pages/scholarrank/. In his academic career preceding his appointment to the bench, Easterbrook was an early and forceful advocate of the contractual view of corporate law, a view that finds voice in *Boilermakers* and subsequent Delaware decisions. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Frank H. Easterbrook, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989).

[128] *Seafarers*, 23 F.4th at 731. (Easterbrook, J., dissenting) ("[I]f there is no such thing as a derivative § 14(a) claim divorced from state corporate law, if derivative suits are proper in state courts, and if exclusivity [of the jurisdiction the Exchange Act vests in the federal courts] is waivable—indeed, if any one of these three propositions holds—then there is no problem with litigating plaintiff's claim in the courts of Delaware.").

[129] *Id.* at 728.

Seafarers is the first major ruling by any court refusing to enforce such a provision. After the Ninth Circuit's *Lee* decision, *Seafarers* remains alone as the only such ruling to date.

2. The Ninth Circuit's Decision in Lee

Much like *Seafarers*, the plaintiff-shareholder in *Lee* brought a derivative *Borak* lawsuit, this time against the directors and officers of The Gap, alleging failures in the management's efforts to promote racial diversity within the ranks of the company's leadership.[130] As a derivative suit, the *Lee* plaintiff alleged that Gap's proxy statements had included materially false or misleading statements about the company's efforts to pursue diversity, which in turn harmed the Gap by enabling the re-election of the company's incumbent directors and approval of the officers' compensation packages.[131]

Unlike the Seventh Circuit in *Seafarers*, however, a unanimous Ninth Circuit panel in *Lee* enforced Gap's forum provision and dismissed the plaintiff's derivative lawsuit.[132] In a terse opinion, the *Lee* court relied primarily on the federal law presumption established by *Bremen* in favor of enforcing contractual forum selection clauses.[133] Quoting a prior Ninth Circuit decision, the *Lee* court explained that "[t]he strong federal policy in favor of enforcing forum-selection clauses ... supersede[s] antiwaiver provisions in … federal statutes...."[134] In this regard, the *Lee* court squarely departed from the Seventh Circuit in *Seafarers*, which as described above held that a corporate forum provision precluding derivative *Borak* suits would contravene the Exchange Act's anti-waiver provision.[135]

[130] *See* Lee v. Fisher, 34 F.4th 777, 779 (9th Cir. 2022).

[131] *See* Complaint at 4-12, 81-83, Lee v. Fisher, 2021 WL 1659842 (N.D. Cal. Apr. 27, 2021), 20-cv-06163-SK (summarizing the complaint and alleging violations of Section 14(a)).

[132] *See Lee*, 34 F.4th at 782.

[133] *See id*. at 780.

[134] *Id*. at 781 (quoting Yei A. Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1090 (9th Cir. 2018)).

[135] *Compare* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 725 (7th Cir. 2022) (*Bremen* … did not involve any claim under a federal statute, let alone a federal statute with a non-waiver

As to Delaware law, the Ninth Circuit panel did not expressly address the import of DGCL Section 115, which was also central to the Seventh Circuit's analysis in *Seafarers*.[136] Instead, the *Lee* court ruled that because the plaintiff had failed to raise DGCL Section 115 previously, she "has waived any reliance on that provision."[137] Accordingly, the Ninth Circuit panel concluded that because the plaintiff "ha[d] not met [the] heavy burden" to overcome Gap's forum provision, the plaintiff's derivative complaint was properly dismissed.[138]

While *Lee* awaits *en banc* review, corporate practitioners have speculated that if the circuit split subsists, then the plaintiff's bar will increasingly target derivative *Borak* suits against corporations headquartered in the Seventh Circuit.[139] That result seems all but certain. For a plaintiff's attorney seeking to evade the watchful scrutiny of the Delaware bench, *Seafarers* establishes a roadmap to circumventing the corporate forum provisions that would otherwise channel derivative lawsuits into Delaware.[140] All that is

provision like Section 29(a) of the Exchange Act. [N]either Bremen nor other decisions have endorsed [forum-selection] clauses as paths to avoid otherwise applicable federal statutes.") *with* Seafarers Pension Plan on behalf of Boeing Co. v. Bradway, 23 F.4th 714, 725 (7th Cir. 2022)") *with Lee*, 34 F.4th at 782 (explaining that although "the Seventh Circuit[] … held that Boeing's bylaw violated the Exchange Act's antiwaiver provision… [o]ur binding precedent forecloses reliance on the Exchange Act's antiwaiver provision").

[136] *See supra* notes 116-119 and accompanying text.

[137] *Lee*, 34 F.4th at 782.

[138] *Id.*

[139] *See, e.g.*, Dechert LLP, *Securities & Derivative Litigation: Quarterly Update* (noting that, as a consequence of *Seafarers*, "future plaintiffs may seek to file Section 14(a) derivative claims within the Seventh Circuit."), https://www.dechert.com/knowledge/onpoint/2022/2/securities---derivative-litigation--quarterly-update.html; Gabriel K. Gillett et al., *Seventh Circuit Overrides a Forum Selection Bar in Federal Securities Lawsuits,* https://jenner.com/system/assets/publications/21552/original/Seventh_Circuit_Overrides_Forum_Selection_Bar_Securities_Lawsuits.pdf?1642696423 (noting that, as a consequence of *Seafarers*, "companies with forum selection bylaws should prepare for the increased likelihood of having to defend shareholder derivative suits in federal court and, in particular, in courts within the Seventh Circuit.").

[140] *See* Marcie Lape et al., *Corporate Boards Need Not Fear 7th Circ. Boeing Decision,* https://www.skadden.com/-/media/files/publications/2022/01/corporateboardsneednotfear7thcircboeingdecision.pdf

required is to recast state corporate law claims of mismanagement into federal *Borak* claims.

It appears equally certain that the questions presented in *Seafarers* and *Lee* will be raised in other circuits, as plaintiff attorney's probe the possibilities of pursuing derivative *Borak* suits elsewhere. Consequently, *Seafarers* and *Lee* are unlikely to be the last words on this subject.

III. CORPORATE FORUM PROVISIONS UNDER STATE CORPORATE LAW

As reflected by both *Seafarers* and *Lee*, the enforceability of a corporate forum provision against derivative *Borak* claims raises issues of both state corporate law and federal securities law. Setting aside the federal law issues until Part IV below, this Part evaluates the enforceability of a corporate forum provision against derivative *Borak* claims *strictly as a matter of Delaware law*. As this Part demonstrates, the Seventh Circuit's application of Delaware law was demonstrably wrong. The Delaware Supreme Court's 2020 decision in *Salzberg v. Sciabacucchi* makes this point clear.[141]

Part A first describes the *Salzberg* decision. Applying *Salzberg*, Part B then demonstrates that DGCL Section 115, which the Seventh Circuit interpreted to prohibit a forum provision precluding derivative *Borak* claims, is in fact irrelevant to that question. Instead, as Part C explains, *Salzberg* establishes that such a provision is both valid and enforceable against shareholders.

A. *Salzberg* v. Sciabaccuchi

In *Salzberg*, the Delaware Supreme Court considered the validity of a corporate forum provision different than the type that was affirmed by *Boilermakers*.[142] Unlike the forum provision upheld in *Boilermakers*, which

(recognizing that *Seafarers* may cause "some shareholder derivative plaintiffs [to] creatively plead Section 14(a) claims to circumvent an exclusive forum provision in a bylaw or charters").

[141] *See* 227 A.3d 102 (Del. 2020).

[142] *See* Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 509-512 (2021) (outlining the legal context and impetus for corporate forum provisions governing Securities Act claims).

chiefly regulated shareholder litigation of state corporate law claims,[143] the forum provision before the Delaware high court in *Salzberg* purported to regulate shareholder litigation of federal securities claims.[144] Specifically, the forum provision stipulated that any shareholder lawsuit arising under the Securities Act of 1933 must be brought in federal courts,[145] to the exclusion of state courts, which otherwise would enjoy concurrent jurisdiction over Securities Act lawsuits.[146] Because such lawsuits do not arise under Delaware corporate law and lie beyond the internal affairs doctrine, there was some question whether Delaware law authorized a forum provision to regulate shareholders' rights to bring Securities Act claims.[147]

Building on the contractual framework articulated by *Boilermakers*,[148] *Salzberg* affirmed the provision.[149] Importantly, in doing so, the *Salzberg* court expressly addressed the relevance of DGCL Section 115.[150] The court explained that DGCL Section 115 *neither authorizes nor prohibits* a forum

[143] *See* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950-51, 962 (Del. Ch. 2013) (concluding that "the forum selection bylaws [at issue] plainly focus on claims governed by the internal affairs doctrine and thus the law of the state of incorporation").

[144] *Salzberg*, 227 A.3d at 123 (explaining that forum provisions at issue cover claims that are not "'internal affairs' claims [because [federal securities law] claims are not governed by substantive Delaware law . . . [r]ather, they are governed by federal law").

[145] *Id.* at 107 (quoting the forum provision at issue to stipulate that "the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision].").

[146] 15 U.S.C. § 77v(a); *see also* Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066, 1078 (2018) (ruling that, despite congressional reforms, state courts retain jurisdiction over Securities Act lawsuits).

[147] *See* Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 301-04 (2020) (explaining the uncertain scope of the internal affairs doctrine as applied to shareholder claims arising under federal securities law).

[148] *See* Manesh & Grundfest, *supra* note 53, at Parts II.A and II.B., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4214943 (describing the contractarian subtext of *Boilermakers* and *Salzberg*),

[149] *See Salzberg*, 227 A.3d at 114.

[150] *See id.* at 116-120.

provision governing federal securities law claims.[151] Rather, the statute merely authorizes forum provisions regulating "internal corporate claims,"[152] which *Salzberg* interpreted to mean shareholder claims arising under Delaware law.[153] Because "[Securities Act] claims are not 'internal corporate claims,'" *Salzberg* explained, "Section 115 does not apply."[154] Thus, if a forum provision governs "'internal corporate claims' … requiring the application of Delaware corporate law as opposed to federal law," then the forum provision is subject to DGCL Section 115.[155] If, instead, a forum provision "govern[s] … claims that do not fall within the definition of "internal corporate claims,'" such as Securities Act claims, then DGCL Section 115 is irrelevant.[156]

Rather than looking to DGCL Section 115, the *Salzberg* court held that a forum provision covering Securities Act claims is authorized under DGCL Section 102(b)(1), governing corporate charters,[157] and its sister section

[151] *See id*. at 120 n.79 ("Section 115 likely was intended to address claims requiring the application of Delaware corporate law as opposed to federal law. Stated differently, we do not think the General Assembly intended to encompass federal claims within the definition of internal corporate claims. Thus, Section 115 is not implicated.").

[152] DEL. CODE ANN. tit. 8, § 115 (authorizing a forum provision that stipulates "any or all *internal corporate claims* shall be brought solely and exclusively in any or all of the courts in this State") (emphasis added).

[153] *See Salzberg*, 227 A.3d at 120 n.79 (explaining "internal corporate claims" refers to "claims requiring the application of Delaware corporate law as opposed to federal law").

[154] *Id*. at 120; *accord id*. at 133 n.146 ("[W]e do not believe [Securities Act] claims come under Section 115's definition of 'internal corporate claims.'").

[155] *See id*. at 120 n.79.

[156] *See id*. 119 ("If a forum-selection provision purports to govern intra-corporate litigation of claims that do not fall within the definition of "internal corporate claims," we must look elsewhere (back to Section 102(b)(1)) to determine whether the provision is permissible."); *id*. at 118-19 ("Section 115 simply clarifies that for [internal corporate] claims, Delaware courts may be the only forum…. Section 102(b)(1)'s general and broad provisions govern all other claims…. Section 115 is not properly viewed as modifying Section 102(b)(1)."); *id*. at 120 n.77 ("Section 115 merely confirms … that charters and bylaws may effectively specify that internal corporate claims must be brought in 'the courts in this State.' Section 115…does not address the propriety of forum-selection provisions applicable to other types of claims.").

[157] *See id*. 114 (holding that a provision "that seeks to regulate the forum in which … 'intra-corporate' litigation can occur is a provision that addresses the 'management of the business' and the 'conduct of the affairs of the corporation,' and is, thus, facially valid under Section 102(b)(1).")

governing corporate bylaws, DGCL Section 109(b).[158] DGCL Section 102(b)(1) broadly permits a corporation's charter to contain "*[a]ny provision* for the management of the business and … affairs of the corporation … and regulating the powers of the corporation, the directors, and the stockholders."[159] In similarly broad language, DGCL Section 109(b) permits a corporation's bylaws to include "*any provision* …, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[160] The *Salzberg* court held a forum provision stipulating the forum in which shareholders may be bring Securities Act claims "easily fall[s] within" the permissible scope of DGCL Sections 102(b)(1) and 109(b).[161]

As the following subparts explain, *Salzberg* offers two clear lessons for a corporate forum provision governing derivative *Borak* lawsuits brought under Section 14(a). First, DGCL 115 is irrelevant to such a provision. Second, such

[158] Although the specific forum provision affirmed in *Salzberg* appeared in a corporate charter, rather than corporate bylaws, the opinion is drafted broadly, discussing charter- and bylaw-based forum provisions without making a distinction. *See, e.g.*, Salzberg, 227 A.3d at 131 (stating, without explanation, that "a *bylaw* that seeks to regulate the forum in which … 'intra-corporate' litigation can occur is … facially valid under [DGCL] Section 102(b)(1)" even though DGCL Section 102(b)(1) pertains only to a corporate charter and not bylaws) (emphasis added); *id*. at 120 (explaining that prior to the adoption of DGCL Section 115 "forum-selection provisions … were valid under Section 102(b) [which defines the permissible scope of corporate charters] and Section 109(b) [which defines the permissible scope of corporate bylaws]"). The court's willingness to speak broadly as to forum provisions in both corporate charters and bylaws is unsurprising given that the relevant statutory provisions defining the permissible scope of charter- and bylaw-based provisions are nearly identical in substance. *Compare* DEL. CODE ANN. tit. 8, § 102(b)(1) (defining the permissible scope of a corporate charter) *with id*. § 109(b) (defining the permissible scope of corporate bylaws).

[159] DEL. CODE ANN. tit. 8, § 102(b); *see also* Manti Holdings, LLC v. Authentix Acquisition Co., Inc., 261 A.3d 1199, 1217 (Del. 2021) ("Th[e] public policy favoring private ordering is reflected in [DGCL] Section 102(b)(1), which allows a corporate charter to contain virtually any provision that is related to the corporation's governance and not contrary to the laws of this State.").

[160] DEL. CODE ANN. tit. 8, § 109(b).

[161] *See Salzberg*, 227 A.3d at 114-15 (holding that a corporate forum provision governing federal securities lawsuits "classically fit" and "easily fall within" the permissible scope of DGCL Section 102(b)).

a provision is both valid and enforceable against shareholders. Thus, *Seafarers* misapplied Delaware law when it held to the contrary.

B. DGCL Section 115 is Irrelevant

The Delaware Supreme Court's ruling in *Salzberg* establishes that DGCL Section 115 is irrelevant to a forum provision governing federal securities law claims. On this point, the Seventh Circuit in *Seafarers* clearly erred.[162]

In particular, *Seafarers* wrongly assumed that derivative *Borak* claims qualify as "internal corporate claims" as that term is used in DGCL Section 115.[163] Yet, *Salzberg* makes clear that because *Borak* claims, like Securities Act claims, arise under federal law rather than Delaware law, such claims are not "internal corporate claims," even if such claims are still "intra-corporate."[164] Thus, like the forum provision governing Securities Act claims that was at issue in *Salzberg*, DGCL Section 115 is inapplicable to a forum provision governing *Borak* claims.[165]

The Seventh Circuit brushed away *Salzberg*, explaining that *Salzberg*'s holding did not extend to Exchange Act claims.[166] But this explanation badly short-shrifts the Delaware Supreme Court's decision. While it is true that *Salzberg* addressed only Securities Act claims, and not Exchange Act claims, the reasoning that *Salzberg* applied to the former plainly also applies to the latter[167]—a point the Seventh Circuit neither considered nor refuted. As the

[162] *See* Ann Lipton, *Inside Out (or, One State to Rule them All): New Challenges to the Internal Affairs Doctrine,* __WAKE FOREST L. REV. (forthcoming 2023) (concurring that Seafarers' holding with respect to DGCL Section 115 "misreads Delaware law," namely *Salzberg*).

[163] *See* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 720 (7th Cir. 2022) ("[DGCL] Section 115 defines 'internal corporate claims' to include derivative claims like this one [brought by the plaintiff].").

[164] *See supra* notes 151-154 and accompanying text.

[165] *See supra* notes 156-156 and accompanying text.

[166] *See Seafarers*, 23 F.4th at 722 ("Defendants read too much into *Salzberg* …. *Salzberg* [did not] appl[y] to claims brought under the Exchange Act of 1934.").

[167] Consider, for example, this passage from *Salzberg*, where the court's discussion of a forum provision governing Securities Act claims could be applied *verbatim* to proxy claims under the Exchange Act:

Salzberg court explained, "internal corporate claims" covers only shareholder "claims requiring the application of Delaware corporate law as opposed to federal law".[168] Because federal securities law claims—whether arising under the Securities Act *or* the Exchange Act—require the application of federal law, such claims are not "internal corporate claims."[169] Consequently, DGCL Section 115 is inapplicable to a forum provision governing *either* Securities Act claims *or* Exchange Act claims.

One might still argue—although the Seventh Circuit did not—that the language in *Salzberg* is actually a bit more ambiguous as it applies to a derivative *Borak* suit.[170] Specifically, although the substance of a *Borak* claim is governed by federal law, when the claim is brought as a derivative action, rather than in a class action, then Delaware corporate law governs certain procedural facets of the derivative lawsuit.[171] Thus, the argument would go, a derivative *Borak* claim does, in fact, "requir[e] the application of Delaware

> "[The forum provision] involve[s] a type of securities claim … arising out of the Board's disclosures to current and prospective stockholders ….. The drafting, reviewing, and filing of [the disclosures] by a corporation and its directors is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders. This Court has viewed the overlap of federal and state law in the disclosure area as "historic," "compatible," and "complimentary." Accordingly, a bylaw that seeks to regulate the forum in which such "intra-corporate" litigation can occur is a provision that addresses the "management of the business" and the "conduct of the affairs of the corporation," and is, thus, facially valid under [DGCL] Section 102(b)(1)."

Salzberg, 227 A.3d at 114.

[168] *Salzberg*, 227 A.3d at 120 n.79.

[169] *See supra* note 151-156 and accompanying text.

[170] *See* Lipton, *supra* note 76, ("*Salzberg* held that DGCL 115 only applies to "claims requiring the application of Delaware corporate law as opposed to federal law." Do federal derivative claims fall into that category by dint of the fact that Delaware standards determine demand futility").

[171] *See* Burks v. Lasker, 441 U.S. 471, 476-80 (1979); Kamen v. Kemper Financial Services, 500 U.S. 90, 98-100 (1991); *see also infra* notes 314-320 and accompanying text (discussing the significance of *Burks* and *Kamen* to derivative *Borak* suits).

corporate law",[172] at least to some procedural facets of the lawsuit, and is, therefore, an "internal corporate claim" subject to DGCL Section 115.[173]

The legislative history of DGCL Section 115, however, discredits this argument. In the official synopsis accompanying the bill that enacted DGCL Section 115, the legislation equated "internal corporate claims" with "claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation."[174] Thus, the legislative history makes clear that "internal corporate claims" is limited to only those shareholder claims that "aris[e] under" Delaware law. It does not cover shareholder claims that arise under federal law, even if such claims might implicate procedural rules of Delaware law.[175]

Curiously, the Seventh Circuit was aware of this legislative history. To justify its holding, the Seventh Circuit quoted language in the bill's synopsis stating that "Section 115 is also *not intended to authorize* a provision that purports to foreclose suit in a federal court based on federal jurisdiction."[176] Pointing to this language, the Seventh Circuit reasoned that "[b]y eliminating federal jurisdiction over the [plaintiff's] exclusively federal derivative claims, Boeing's forum bylaw forecloses suit in a federal court based on federal jurisdiction. That's exactly what Section 115 was *not intended to authorize*."[177]

The problem with this reasoning is obvious: it conflates "*not intended to authorize*" with "*intended to prohibit*." But as *Salzberg* explained, because federal securities law claims are *not* "internal corporate claims," and because

[172] *See Salzberg*, 227 A.3d at 120 n.79 (explaining "internal corporate claims" refers to "claims requiring the application of Delaware corporate law as opposed to federal law").

[173] *See* DEL. CODE ANN. tit. 8, § 115 (regulating a corporate forum provision governing "internal corporate claims").

[174] *See* 2015 Del. Laws 40 Synopsis.

[175] *See Salzberg*, 227 A.3d at 120 n.79 ("[W]e do not think the General Assembly intended to encompass federal claims within the definition of internal corporate claims.").

[176] *Seafarers*, 23 F.4th at 720 (quoting 2015 Del. Laws 40 Synopsis).

[177] *Id.*

DGCL Section 115 concerns *only* "internal corporate claims", then DGCL Section 115 neither authorizes nor prohibits a forum provision governing federal securities law claims.[178] DGCL Section 115 is simply irrelevant. Instead, to evaluate the validity of such a provision, *Salzberg* shows that one must look elsewhere.[179]

C. Validity and Enforceability

Rather than being barred by Delaware's corporate statute, *Salzberg* confirms that a forum provision governing derivative *Borak* suits is, in fact, authorized by DGCL Sections 102(b)(1) and 109(b).[180] Like the Securities Act claims at issue in *Salzberg*, *Borak* claims "aris[e] out of the Board's disclosures to current and prospective stockholders."[181] As the *Salzberg* court explained, Securities Act claims concern "litigation arising out of the Board's disclosures to current and prospective stockholders…. The drafting, reviewing, and filing of [those disclosures] by a corporation and its directors is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders."[182] Of course, the very same could be said of *Borak* claims. Accordingly, like a forum provision governing Securities Act claims, a forum provision governing *Borak* claims "easily fall[s] within" the broad scope of DGCL Sections 102(b) and 109(b)[183] and is, therefore, facially valid.

The only limit that Delaware law places on a forum provision authorized by DGCL Sections 102(b) and 109(b) is based in equity.[184] That is because

[178] *See supra* note 151-156 and accompanying text.

[179] *Salzberg*, 227 A.3d at 119 ("If a forum-selection provision purports to govern intra-corporate litigation of claims that do not fall within the definition of "internal corporate claims," we must look elsewhere (back to Section 102(b)(1)) to determine whether the provision is permissible.").

[180] *See supra* note 161 and accompanying text.

[181] *Salzberg*, 227 A.3d at 114.

[182] *Id.*

[183] *See id.*

[184] *See* Manesh & Grundfest, *supra* note 53, at Part III.A. (describing the equitable limits that Delaware law imposes of contractual freedom in corporate charters and bylaws).

under Delaware law, "all corporate acts must be 'twice-tested'—once by the law and again in equity."[185] Consequently, even a facially valid forum provision will be unenforceable in any situation where it would operate inequitably as applied to shareholders. Both *Salzberg* and *Boilermakers* recognized that equity—the judicial power "to do right and justice"[186]—serves as an essential backstop to the freedom of contract afforded by DGCL Sections 102(b) and 109(b).[187]

[185] Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007) (Strine, V.C.) (quoting Adolphe A. Berle, *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049, 1049 (1931)); *accord* Backer v. Palisades Growth Cap. II, L.P., 246 A.3d 81, 97 (Del. 2021); In re *Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1222-23 (Del. 2017). As recently explained by Chancellor McCormick, under Delaware law's twice-tested framework:

> [D]irector actions are tested both for legal authorization and for equity.... The first layer of analysis asks whether board action was legally authorized and looks to whether the conduct was permitted under positive law and the corporation's constitutive documents... The second layer of analysis asks whether board action was equitable and looks to whether the directors comprising the board complied with their fiduciary obligations.

Totta v. CCSB Financial Corp., 2022 WL 1751741, *11-*12 (Del. Ch. May 31, 2022).

[186] *See* Schoon v. Smith, 953 A.2d 196, 205 (Del. 2008) ("[T]he final object of equity is to do right and justice.") (quoting 1 POMEROY'S EQUITY JURISPRUDENCE § 60, at 80 (5th ed. 1941)); *see also* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 821 (1993) ("[E]quity is a moral sense of fairness based on conscience.").

[187] Alluding to Delaware law's twice-tested framework, the *Salzberg* court explained that a forum provision "that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." Salzberg v. Sciabacucchi, 227 A.3d 102, 135 (2020). Likewise, *Boilermakers* acknowledged that shareholders remain free to challenge the enforceability of an otherwise valid forum provision if the provision "cannot be equitably enforced in a particular situation." *See* Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013). Consistent with Delaware corporate law's equitable constraints, both *Salzberg* and *Boilermakers* also noted that a plaintiff may overcome the *Bremen* presumption if enforcement of a forum provision would be "unreasonable and unjust" as applied to a particular factual situation. *Salzberg*, 227 A.3d at 135; *Boilermakers*, 73 A.3d 949, 958. "[S]uch 'as applied' challenges," the *Salzberg* court explained, "are an important safety valve in the enforcement context" to ensure that an otherwise lawful forum provision is not used inequitably against shareholders. *Salzberg*, 227 A.2d at 135; *accord Boilermakers*, 73 A.3d at 958 ("[I]f a plaintiff believes that a forum selection clause cannot be equitably enforced in a particular situation, the plaintiff may sue in her preferred forum and ... argue that... the forum selection clause should not be enforced because the bylaw was being used for improper purposes inconsistent with the directors' fiduciary duties.").

Notably, however, the enforcement of a forum provision directing all derivative lawsuits to state courts raises no serious equitable concerns. To be sure, such a provision would bar shareholders from ever bringing *Borak* claims in a derivative action—a fact that was central to the Seventh Circuit's reasoning in *Seafarers*.[188] But that fact alone does not make enforcement of the provision inequitable or unjust. For one, as explained in Part IV below, there is every reason to believe that under the Supreme Court's post-*Borak* precedents, shareholder suits under Section 14(a) are cognizable only as direct, not derivative actions.[189] Although the Seventh Circuit failed to consider these precedents, they signal that a forum provision precluding derivative *Borak* actions merely precludes a type of lawsuit that shareholders have no right to bring in the first place.

But even if one ignores the Court's post-*Borak* decisions, there would be nothing inequitable in the enforcement of a forum provision that precludes shareholders from bringing derivative *Borak* claims. After all, as Judge Easterbrook aptly noted in dissent, shareholders would still retain other options.[190] First, nothing would preclude a shareholder from bringing the same *Borak* claim in federal court as a direct or class action, rather than as a derivative action.[191] Moreover, a shareholder would remain free to bring a

[188] *See supra* notes 114-125 and accompanying text.

[189] *See infra* Parts IV.B.2 and IV.B.3.

[190] *See* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 729-30 (7th Cir. 2022) (Easterbrook, J., dissenting).

[191] *See id.* at 729 (Easterbrook, J., dissenting) ("Nothing in Boeing's bylaw strips plaintiff, as a recipient of proxy materials, of the ability to file a direct § 14(a) action in federal court. And since plaintiff retains that ability, it is hard to see how it has been deprived of a right to enforce § 14(a)."); Randall W. Quinn, *Shareholder Proxy Suits under Federal Securities Laws Should Be Viewed as Direct Actions*, 20 SEC. REG. L.J. 173, 185-86 (1992-1993) (arguing that "it is not readily apparent why" limiting shareholders to direct suits under Rule 14(a) would be "inadequate for private enforcement"); *id.* at 188 ("[D]erivative suits arose to provide an equitable remedy for shareholders where no remedy at law was available to redress wrongs committed by a corporation or its managers. Proxy suits [brought as a direct action], however, provide shareholders with an adequate remedy.").

To be sure, plaintiff's lawyers may have reason to prefer a derivative over a direct or class action. For one, as noted above, bringing a *Borak* claim as a derivative action, rather than a direct or class action, avoids consolidation of the *Borak* claim into other existing class actions concerning the same facts or events. *See supra* notes 76-79 and accompanying text. Perhaps

derivative action against the corporation's managers, making state corporate law claims, in the state courts of Delaware.[192] Given these alternatives, there is no equitable reason to deny the enforceability of an otherwise lawful forum provision precluding derivative *Borak* claims.[193]

Consider Boeing's case. Before *Seafarers* was decided by the Seventh Circuit, the company's shareholders had already brought at least two other lawsuits in the wake of the 737 Max's disastrous rollout. In a derivative action in the Delaware chancery court by shareholders represented by one set of lawyers, Boeing's directors faced breach of fiduciary duty claims arising from their oversight of the ill-fated airliner.[194] And in a separate class action

uncoincidentally in Boeing's case, the corporation already faced a federal securities class action arising from the disastrous rollout of the 737 Max. *See infra* note 195 and accompanying text.

[192] The precise nature of the derivative claim could take different forms. The derivative claim could be the typical tag-along claim. *See supra* note 97; *see also* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 729 (7th Cir. 2022) (Easterbrook, J., dissenting) ("[Where] a corporation, author of the proxy materials, sues its own directors… Plaintiff's theory … would be that the directors violated their state-law duty of care by permitting Boeing to do things that exposed it to liability under federal law."). Alternatively, the derivation action could make breach of state law fiduciary duty claim challenging board oversight, of the same internal corporate conduct that might be targeted in a derivative *Borak* action. *See* Erickson, *Corporate Governance*, *supra* note 22, at 1777 (explaining how a federal securities law claim may be turned into a *Caremark* oversight claim and finding in a sample set of derivative suits filed in federal courts that over 90% included a *Caremark* oversight claim); Erickson, *Overlitigating*, *supra* note 31, at 80 ("The most common way for derivative plaintiffs to challenge alleged fraud is by alleging that the board of directors breached its duty of oversight by failing to prevent the alleged fraud."). As previously noted, it is already common practice for derivative *Borak* claims challenging managerial conduct to be made alongside state law breach of fiduciary duties claims in the same lawsuit. *See supra* note 98.

[193] In this respect, a forum provision precluding derivative *Borak* claims would be very different than a provision mandating arbitration of securities law claims. The former still permits both derivative state law claims and federal *Borak* claims. *Cf.* Salzberg v. Sciabacucchi, 227 A.3d 102, 114-16 (2020) (holding that a forum provision that precludes federal securities claims in state court is valid where those same claims may still be brought in federal court). The latter, by precluding shareholder class actions, would effectively operate as a waiver of federal securities law claims. *See* Manesh & Grundfest, *supra* note 53, at Part III.C.

[194] *See* In re Boeing Co. Derivative Litig., 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (denying the defendant-directors' motion to dismiss). The Delaware Chancery Court's decision to allow the case to proceed was immediately recognized as a watershed precedent concerning the fiduciary obligations of corporate directors. Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. OF CORP. L (forthcoming, 2022). The litigation

in federal district court, brought by shareholders represented by another set of lawyers, Boeing and its officers faced direct claims alleging they had misrepresented the 737 Max's safety risks in the company's public disclosures.[195] Thus, the derivative *Borak* suit brought by the *Seafarers* plaintiffs, themselves represented by yet another set of lawyers, was at least the third shareholder lawsuit concerning the safety issues of Boeing's new airplane. Between the state law derivative action brought on behalf of the corporation and the federal securities class action brought on behalf of the shareholders, it is not obvious what this third lawsuit, arising from the very same events, would hope to accomplish for Boeing, its shareholders, or society more broadly. Instead, the only party standing to benefit from the wasteful, duplicative litigation is the plaintiff's lawyers behind it.[196]

"In general, equity is reluctant to create remedies when adequate legal remedies already exist."[197] Given the other remedies available to Boeing and

ultimately settled for in a $225 million. Andrew Tangel, Boeing Shareholders Reach Settlement in 737 MAX Board Oversight Suit, WALL ST. J. (Nov. 4, 2021).

[195] *See* In re Boeing Co. Aircraft Sec. Litig., 2022 WL 3595058 (N.D. Ill. Aug. 23, 2022) (denying, in part, Boeing's motion to dismiss shareholder class action brought under Rule 10b-5).

In addition to the shareholder class action, Boeing also faced and ultimately settled for $200 million an SEC investigation into whether the company had violated federal securities law in its disclosures to investors about problems with the 737 Max plane. Matthew Goldstein and Niraj Chokshi, *Boeing Reaches $200 Million Settlement With Regulators Over Its 737 Max*, N.Y. TIMES (Sept. 22, 2022).

[196] After Boeing's loss at the Seventh Circuit, the company's managers agreed to settle the derivative lawsuit for $6.25 million and an amendment to the company's bylaws to permit derivative suits in federal courts. *See* Cohen Milstein Sellers & Toll PLLC, *Boeing's $6.25M Settlement Over 737 Max Gets Initial OK*, at https://www.cohenmilstein.com/update/%E2%80%9Cboeings-625m-settlement-over-737-max-gets-initial-ok%E2%80%9D-law360. Tellingly, the entire settlement amount would be paid not by the defendant managers personally, but instead by a D&O insurance policy the company had purchased on behalf of the managers, and $4.25 million of the settlement amount would be paid directly to the plaintiff's attorneys. *See id.*; *see also* Erickson, *Corporate Governance*, *supra* note 22, at 1808 (reviewing the nonpecuniary settlements reached in a sample set of derivative lawsuits filed in federal court and concluding that such settlements provide shareholders only nominal benefit and "may simply be means for plaintiffs' attorneys to recover their fees").

[197] Prod. Res. Grp., L.L.C. v. NCT Grp., Inc., 863 A.2d 772, 801 (Del. Ch. 2004) (Strine, V.C.).

its shareholders, it is difficult to claim that the enforcement of Boeing's forum provision would be inequitable in any meaningful sense. To the contrary, by requiring all derivative suits to be filed in the state courts of Delaware, the forum provision would eliminate the duplicative litigation represented by the *Seafarers* plaintiff's derivative *Borak* action.[198] And it would do so without materially impairing the rights of Boeing's shareholders to bring other types of suits, hold management accountable, and seek redress on behalf of themselves and the corporation.

In this respect, Boeing's forum provision would operate no differently than forum provisions in other contexts, "regulat[ing] where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain."[199] By precluding derivative *Borak* lawsuits, the forum provision does not preclude shareholder litigation. Rather, it simply bifurcates a shareholder's litigation options: If a shareholder seeks a remedy for misrepresentations made to shareholders in the corporation's public disclosures, then she may bring a direct action, individually or as a class, in federal court making federal securities law claims. If, instead, the shareholder seeks redress for alleged harms caused to the corporation by its officers and directors, then she may bring a derivative action in Delaware chancery court making state corporate law claims.[200] This bifurcation of litigation options accomplishes two important ends. First, it ensures that derivative lawsuits concerning internal corporate affairs are adjudicated in the state courts of Delaware.[201] Second, it eliminates duplicative derivative lawsuits raising federal securities law claims that cannot be consolidated

[198] *See supra* notes 194-196 and accompanying text (noting the multiple shareholder lawsuits involving the rollout of Boeing's 737 Max).

[199] *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 136 (2020) (quoting Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 952 (Del. Ch. 2013)).

[200] *See* Erickson, *Corporate Governance*, *supra* note 22, at 1829 ("The chief function of derivative suits should be to enforce the fiduciary duties of corporate officers and directors. As derivative suits become simply another tool of activist shareholders and eager attorneys, this function is increasingly left by the wayside.").

[201] *See supra* notes 49-50 and accompanying text.

with either a closely related state corporate law derivative action or a federal securities class action arising from the same facts or events.[202]

Salzberg was explicit: Delaware law aims "to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes."[203] Like the forum provisions affirmed by *Salzberg*, a provision eliminating derivative *Borak* claims advances these aims. Such a provision offers "a corporation with certain efficiencies in managing the procedural aspects of securities litigation."[204] It would "allow for litigation of federal [securities] claims in a federal court of plaintiff's choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs."[205] Given the practical effects of a forum provision directing all derivative lawsuits to the state courts of Delaware, *Salzberg* makes clear that such provision is both valid and enforceable against plaintiffs asserting a derivative *Borak* claim.

IV. CORPORATE FORUM PROVISIONS UNDER FEDERAL SECURITIES LAW

Having established the enforceability under Delaware law of a corporate forum provision precluding derivative *Borak* claims, this Part turns to consideration of federal law. After all, the Supremacy Clause of the U.S. Constitution ensures that state law cannot permit something that federal law prohibits.[206]

As to federal law, the Seventh Circuit decision in *Seafarers* centered on the premise that *Borak* dictates a right for shareholders under Section 14(a) to bring derivative lawsuits.[207] Because enforcement of Boeing's forum

[202] *See* Lutz & Kahn, *supra* note 70 ("The rise in derivative Section 14(a) claims has frustrated recent attempts by corporations to consolidate shareholder derivative actions in a single forum and avoid the inefficiencies of multi-forum litigation on the same issues.").

[203] *Salzberg*, 227 A.3d at 137.

[204] *Id.* at 114.

[205] *Id.* at 137; *see also* Erickson, *Corporate Governance*, *supra* note 22, at 1805 (outlining the "considerable" expenses that a target corporation incurs when faced with derivative litigation).

[206] *See* U.S. CONST. art. VI., cl. 2.

[207] *See supra* notes 120-125 and accompanying text.

provision would functionally waive this right, the Seventh Circuit reasoned that the provision is prohibited by the Exchange Act's anti-waiver provision.[208]

The Supreme Court's post-*Borak* decisions, however, make clear that this premise is flat wrong. As Part A explains, *Borak* is an antique of a bygone era, its rationale having since been expressly rejected by the Court's subsequent precedents. To the extent its holding survives, Part B shows that under the Court's post-*Borak* decisions, either shareholder claims under Section 14(a) are cognizable as only direct actions or, at least, that *Borak* must be interpreted narrowly to permit the waiver of derivative actions.

A. *Borak* is an Anachronism

By the standards of later Supreme Court decisions, *Borak* is an anachronism. Although the Court has never overruled its holding, it has expressly repudiated the rationale underlying the decision. Thus, by relying on *Borak*, the Seventh Circuit's holding in *Seafarers* begins on a crumbling foundation.

Borak is a vestige of an era when the Court's attitude toward judicially implied rights was far more permissive than it is today.[209] Emphasizing the "broad remedial purposes" of the Exchange Act, the *Borak* court believed it was the judiciary's role to imply rights into the statute if doing so would further Congress's underlying policies.[210] As the *Borak* court confidently asserted, "it is the duty of the courts to be alert [and] provide such remedies

[208] *See* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 717-18 (7th Cir. 2022) ("Applying the forum bylaw to this case is contrary to … federal securities law [because it fails to] respect[] the non-waiver provision in Section 29(a) of the federal Exchange Act").

[209] *See, e.g.*, Correctional Services Corp. v. Malesko 534 U.S. 61, 67, n.3, (2001) ("[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one. Just last Term it was noted that we 'abandoned' the view of *Borak* decades ago, and have repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'").

[210] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 431 (1964); *see also* Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15–16 (1979) (explaining that *Borak* "placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute").

as are necessary to make effective the congressional purpose."[211] Applying this freewheeling interpretative approach to Section 14(a), *Borak* reasoned that "[w]hile the [statutory] language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[212] As support, *Borak* pointed to Section 27(a) of the statute, which grants the federal courts exclusive jurisdiction over Exchange Act lawsuits.[213] Without elaboration, the Court baldly asserted that "[i]t appears clear that private parties have a right under [Section] 27 to bring suit for violations of [Section] 14(a)."[214]

In subsequent decisions—starting first with *Cort v. Ash*[215] and more recently *Alexander v. Sandoval*[216]—the Court has conspicuously distanced itself from *Borak*.[217] In deference to constitutional separation of powers,[218] the

[211] *Borak*, 377 U.S. at 433.

[212] *Id.* at 432.

[213] 15 U.S.C. § 78aa(a).

[214] *Borak*, 377 U.S. at 430. *See also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 (1971) (Harlan J., concurring) (noting that *Borak* implied a private right of action from "what can only be characterized as an 'exclusively procedural provision' affording access to a federal forum").

[215] 422 U.S. 66, 78 (1975) (announcing a four-factor test for "determining whether a private remedy is implicit in a statute" in which "legislative intent… to create such a remedy" is but one factor); *see also* Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J. concurring in the judgment) (explaining that subsequent Court decisions have narrowed and thus "effectively overruled the *Cort v. Ash* analysis …, converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence").

[216] 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative."); *see also* Ziglar v. Abbasi 137 S. Ct. 1843, 1855-56 (2017) (summarizing the doctrinal shift in the Court's implied right of action decisions from *Borak* to *Sandoval*).

[217] *See, e.g.*, *Sandoval*, 532 U.S. 275, 278 ("Respondents would have us revert … to the understanding of private causes of action that held sway 40 years ago [under *Borak*]. We abandoned that understanding in *Cort v. Ash* …. Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").

Court has instead adopted "a far more cautious" approach toward implying private rights of action.[219] Rather than asking whether a judicially implied right of action would further the legislative policy embodied by a federal statute, the Court now focuses exclusively on whether the express statutory text evinces a legislative intent to create a private remedy.[220] "[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."[221] And that determination "must begin with the language

[218] *See, e.g.*, *Abassi*, 137 S. Ct. at 1857 ("[W]hen a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis."); *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment…."); *see also* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) ("Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts.") (Gorsuch, J., concurring in part and concurring in the judgment) (quoting *Abassi*, 137 S. Ct. at 1857).

[219] *See Abassi*, 137 S. Ct. at 1855; *see also* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1103 (1991) ("*Borak*'s probe of the congressional mind, however, never focused squarely on private rights of action, as distinct from the substantive objects of the legislation. In fact, the importance of enquiring specifically into intent to authorize a private cause of action became clear only later [in] *Cort v. Ash* … and only later still, in *Touche Ross*, was this intent accorded primacy…."); Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 15–16 (1979) ("While [*Borak*] placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute…, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.").

[220] *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 567 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted…."); *Sandoval*, 532 U.S. at 286 ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy…. Statutory intent on this latter point is determinative."); *see also Thompson,* 484 U.S. at 189 (*Scalia, J.,* concurring in the judgment) (explaining that congressional intent is "the determinative factor" in evaluating the existence of a private cause of action).

[221] *TAMA*, 444 U.S. at 15–16; *accord Abassi*, 137 S. Ct. at 1856 ("[T]he judicial task [is] 'limited solely to determining whether Congress intended to create the private right of action asserted.'") (quoting *Touche Ross*, 442 U.S. at 568).

of the statute itself."[222] "[A] private right of action under federal law is not created by mere implication, but must be *unambiguously* conferred."[223]

Under the *"ancien* regime" of *Borak*, the Court would "as a routine matter… imply causes of action not explicit in the statute"[224] if it believed the Court could "improve upon" Congress's legislative handiwork.[225] By contrast, applying today's more rigorous standard, the Court has repeatedly declined to imply new private remedies, "no matter how desirable it might be as a policy, or how compatible with the statute."[226] Indeed, it has been over four decades since the Court last found a new implied private right of action under federal securities law.[227]

Consider, for example, the Court's 1979 decision in *Touche Ross & Co. v. Redington*.[228] In *Touche Ross*, the Court declined to imply a private remedy under Section 17(a) of the Exchange Act, which requires brokerage firms to file financial statements with the SEC.[229] Rather than asking whether a judicially implied right would further the statute's underlying purpose, the Court explained that its analysis was "limited *solely* to determining whether Congress intended to create the private right of action."[230]

[222] *Touche Ross*, 442 U.S. at 568; *accord Abassi*, 137 S. Ct. at 1856 ("[I]f the statute does not itself so provide, a private cause of action will not be created through judicial mandate.").

[223] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015) (emphasis added); *accord* Sandoval, 532 U.S. at 293 n.8 ("*Affirmative evidence* of congressional intent must be provided for an implied remedy, not against it, for without such intent the essential predicate for implication of a private remedy simply does not exist.").

[224] *Abbasi*, 137 S.Ct 1855.

[225] *Touche Ross*, 442 U.S. at 578.

[226] *Abbasi*, 137 S.Ct 1856 (quoting *Sandoval*, 532 U.S. at 286).

[227] See *TAMA*, 444 U.S. at 19-24 (recognizing an implied privative right of action under Section 215 of the Investment Advisers Act of 1940 to seek recission of an investment advisers contract, but refusing to recognize a private remedy under Section 206 to seek damages or other monetary relief).

[228] 442 U.S. 560 (1979).

[229] *See* 15 U.S.C. § 78q(a).

[230] Touche Ross & Co. v. Redington, 442 U.S. 560, 567 (1979).

Turning to the statutory text, *Touche Ross* expressly rejected *Borak*'s appeal to the "broad remedial purposes" of the Exchange Act.[231] "That a federal statue has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."[232] Accordingly, the Court ruled that "the mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf."[233] In equally pointed language, *Touche Ross* also discredited *Borak*'s bald assertion that Exchange Act Section 27 supports an implied remedy. Section 27 is merely a "jurisdictional provision," the *Touche Ross* court explained.[234] "It creates no cause of action of its own force and effect; it imposes no liabilities."[235]

Recognizing the unmistakable conflict with *Borak*, the *Touche Ross* court candidly concluded:

> We do not now question the actual holding of [*Borak*], but … [t]o the extent our analysis in today's decision differs …, it suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.[236]

[231] *See id.* at 578 ("The invocation of the "remedial purposes" of the [Exchange] Act is similarly unavailing. Only last Term, we emphasized that generalized references to the 'remedial purposes' of the [Exchange] Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'") (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978)).

[232] *Touche Ross*, 442 U.S. at 568 (quoting Cannon v. University of Chicago 441 U.S. at 688).

[233] *Touche Ross*, 442 U.S. at 568

[234] *See id.* at 577.

[235] *Id.*

[236] *Id.* at 578

When the Court would eventually return to *Borak* more than a decade later, the Court explicitly sidestepped the question of whether the beleaguered precedent remains good law.[237] Focusing squarely on the issues presented by the litigants, the Court in *Virginia Bankshares, Inc. v. Sandberg* stated simply that "the object of our enquiry does not extend further to question the holding of … [*Borak*], at this date, any more than we have done so in the past."[238] Nevertheless, the Court emphasized that its post-*Borak* decisions have affirmatively rejected *Borak*'s promiscuous approach to judicially implied rights of action.[239] "The rule that has emerged in the years since *Borak* … is that recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy."[240]

In the years since *Virginia Bankshares*, the Court has been more emphatic.[241] In *Sandoval*, the Court explained it has "abandoned" *Borak*'s logic.[242] Indeed, during recent oral arguments, the chief justice observed that

[237] To be sure, in the years immediately following *Borak*, the Court applied the implied right of action under Section 14(a) in two other decisions, suggesting that *Borak* remains a viable precedent. But in those two subsequent decisions—*Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) and *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976)—no party contested the existence of a privative right of action and, therefore, the Court merely assumed that a private right exists, without squarely questioning it. *See* Bradford, *supra* note 3, at 324. Consequently, the Courts application of the implied right in *Mills* and *TSC* did not implicitly reaffirm *Borak*. *See* Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."); Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 97 n.4 (1991) (asserting the same). In any case, both *Mills* and *TSC* predated the dramatic shift in the Court's implied private right of action jurisprudence as reflected in decisions like *Touche Ross*, *Virginia Bankshares*, and *Sandoval*. *See* Bradford, *supra* note 3, at 320.

[238] 501 U.S. 1083, 1104 n.11 (1991); *see* Bradford, *supra* note 3, at 326 ("*Sandberg* may be read either as a reluctant reaffirmation of *Borak* or as a tentative first step toward overruling *Borak*.").

[239] *See Virginia Bankshares,* 501 U.S. at 1102-03 (describing the doctrinal shift since *Borak* in the Court's implied right of action jurisprudence).

[240] *Id.* at 1102.

[241] *Abbasi*, 137 S.Ct at 1856 (explaining that *Borak* represents an "ancien regime" and that today "the Court [has] adopted a far more cautious course before finding implied causes of action").

[242] *Sandoval*, 532 U.S. 275, 278

"we now know that [*Borak*] was not the right approach," that "*Borak* would not be decided the same way today," and that, "from today's perspective, what we did back then [in *Borak*] was a mistake."[243]

B. The Implications of the Post-*Borak* Decisions

Under the Court's subsequent decisions, all that remains of *Borak* is its holding, which "has no basis in current law, but … has not yet been overruled."[244] Given its "derelict" status,[245] some have questioned whether it is only a matter of time before the Court expressly reverses the 1964 decision.[246]

But even if *Borak* remains good law,[247] the Court post-*Borak* precedents offer three unmistakable lessons about the implied private right of action

[243] *See* Oral Arg. Tr. at 40, *Emulex v. Varjabedian*, No. 18-459, (Apr. 15, 2019) (Roberts, C.J.), at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-459_5ie6.pdf; *accord*;

[244] *See* Bradford, *supra* note 3, at 321.

[245] Seafarers Pension Plan v. Bradway, 23 F.4th 714, 730 (7th Cir. 2022) (Easterbrook, J., dissenting).

[246] *See, e.g.*, Bradford, *supra* note 3, at 308 ("The Supreme Court has clearly rejected *Borak*'s reasoning, leaving only an unsupported holding.…What remains of *Borak* stands ready to collapse, waiting only for the appropriate push.").

Until the Court does so, however, lower courts will be understandably circumspect to disregard *Borak* as bad law. *See* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484, (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *id*. at 486 (inveighing that where a lower court "refused to follow … a controlling precedent of this Court" the lower court "engaged in an indefensible brand of judicial activism") (Stevens, J., dissenting).

[247] In the nearly six decades since *Borak* was decided, Congress has never expressly affirmed the private right of action judicially implied under Section 14(a). *See* Bradford, *supra* note 3, at 320; Pub. L. No. 104-67, § 203, 109 Stat. 737, 762 (1995) §203 ("Nothing in this Act or the amendments made by this Act shall be deemed to create or ratify any implied private right of action ….") Nor has Congress legislatively disavowed the private right either. Nevertheless, legislative inaction "deserve[s] little weight in the interpretive process" because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation". Alexander v. Sandoval, 532 U.S. 275, 292 (2001).

under Section 14(a). First, that right must be narrowly interpreted. Second, that right belongs to only shareholders. And third, shareholder standing to assert that right is limited to direct, not derivative, lawsuits. In each instance, the implication is the same: the Seventh Circuit's reliance on *Borak* was mistaken. A corporate forum provision precluding derivative actions in federal court does not violate shareholders' implied right under Section 14(a).

1. Borak must be Narrowly Interpreted

As the Court has repeatedly explained, judicially implied private rights of action must be narrowly interpreted.[248] A strict interpretation is an essential "corollary" to the Court's more rigorous, post-*Borak* skepticism toward implying rights in the first instance.[249] "Concerns with the judicial creation of a private cause of action [also] caution against its expansion. The decision to extend the cause of action is for Congress, not for [the courts]" to make.[250] Because "any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy," it follows that "the breadth of right once recognized should not, as a general matter, grow beyond the scope congressionally intended."[251]

Applying this skeptical approach to the implied right of action under Rule 10b-5 in particular, the Court has in decision after decision declined to expand the scope of that right beyond the "present boundaries" established by the Court's precedents.[252] Besides separation-of-powers concerns, the Court

[248] *See* Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011) ("We must give 'narrow dimensions ... to a right of action Congress did not authorize…') (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008)); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2017) (noting the "Court's general reluctance to extend judicially created private rights of action.").

[249] Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991).

[250] *Stoneridge*, 552 U.S. at 165.

[251] *Virginia Bankshares*, 501 U.S. at 1102.

[252] *See, e.g., Stoneridge*, 552 U.S. at 159-65 (declining to expand Rule 10b-5 to encompass scheme liability for secondary actors); Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 142-48 (2011) (declining to expand Rule 10b-5 liability beyond the "maker" of a false or misleading statement); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 170-78 (1994) (declining to expand Rule 10b-5 to encompass liability for

has also cited the "practical consequences" that may flow from a judicial expansion of Rule 10b-5 in the absence of congressional intent.[253] Specifically, the Court has cautioned that expansion risks inviting "strike suits" that have "little chance of success," but are instead brought by plaintiff attorneys only for "settlement value."[254] Enabling "plaintiffs with weak claims to extort settlements from innocent companies… rais[es] the cost of doing business," the Court has explained.[255] "This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets."[256] Consequently, expanding the private right of action under Rule 10b-5 risks creating "a social cost rather than a benefit."[257]

Importantly, the Court has signaled this same jaundiced view to the private right of action implied under Section 14(a). In declining to "extend the scope of *Borak* actions beyond the ambit" established by its previous decisions, the Court in *Virginia Bankshares* explained that it could "find no manifestation of [congressional] intent" in the text or legislative history of Section 14(a) to authorize a private cause of action, let alone one as broad as

aiding and abetting fraud); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (declining to expand Rule 10b-5 standing to encompass potential purchasers or sellers); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) (declining to expand Rule 10b-5 to encompass breaches of fiduciary duty).

[253] *Stoneridge*, 552 U.S. at 163; *accord Blue Chip Stamps*, 421 U.S. at 740-49 (describing various "practical factors" that weigh against expanding 10b-5 liability); *Cent. Bank of Denver*, 511 U.S. at 1454 (describing the problematic "ripple effects" of expanding 10b-5 liability); *see also Virginia Bankshares*, 501 U.S. at 1105-06 (discussing the problematic "practical consequences" that may flow from a judicial expansion of *Borak*).

[254] *Blue Chip Stamps*, 421 U.S. at 741-49; *accord Cent. Bank of Denver*, 511 U.S. at 1454 (explaining that expansion Rule 10b-5 liability risks inviting "uncertainty and excessive litigation" requiring defendants to "expend large sums even for pretrial defense and the negotiation of settlements").

[255] *Stoneridge*, 552 U.S. at 163.

[256] *Id.* at 164; *accord Cent. Bank of Denver*, 511 U.S. at 1454 (explaining the "ripple effects" of expanding 10b-5 liability includes "the increased costs incurred by professionals because of the litigation and settlement costs under 10b–5 [which] may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute").

[257] *Blue Chip Stamps*, 421 U.S. at 741.

the plaintiff-shareholder had claimed.[258] Turning next to "policy considerations," the Court cautioned that the expansion of the implied private right of action under Section 14(a), like Rule 10b-5, would risk inviting the "same threats" of "strike suits" based on "speculative claims."[259]

A strict interpretation of *Borak* presents obvious problems for the Seventh Circuit's analysis in *Seafarers*. For one, as Judge Easterbrook recognized in dissent, nothing in *Borak* expressly holds that the right to bring a derivative action under Section 14(a) cannot be waived so long as shareholders retain the right to bring a direct or class action.[260] Instead, *Borak* simply stated that "a right of action exists as to both derivative and direct causes" because denying derivative standing would be "tantamount to a denial of private relief."[261] But as Boeing's experience demonstrates,[262] where shareholders are able to bring (i) a federal securities class action to recover any damage they suffered personally *and* (ii) a derivative action under state corporate law to recover any damage suffered by the corporation, it can be hardly said that shareholders are "deni[ed] … private relief" without derivative standing under Section 14(a).[263] To the contrary, a derivative *Borak* action accomplishes little more than benefit the plaintiff's bar.[264]

[258] *Virginia Bankshares*, 501 U.S. at 1102-03; *see also id* at 1104 ("We would have trouble inferring any congressional urgency to depend on implied private actions to deter violations of § 14(a), when Congress expressly provided private rights of action in [three other provisions] of the [Exchange] Act.").

[259] *Virginia Bankshares*, 501 U.S. at 1105-06.

[260] Seafarers Pension Plan v. Bradway, 23 F.4th 714, 729 (7th Cir. 2022) (Easterbrook, J., dissenting) ("The Supreme Court has never held or even intimated that there is a federal right to pursue a derivative claim under § 14(a) when the investor can pursue a direct claim.") (citing *Virginia Bankshares*).

[261] J. I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964). Elsewhere, the Supreme Court has explained that a contract violates the Exchange Act's anti-waiver provision only if it "'weakens' [investors'] ability to recover under the Exchange Act." Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 230 (1987).

[262] *See supra* notes 194-196 and accompanying text.

[263] *See* Seafarers, 23 F.4th at 729 (Easterbrook, J., dissenting) ("*Borak* … holds that § 14 supports a derivative claim when its denial would "be tantamount to a denial of federal relief"; that condition does not hold when the private plaintiff can pursue a direct action in federal court."); Lutz & Kahn, *supra* note 70 (*Borak*'s rationale for holding that Section 14(a) claims

A second, more fundamental problem for *Seafarers* is that *Borak*'s statements concerning derivative actions are nonbinding dicta, and not a part of the actual holding of the decision. This interpretation comports with the *Borak* Court's own statement of the question presented in the case: "We consider *only* the question of whether [Section] 27 of the Act authorizes a federal cause of action for rescission or damages to a corporate stockholder …. This being the *sole* question …, we will not consider other questions …."[265] This purposefully narrow articulation of the question before the Court suggests that *Borak*'s *sole* holding is that a federal cause of action does in fact exist.[266] Any subsequent musings by the Court as to the precise nature of that action, whether direct or derivative, were unnecessary to answer the question presented. Indeed, the Court would later characterize *Borak* in precisely these terms, explaining in *Virginia Bankshares* that "[*Borak*] did not itself … define the class of plaintiffs eligible to sue under § 14(a). But its *general holding* [is] that a private cause of action was available to *some shareholder class*."[267] Thus, the holding of *Borak* is agnostic as to whether a derivative or direct action may be brought under Section 14(a). Rather, it merely establishes that *some* private right of action exists.

One final problem with the Seventh Circuit's reliance on *Borak* is that it wholly fails to account for how a half century of subsequent Supreme Court precedents has substantially qualified the 1964 decision. If *Borak* were

may be brought derivatively is flawed…. Stockholders often sue companies, directors and officers directly for damages under Section 14(a)."); Quinn, *supra* note 191, at 186 ("The rationale of *Borak* … does not mandate viewing proxy suits as derivative…. [*Borak*] appears to be concerned with providing redress for an injury to the 'stockholders as a group,' but a direct action is not necessarily inadequate for private enforcement, particularly when the Court goes on to hold that district courts are not limited to ordering only prospective relief.").

[264] *See id*. (Easterbrook, J., dissenting) ("The federal right is for investors … to sue directly. Many investors *have* sued Boeing directly about the 737 MAX debacle. A derivative suit adds only a procedural snarl."); *see also supra* notes 76-79 and accompanying text (describing the advantages a derivative *Borak* claim presents to the plaintiff's bar).

[265] J. I. Case Co. v. *Borak*, 377 U.S. 426, 428 (1964) (emphasis added).

[266] *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 383 (1970) (explaining that "[i]n *Borak*… , the Court limited its inquiry to whether a violation of s 14(a) gives rise to 'a federal cause of action for rescission or damages….").

[267] *Virginia Bankshares*, 501 U.S. at 1099 (emphasis added).

narrowly interpreted, it would account for these post-*Borak* decisions, which together signal that a corporate forum provision precluding derivative actions in federal courts does not impinge upon shareholder rights under Section 14(a).

2. Shareholders alone have standing under Section 14(a)

The Court's post-*Borak* decisions establish a key limit on the implied right of action that *Borak* created: standing under Section 14(a) extends only to shareholders. It does not extend to others. In particular, standing does not extend to a corporation whose shareholders are solicited.

Borak itself signals as much. The *Borak* court was emphatic that the primary aim of Section 14(a) is the protection of shareholders.[268] As the Court explained, Section 14(a) was enacted to protect the "free exercise of the voting rights of stockholders."[269] When a shareholder's vote is secured through a false or misleading proxy statement, it is the shareholder's personal right to "'fair corporate suffrage" that is violated.[270] "The damage suffered results … from the deceit practiced *on the stockholders as a group*."[271]

Although this point is marbled throughout *Borak*, it becomes confused by the Court's assertion that shareholders may enforce Section 14(a) through a derivative action.[272] A derivative lawsuit is brought by shareholders *on behalf of the corporation* in order to vindicate some right of the corporation.[273] By

[268] *Borak*, 377 U.S. at 432 ("While [Section 14(a)] makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors.'"); *accord* 15 U.S.C. § 78n(a) (authorizing the SEC to promulgate rules regulating proxy solicitations "for the protection of investors").

[269] *Id.* at 431.

[270] *Id.*

[271] *Id.* at 432.

[272] *Id.* at 431-32.

[273] *See* Burks v. Lasker, 441 U.S. 471, 477 (1979) ("A derivative suit is brought by shareholders to enforce a claim on behalf of the corporation."); MAXXAM, Inc./Federated Dev. S'holders Litig., In re, 698 A.2d 949, 956 (Del. Ch. 1996) ("A derivative claim belongs to the corporation, not to the shareholder plaintiff who brings the action…. The stockholder plaintiff's claim for

contrast, a direct lawsuit is brought by shareholders *on their own behalf* in order to vindicate some personal right of the shareholders.[274] Accordingly, if a lawsuit aims to vindicate the "free exercise of the voting rights of stockholders", then the lawsuit should be direct, not derivative.[275] Indeed, even the plaintiff in *Borak* had argued that his suit was direct and not derivative.[276] Nonetheless, the court said "[W]e need not embrace that view, because we believe that a right of action exists as to be both derivative and direct causes."[277]

In characterizing the private right implied under Section 14(a) to include derivative actions, perhaps the *Borak* Court was concerned that direct suits would be ineffective in protecting shareholders.[278] After all, *Borak* was decided two years before the federal rules of civil procedure governing class actions were modernized, shifting from an opt-in to an opt-out model and thus enabling shareholder class actions with potential damages (and resulting fees) worthwhile for plaintiff's attorneys to bring meritorious proxy claims.[279] By contrast, in a successful derivative action, a plaintiff's attorney

redress in a derivative action is not personal…. [T]he corporation is always the real party in interest.") (Jacobs, V.C.).

[274] *See* Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1126 (Del. 2016) (holding that shareholder claims are direct and "not derivative because they are personal to the stockholder and do not belong to the corporation itself"); *id.* at 1039-40 (explaining that "when a plaintiff asserts a claim based on the plaintiff's own right" the claim is direct, not derivative; Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1039 (Del. 2004) (explaining that, in contrast to a derivative claim, a direct claim is one in which a shareholder suffered a "direct injury …independent of any alleged injury to the corporation").

[275] *See* Quinn, *supra* note 191, at 186-87 ("A suit alleging violation of federal proxy rules seeks redress for a direct injury to shareholder rights…. Because this personal right is violated when shareholder votes are obtained through a false or misleading proxy solicitation, action to redress such a violation is direct, not derivative.").

[276] *See Borak*, 377 U.S. at 431 ("[T]he respondent contends that his … claim is not a derivative one….").

[277] *Id.* at 431.

[278] *See* STEPHEN M. BAINBRIDGE, CORPORATE LAW 320-21 (4TH ED. 2020); Quinn, *supra* note 191, at 186.

[279] *See* 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:15 (6th ed.) (describing the 1966 amendments to the federal rule of civil procedure governing class actions); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (upholding the constitutionality of the opt-in model

would be entitled to have its fees paid by the corporation, the attorney's nominal client, even in a suit that results in no monetary damages.[280] If the deficiencies of class action procedure motivated the *Borak* courts to include derivative actions within the sweep of Section 14(a), then the subsequent procedural developments have undermined this logic.

Whatever the reason for *Borak*'s insistence on derivative actions, lower courts soon thereafter extended standing under Section 14(a) from shareholders whose proxies are solicited to the corporate entity at the center of a proxy contest.[281] As Judge Friendly reasoned in the Second Circuit's seminal decision *Studebaker Corp. v. Gittlin*, "If [the] Exchange Act authorizes a stockholder to assert [a derivative] claim on the corporation's behalf, as held in *Borak*, it must also authorize the corporation to do so on its own."[282] In justifying this conclusion, *Gittlin* echoed *Borak*'s "broad remedial" spirit,[283] explaining that "in … contests for [corporate] control" Congress anticipated "the corporation, as represented by its management has a role to play" in protecting shareholders from "irresponsible outsiders seeking to wrest control of [the] corporation."[284]

introduced by the 1966 amendments).

[280] *See* STEPHEN M. BAINBRIDGE, CORPORATE LAW 240 (4TH ED. 2020).

[281] *See* Studebaker Corp. v. Gittlin, 360 F.2d 692, 695 (2d Cir. 1966); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 794 (8th Cir. 1967); In re Haas, 36 B.R. 683, 690 (N.D.Ill.1984); Calumet Indus., Inc. v. MacClure, 464 F.Supp. 19, 28 (N.D.Ill.1978); Ameribanc Investors Group v. Zwart, 706 F. Supp. 1248, 1252-53 (E.D. Va. 1989); Bound Brook Water Co. v. Jaffe, 284 F.Supp. 702, 705 (D.N.J.1968); Reserve Management Corp. v. Anchor Daily Income Fund, Inc., 459 F.Supp. 597, 607 (S.D.N.Y.1978); D & N Fin. Corp. v. RCM Partners Ltd. P'ship, 735 F. Supp. 1242, 1247 (D. Del. 1990); CNW Corp. v. Japonica Partners, L.P., 776 F.Supp. 864, 869 (D. Del. 1990).

[282] *Studebaker*, 360 F.2d at 695.

[283] *See supra* note 210 and accompanying text.

[284] *Studebaker*, 360 F.2d at 695; *see also Ameribanc*, 706 F. Supp. at 1253 (following *Gittlin* and reasoning "[h]ow better to promote this purpose than to entrust the enforcement of the section, at least in part, to the entity best equipped and motivated to detect proxy statement errors? Conferring on target companies a right to sue under Section 14(a) helps insure prompt detection and correction of proxy statement errors.").

Perhaps *Gittlin*'s logic made sense in an era when the Court encouraged promiscuity toward judicially implied rights of action. However, it makes no sense today, where the Court has repeatedly cautioned against the judicial creation or expansion of implied rights.[285] Worse yet, *Gittlin*'s logic relies on the discredited notion that, in a contest for corporate control, the corporation's incumbent managers are well positioned to protect shareholders' interests.[286] Since the 1980s rise of tender offers, courts led by Delaware have instead recognized that when a corporation's managers face potential ouster by a hostile outsider, the managers' actions become inherently suspect due to the "omnipresent specter" of self-interest.[287] Consequently, in a battle for corporate control, the "corporation, as represented by its management," is a "poor representative of shareholder interests."[288]

Putting aside the merits of *Gittlin*, the Court has never expressly endorsed the expansion of *Borak* from shareholders to the corporation that is owned by shareholders. Instead, the Court's post-*Borak* precedents confirm that standing under 14(a) is, in fact, limited to shareholders only.

In *Piper v. Chris-Craft Industries, Inc.*,[289] both the majority and dissent acknowledged this point as well as the awkward tension created by *Borak*'s recognition of a derivative action. *Piper* held that Exchange Act Section 14(e)—a sister provision to Section 14(a) that prohibits any false or misleading statements in connection with a tender offer[290]—does not imply a

[285] *See supra* notes 217-227, 248-259 and accompanying text.

[286] Arguably, this premise is discredited by the original legislative history of the Exchange Act itself, which recognized the purpose of Section 14(a) is to "protect investors from promiscuous solicitations of their proxies, on the one hand, by irresponsible outsider … and, on the other hand, by unscrupulous corporate officials seeking to retain control…." *See* S. REP. NO. 1455, 73d Cong., 2d Sess. 77 (1934).

[287] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

[288] *See* Polaroid Corp. v. Disney, 862 F.2d 987, 999–1000 (3d Cir. 1988) (denying the corporate entity standing to bring a private right of action under the all holders rule, Exchange Act Rule 14d-10).

[289] 430 U.S. 1 (1977).

[290] 15 U.S.C. § 78n(e).

private right of action on behalf of a tender offeror.[291] To justify this conclusion, the Court reasoned that "the sole purpose of [Section 14(e)] was the protection of investors…. [T]here is … no indication that Congress intended to create a damages remedy" in favor of any other parties.[292] In dissent, Justice Stevens aptly noted that the majority's reasoning stood in conflict with *Borak*.[293] Although *Borak* "held that a derivative suit on behalf of the corporation could be brought under [Section] 14(a), it seems clear that the primary beneficiaries of that section [are] individual stockholders."[294] Applying *Borak*'s logic, Justice Stevens reasoned, the Court should also imply a private right of action for tender offerers.[295] The *Piper* majority brushed away this apparent tension by correcting the dissent's "misreading of *Borak*".[296] As the Piper court explained, "The *Borak* Court was … *focusing on all stockholders* the owners of the corporation as the beneficiaries of [Section] 14(a). Thus, the majority recast *Borak* as "a case in which the remedy was *afforded to shareholders*[,] the direct and intended beneficiaries of the legislation."[297]

Later, in *Virginia Bankshares*, the Court sharpened the focus on shareholders by narrowing in on voting rights as a prerequisite for standing under Section 14(a). In *Virginia Bankshares*, the Court refused to extend *Borak* to shareholders whose votes were unnecessary to authorize the corporate action for which their proxy was solicited.[298] Instead, the Court ruled that only shareholders whose "votes [are] legally required to authorize a [corporate] action," have standing under Section 14(a).[299] Thus, under

[291] *See Piper*, 430 U.S. at 41-42.

[292] *See id.* 35, 38.

[293] *See id.* 66-67 (Stevens, J., dissenting).

[294] *Id.* 66 (Stevens, J., dissenting).

[295] *See id.* 67 (Stevens, J., dissenting).

[296] *See id.* 33 n.21.

[297] *Id.* 33 n.21.

[298] *See* Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1087 (1991).

[299] *See id.* at 1102 (declining "to expand the class of plaintiffs entitled to bring *Borak* actions" beyond shareholders whose "votes [are] legally required to authorize the action proposed"); *id.*

Virginia Bankshares, standing does not extend to minority and nonvoting shareholders, who even if misled by a false or misleading proxy solicitation, lack the votes to potentially affect the outcome of a corporate election.[300]

By anchoring standing in the voting rights of shareholders, *Virginia Bankshares* makes clear that the corporate entity itself lacks standing to bring a claim under Section 14(a). After all, *a corporation has no voting rights*. A corporation cannot legally vote its own shares in any election for which its shareholders are solicited.[301] Rather, only the shareholders whose "votes [are] legally required" have standing under Section 14(a).[302]

Notably, this restrictive approach to Section 14(a) standing "also accords with the narrow scope that we must give … implied private right[s] of action."[303] As *Borak* itself acknowledged, Section 14(a) is about the "protection of investors."[304] Nothing in either *Borak* or the statutory text suggests Section 14(a) was intended to protect a corporation whose shareholders are solicited. To the contrary, both *Borak* and the legislative history recognized that the "free exercise of the voting rights of stockholders" could be manipulated by outsiders as well as by the corporation, acting through its "unscrupulous corporate officials, seeking to retain control of the management."[305] Thus, to

at 1105 (explaining that standing under Section 14(a) does not extend beyond "shareholders with votes necessary" to approve a corporate action).

[300] *See, e.g.*, 7547 Corp. v. Parker & Parsley Development Partners, L.P., 38 F.3d 211, 229-231 (5th Cir. 1994) (applying *Virginia Bankshares* to hold that limited partnership investors who lacked voting rights do not have standing to challenge a proxy solicitation under Section 14(a)).

[301] *See* Lutz & Kahn, *supra* note 70 (arguing Section 14(a) claims are not appropriately brought as derivative actions because "the real party in interest in derivative actions is the corporation, not its stockholders, and the corporation does not vote on matters set forth in its proxy materials").

[302] *See Virginia Bankshares*, 501 U.S. at 1102.

[303] *See* Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 144 (2011).

[304] *See* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) ("[A]mong [Section 14(a)'s] chief purposes is 'the protection of investors.'"); *accord* 15 U.S.C. § 78n(a) (authorizing the SEC to promulgate rules regulating proxy solicitations "for the protection of investors").

[305] *See Borak*, 377 U.S. at 432 ("[Section 14(a)] was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which … [had] frustrated the free exercise of the voting rights of stockholders.'") (quoting H.R. REP. NO.

extend Section 14(a) standing to a corporation whose shareholders are solicited would be to extend standing to a party against whom Section 14(a) aims to protect shareholders. In the language of *Virginia Bankshares*, it would impermissibly "expand the class of plaintiffs entitled to bring *Borak* actions" beyond its original ambit.[306]

Citing *Piper* and *Virginia Bankshares*, Judge Easterbrook in dissent recognized that standing under Section 14(a) is limited to only shareholders; it does not extend to a corporation whose shareholders are solicited.[307] Indeed, since *Virginia Bankshares*, at least three federal district courts have come to the same conclusion, ruling that a corporation lacks standing to challenge a proxy solicitation directed at the corporation's shareholders.[308] In doing so, these district courts have conspicuously departed from *Gittlin* and its progeny, which were established before *Virginia Bankshares* changed the doctrinal landscape.

By contrast, the Seventh Circuit's majority decision in *Seafarers* fails to even once mention *Virginia Bankshares*.[309] This is a damning omission. Because recognizing that a corporation lacks standing under Section 14(a) has an obvious implication for shareholder standing to bring a derivative

1383, 73d Cong., 2d Sess. 14 (1934); S. REP. NO. 1455, 73d Cong., 2d Sess. 77 (1934) ("[Section 14(a)] will protect investors from promiscuous solicitation of their proxies, on the one hand, by irresponsible outsiders seeking to wrest control of a corporation …; and, on the other hand, by unscrupulous corporate officials seeking to retain control of the management….").

[306] *See Virginia Bankshares*, 501 U.S. at 1102.

[307] *See* Seafarers Pension Plan v. Bradway, 23 F.4th 714, 729 (7th Cir. 2022) (Easterbrook, J., dissenting) (explaining that the "private right of action" under Section 14(a) "is one that permits investors to sue…, *not one that permits issuers* (the authors of the contested documents) to sue") (emphasis added).

[308] *See* Diceon Electronics, Inc. v. Calvary Partners, L.P., 772 F. Supp. 859, 869 (D. Del. 1991); Tenet Healthcare Corp. v. Community Health Systems, Inc., 839 F. Supp.2d 869, 871-72 (N.D. Tex. 2012); In re Verso Techs., Inc., 2010 WL 11598054, *29 (N.D. Ga. June 30, 2010). *But see* Int'l Jensen Inc. v. Emerson Radio Corp., 1997 WL 43229, at *5 (N.D. Ill. Jan. 24, 1997) (ruling that a corporation does have standing under Section 14(a)); Enzo Biochem, Inc. v. Harbert Discovery Fund, LP, 2021 WL 4443258, at *6 (S.D.N.Y. Sept. 27, 2021) (same).

[309] By contrast, *Virginia Bankshares* figures prominently in Judge Easterbrook's dissent. *See Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting) ("Virginia Bankshares treats *Borak* as limited to its facts and declines to extend private rights under § 14(a) to new theories.").

Borak claim. After all, "[a] derivative suit is brought by shareholders *to enforce a claim on behalf of the corporation*."[310] It is a suit brought by a shareholder "*to enforce a corporate cause of action*."[311] Thus, "one precondition for the suit [is] a valid claim on which the corporation could have sued."[312] If this precondition fails—if a corporation has no valid claim that it can bring under Section 14(a)—then a shareholder cannot bring a derivative action on behalf of the corporation. And if a shareholder cannot bring a derivative action in the first instance, then a forum provision precluding such actions cannot violate shareholders' rights under Section 14(a).

3. Shareholder standing is limited to Direct Actions

As the foregoing discussion suggests, if *Borak* is narrowly interpreted, then what remains is an implied right of action under Section 14(a) to bring only direct shareholder claims; there is no implied right to bring derivative claims.[313] A separate thread of the Court's post-*Borak* decisions only confirms this conclusion.

First in *Burks v. Lasker*,[314] and again in *Kamen v. Kemper Financial Services*,[315] the Court held that, in the absence of express congressional intent to the contrary, federal courts must look to state corporate law in adjudicating derivative lawsuits brought under the federal securities statutes.[316] In both cases, the Court was confronted with derivative shareholder lawsuits asserting implied rights of action under the Investment Company Act of 1940.[317] And in both cases, the Court reasoned that because a

[310] Burks v. Lasker, 441 U.S. 471, 477 (1979).

[311] Ross v. Bernhard, 396 U.S. 531, 534–35 (1970).

[312] *Id.*

[313] *See Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting) ("The federal right [under Section 14(a)] is for investors … to sue *directly*."); *see also* Quinn, *supra* note 191, at 186 ("Viewing proxy suits as direct actions… best accommodates the policy underling the proxy provisions of federal securities law as well as the purpose of derivative suits").

[314] 441 U.S. 471 (1979).

[315] 500 U.S. 90 (1991).

[316] *See Burks*, 441 U.S. at 475-77; *Kamen*, 500 U.S. at 98-99.

[317] *See Burks*, 441 U.S. at 473.

derivative lawsuit "relates to the allocation of governing power within the corporation" as between directors and shareholders, and because state law "is the font of corporate … powers,"[318] state law dictates the rules governing derivative litigation.[319]

Thus, *Burks* and *Kamen* direct federal courts to look to state corporate law to determine whether a *Borak* claim is direct or derivative.[320] Looking to state corporate law, Delaware could not be more explicit. In distinguishing between direct and derivative claims, Delaware law asks "(i) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)."[321] Applying this test,[322] the Delaware Supreme Court has plainly stated that "where it is claimed that a duty of disclosure violation impaired the stockholders' right to cast an informed vote, that claim is direct."[323] The claim is direct, not derivative, because "where a shareholder

[318] *See Kamen*, 500 U.S. at 99, 101 (quoting *Burks*, 441 U.S. at 478).

[319] *See Burks*, 441 U.S. at 478 (ruling that "the first place one must look to determine the powers" of directors and shareholders in derivative litigation "is in the relevant State's corporation law"); *Kamen*, 500 U.S. at 99 ("We reaffirm the basic teaching of *Burks v. Lasker*…: where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law…").

[320] *E.g.*, Freedman v. MagicJack Vocaltec Ltd., 963 F.3d 1125, 1134 (11 Cir. 2020) (holding that state corporate law determines whether a shareholder claim under Section 14(a) is direct or derivative); Calamore v. Juniper Networks Inc., 364 F. App'x 370, 371 (9th Cir. 2010) (same); *see also* Strougo v. Bassini, 282 F.3d 162, 169 (2d Cir. 2002) (holding that state law determines whether an investor claim under Investment Company Act is direct or derivative); Lapidus v. Hecht, 232 F.3d 679, 682 (9th Cir. 2000) (same); Boland v. Engle, 113 F.3d 706, 715 (7th Cir. 1997) (same).

[321] *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033, 1035 (Del. 2004).

[322] Technically, the *Tooley* test applies only to "the narrow issue of whether a claim for breach of fiduciary duty or otherwise to enforce the corporation's own right must be asserted derivatively or directly." Citigroup Inc. v. AHW Inv. P'ship, 140 A.3d 1125, 1127 (Del. 2016) The *Tooley* test is inapplicable where a "plaintiff seek[s] to bring a claim belonging to her personally," because such a claim is direct to begin with. *Id.* Accordingly, in *Citigroup* the Delaware Supreme Court held that a plaintiff-shareholder's claim that she "allegedly relied on the corporation's misstatements to her detriment" is direct, not derivative. *Id.*

[323] *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 766, 772 (Del.2006). In *J.P. Morgan*, plaintiff-shareholders alleged that their corporation's misleading proxy statement

has been denied one of the most critical rights he or she possesses—the right to a fully informed vote—the harm suffered is almost always an individual, not corporate, harm."[324]

Consequently, deference to state corporate law, which *Burks* and *Kamen* dictate,[325] reinforces what *Piper* and *Virginia Bankshares* already suggest: a shareholder claim under Section 14(a) is not cognizable as a derivative action. If it is cognizable at all, it is as a direct action only.[326]

caused the shareholders to approve a proposed acquisition, in which the corporation overpaid $7 billion for the target. *Id.* at 769. The Delaware Supreme Court ruled that because the economic loss was suffered by the corporation, and not its shareholders, the loss was not recoverable by the shareholders in direct action. *Id.* at 772-73. As the court explained, "[a]lthough the $7 billion damage figure would be a logical and reasonable consequence (and measure) of the harm caused to [the corporation] for being caused to overpay for [the target], that $7 billion figure has no logical or reasonable relationship to the harm caused to the [corporation's] shareholders *individually* for being deprived of their right to cast an informed vote." *Id.* at 773.

[324] *In re* Tyson Foods, Inc., 919 A.2d 563, 601 (Del. Ch. 2007) (Chandler, C.).

[325] *See supra* notes 314-319 and accompanying text. As the *Burks* Court explained in the context of corporations, "[federal] legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Burks*, 441 U.S. at 478. Elaborating on this reasoning, the *Kamen* Court explained that "Corporation law is [an] area" where "[t]he presumption that state law should be incorporated into federal common law is particularly strong" because "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98.

[326] To be sure, after *Borak*, the Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), considered another derivative suit brought under Section 14(a) and never questioned whether the plaintiff-shareholder had derivative standing. But the defendants in *Mills* did contest the existence of derivative standing under Section 14(a). *See supra* note 237 (explaining that *Mills* predated the dramatic shift in the Court's implied private right of action jurisprudence as reflected in decisions like *Touche Ross*, *Virginia Bankshares*, and *Sandoval*). In this respect, *Mills* is like many other lower court post-*Borak* precedents that relied on the "the Court's casual comments" in *Borak* to assume, without analysis, that proxy suits are derivative." Quinn, *supra* note 191, at 184; *see also id.* at 185 ("*Borak* seems to have inhibited analysis of whether federal proxy suits are direct or derivative. Many subsequent cases assume without analysis that proxy suits are derivative.").

Heeding this message, the Ninth Circuit has twice ruled that shareholder claims under Section 14(a) are direct, not derivative.[327] Citing controlling Delaware court precedents, the Ninth Circuit has explained that where shareholders are "deprived of the right to a fully informed vote," the claim is a direct claim because "[the] claimed injury is independent of any injury to the corporation and implicates a duty of disclosure owed to shareholders."[328]

By contrast, the Seventh Circuit's majority opinion in *Seafarers*, despite making a perfunctory citation to *Kamen*,[329] never considers how Delaware law would characterize shareholder claims brought under Section 14(a).[330] Again, this error is fatal. Because Delaware law unambiguously classifies such claims as direct claims,[331] a forum provision precluding a derivative action under Section 14(a) cannot infringe upon the rights of shareholders. Shareholders have no right to bring such claims in the first instance.

To be clear, nothing about this conclusion denies the real damage that a corporation can itself suffer when its shareholders are deceived by a misleading proxy solicitation distributed by the corporation's management. As *Borak* itself recognized, "[t]he injury which a stockholder suffers from … a deceptive proxy solicitation ordinarily flows from the damage done to the corporation."[332] But what the Court's post-*Borak* decisions establish is that the right secured by Section 14(a) is the *right of shareholders* to "fair

[327] *See* New York City Employees' Retirement System v. Jobs, 593 F.3d 1018, 1022-23 (9th Cir. 2010) (applying Delaware case law to conclude that a shareholder's "claim for injury to its right to a fully informed vote is a direct claim") *overruled on other grounds by* Lacey v. Maricopa Cnty., 693 F.3d 896 (9th Cir. 2012); Calamore v. Juniper Networks Inc., 364 F. App'x 370, 371 (9th Cir. 2010) (same).

[328] *See Jobs*, 593 F.3d at 1022-23 (citing Delaware case law).

[329] Seafarers Pension Plan v. Bradway, 23 F.4th 714, 719 (7th Cir. 2022) (quoting *Kamen* for the undisputed proposition that "A derivative suit is considered 'an asset of the corporation' and permits 'an individual shareholder to bring 'suit to enforce a corporate cause of action against officers, directors, and third parties.'").

[330] By contrast, *Kamen* figures prominently in Judge Easterbrook's dissent. *See id*. at 730-31 (Easterbrook, J., dissenting) ("The Justices told us [in *Kamen*] to apply state law to procedural matters in derivative suits, no matter the source of the substantive theory.").

[331] *See supra* notes 323-324 and accompanying text.

[332] J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

corporate suffrage,"[333] and *not any right of the corporation*.[334] If a shareholder lawsuit aims to redress damage to the corporate entity, then those damages must be pursued not in a derivative federal securities lawsuit under Section 14(a), but instead in a derivative lawsuit brought under state law asserting breach of fiduciary duty claims against the corporation's managers.[335]

The Exchange Act "implement[s] a 'philosophy of full disclosure."[336] It does "not seek to regulate … internal corporate mismanagement."[337] To permit derivative shareholder suits under Section 14(a) alleging internal corporate mismanagement by bootstrapping such allegations onto disclosure claims would be to "federalize the substantial portion of the law of corporations."[338] This is precisely what the post-*Borak* Court has cautioned against:

> "The result would be to bring within [the scope of Section 14(a)] a wide variety of corporate conduct traditionally left to state regulation.… In addition to posing a 'danger of vexatious litigation which could result from a widely expanded class of plaintiffs…,

[333] *Id*. at 431.

[334] *See supra* Part IV.B.2.

[335] *See* Koppel v. 4987 Corp., 167 F.3d 125, 133 (2d Cir.1999) ("We have long recognized that no general cause of action lies under § 14(a) to remedy a simple breach of fiduciary duty"); Cowin v. Bressler, 741 F.2d 410, 428 (D.C.Cir.1986) ("Appellant is alleging a subsequent breach of fiduciary duty which is only an incident to the election of directors and not actionable under section 14(a). This claim is actionable, if at all, as a state law claim for breach of fiduciary duty."); Golub v. PPD Corp., 576 F.2d 759, 764 (8th Cir. 1978) (dismissing a Section 14(a) claim because "it was not the purpose of federal securities law to provide a federal cause of action for stockholders who have been damaged by mere corporate mismanagement or breach of fiduciary duty.… Controversies in those areas have traditionally been the subject of litigation in the state courts, and federal legislation in the field of securities regulation was not designed to draw such controversies into the federal courts.…").

[336] Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 478 (1977).

[337] *Id*. at 479.

[338] *Id*.

> this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law."[339]

Where "the cause of action (is) one traditionally relegated to state law," and where the relevant state's law provides ample remedies for managerial harm caused to the corporation, "it is entirely appropriate … to relegate [shareholders] to whatever remedy is created by state law."[340] After all, "[c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires [otherwise], state law will govern the internal affairs of the corporation."[341] "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute."[342]

V. CONCLUSION

If *Seafarers* were decided in the months following *Borak*, one might not quibble with it. But since 1964 the times have changed. Delaware courts have accepted that a corporate forum provision is contractually binding on shareholders. Moreover, with *Salzberg*, Delaware law has made it clear that such a provision may stipulate the forum in which shareholders must litigate federal securities law claims. At the federal level, the Supreme Court has firmly embraced the enforceability of contractual forum provisions. More importantly, the Court has also established that the implied private right of action under Section 14(a) must be strictly interpreted and that such actions may only be brought by shareholders as direct or class actions.

[339] *Id.* at 478-79. Although *Sante Fe* was decided in the context of Exchange Act Section 10(b) and Rule 10b-5, "Section 10(b) and Rule 10b-5 and Section 14(a) … and Rule 14a-9 are obviously aimed at the same general evils … and should be similarly construed…. Thus, a decision like [*Santa Fe*], which is rendered in the context of a Rule 10b-5 suit may well be applicable in a case involving Section 14(a) and Rule 14a-9." *Golub*, 576 F.2d at 764.

[340] *Santa Fe*, 430 U.S. at 478.

[341] Cort v. Ash, 422 U.S. 66, 84 (1975) (emphasis added).

[342] Burks v. Lasker, 441 U.S. 471, 479 (1979); *accord* Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 106 (1991) (explaining that "*Burks* counsels against establishing competing federal- and state-law principles on the allocation of managerial prerogatives within the corporation" in order "to disruption to the internal affairs of the corporation").

Together, these post-*Borak* developments wholly discredit the Seventh Circuits' conclusion in *Seafarers*. Nothing in the corporate law of Delaware or the Exchange Act precludes the enforceability of a forum provision requiring all derivative shareholder actions to be brought exclusively in the courts of the state where a corporation is chartered. Thus, much like the 1964 decision upon which it is based, *Seafarers* is an anachronism.