Case No. S282521

IN THE SUPREME COURT OF CALIFORNIA

EPICENTRX, INC., ET AL.,
Defendants and Petitioners,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Plaintiff and Respondent

EPIRX, LP,
Real Party in Interest

AFTER A DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
CASE NO. D081670

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS AND PETITIONERS

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Application to File Amicus Curiae Brief

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") hereby applies pursuant to California Rule of Court 8.520(f) and this Court's inherent powers for leave of Court to file the attached amicus curiae brief in support of Petitioners. "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

As explained below, the Chamber has a significant interest in the outcome of this case and believes that the Court would benefit from additional briefing on the issues addressed in the attached brief.[1]

Interest of Amicus Curiae

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members and affiliates include forum-selection clauses in their business contracts or articles of incorporation. As a result, the question presented in this case concerning the

[1] No party or counsel for a party in the pending case authored the proposed amicus curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief.

enforcement of such clauses significantly affects the interests of the Chamber and its members. By declining to enforce a forum-selection clause despite finding that the clause is valid, the decision below frustrates the legitimate expectations of thousands of businesses, shareholders, and customers with similar contract provisions. If permitted to stand, it will undermine the ability of parties to structure their business contracts to select in advance the fora in which disputes will be litigated. The decision below also invites forum shopping because it expands and perpetuates the current lack of federal judicial uniformity in the enforcement of forum-selection clauses.

Accordingly, the Chamber respectfully requests that this Court accept and file the attached amicus brief.

DATED: April 3, 2024

Respectfully submitted,

EIMER STAHL LLP

By: /s/ *Robert E. Dunn*
Robert E. Dunn

Attorney for Amicus Curiae
The Chamber of Commerce of the
United States of America

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INTRODUCTION

This case involves a dispute between a Delaware-incorporated biotechnology company and its Delaware-incorporated minority shareholder. The company's certificate of incorporation contains a forum-selection clause specifying that Delaware's Court of Chancery is the sole and exclusive forum to bring such disputes. Forum-selection clauses like the one at issue here are widely used and serve important purposes in many business contracts. They enable parties to eliminate uncertainty as to where litigation will take place and to reduce their potential litigation costs by limiting the fora in which they can be sued. They also allow parties (and courts) to avoid costly and time-consuming pretrial motion practice on venue issues.

Despite recognizing the validity of the forum-selection clause, the court below refused to enforce the clause, holding that the clause contravenes California's policy preference against enforcement of an "implied predispute jury trial waiver[]." (*EpicentRx, Inc. v. Superior Court* (2023) 95 Cal.App.5th 890, 908, *as modified on denial of reh'g* (Oct. 10, 2023) (*EpicentRx*).) That holding calls into doubt the enforceability of countless contracts containing forum-selection clauses, violates principles of comity, and directly contradicts the United States Supreme Court's admonition that "[w]hen parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations." (*Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas* (2013) 571 U.S. 49, 66 (*Atlantic Marine*).) Accordingly, this Court should reverse the decision below.

ARGUMENT

I. This State's Public Policy Favors the Enforcement of Forum-Selection Clauses, and Delaware Is an Especially Appropriate Forum for Resolving Commercial Disputes.

Thousands—perhaps tens or even hundreds of thousands—of businesses operating in California have entered into contracts with forum-selection clauses specifying a non-California venue for disputes. These provisions are now in jeopardy if they specify a jurisdiction that does not guarantee the right to a civil jury trial. That blanket invalidation would frustrate the legitimate contractual expectations of thousands of businesses that have relied on forum-selection clauses and would create significant commercial uncertainty for these businesses.

A. Public policy favors the enforcement of bargained-for contracts generally and forum-selection clauses specifically.

This Court has long recognized California's strong public policy in favor of enforcing contracts according to their terms. (See, e.g., *Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 595 ["California's policy is . . . to enforce lawful contracts."]; *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495–96 (*Smith, Valentino & Smith*) [noting the public interest in enforcing a "clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length"]; see also Civ. Code § 1636 ["[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."].) The purpose of a contract is "to allocate risks and to bring certainty, order, and predictability" to the parties' relationship, and a clear policy goal of contract law is "to assist contracting parties in achieving this objective

by making the outcome of legal disputes clear and predictable." (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 494 (*Nedlloyd*) (conc. & dis. opn. of Kennard, J.).) Failure to enforce the terms of a contract "defeats the purpose of contract law—predictability and stability." (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1176.)

The rationale for enforcing contracts is particularly strong where, as here, both parties are sophisticated commercial entities. "Commerce depends on the enforceability, in most instances, of a duly executed written contract." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911.) Businesses place a premium on "predictability in assuring commercial stability in contractual dealings." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 553; see also *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98 [same].) One of the reasons that businesses enter into contracts is "[t]o avoid future disputes and to provide predictability and stability to transactions." (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356, *as modified* (Nov. 5, 2010).) Courts' enforcement of contractual terms encourages "stability" and gives the parties "the benefit of the bargain created by such unambiguous language." (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1082 (conc. opn. of Moreno, J.).)

As the Supreme Court of the United States has noted, forum-selection clauses are a particularly important type of contractual provision that courts should be loath to set aside.

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have

> affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. *In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.*

(*Atlantic Marine*, supra, 571 U.S. at 66 (emphasis added)). That is why forum-selection clauses "are prima facie valid" (*M/S Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 10 (*Bremen*)) and should be enforced even if they are non-negotiated clauses in "a form contract" (*Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585, 593 (*Carnival*)). Justice Kennedy noted that "Courts should announce and encourage rules that support private parties who negotiate [forum-selection] clauses" because they "spare litigants unnecessary costs but also . . . relieve courts of time-consuming pretrial motions." (*Stewart Organization, Inc. v. Ricoh Corp.* (1988) 487 U.S. 22, 33 (conc. opn. of Kennedy, J.); see also *Carnival*, supra, 499 U.S. at 593–94 ["[A] clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended."].) Because forum-selection clauses can form such a fundamental portion of the parties' expectations, "courts must enforce a forum-selection clause unless the contractually selected forum affords the plaintiffs no remedies whatsoever." (*Sun v. Advanced China Healthcare, Inc.* (9th Cir. 2018) 901 F.3d 1081, 1092.)

This Court has also recognized the importance of contractual forum-selection clauses and the policy interest in enforcing them where "a plaintiff has freely and voluntarily negotiated away his right to a California forum." (*Smith, Valentino & Smith,* supra, 17 Cal.3d at 495.) Indeed, this Court noted the "modern trend which favors enforceability

of . . . forum selection clauses" and that "[n]o satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length." (*Id.* at 495–96.)

As with contractual provisions in general, forum-selection clauses provide businesses with predictability, which is critical for growth and risk-taking. For example, the United States Supreme Court has recognized that a forum-selection clause is an "almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 516; see *E. & J. Gallo Winery v. Andina Licores S.A.* (9th Cir. 2006) 446 F.3d 984, 993 [describing forum-selection clauses as providing "indispensable, essential functions within international trade"].) The same is true for companies conducting interstate business, and forum-selection clauses reduce uncertainty and thus spur economic growth. (See *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, 731 [noting that the benefits of "'elimination of all [venue] uncertainties by agreeing in advance on a forum'" is an "indispensable" element of commerce and observing that the "commercial considerations" supporting forum-selection clauses apply equally to "interstate and international disputes"] [quoting *Bremen*, supra, 407 U.S. at 13–14].) Such clauses have been credited with "reducing litigation expenses and avoiding duplication of effort (not to mention promoting efficient use of judicial resources), which is beneficial to corporations and their shareholders alike." (*Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696, 709 (*Drulias*).) Companies

benefit from the "stability and predictability" offered from a guaranteed forum for disputes free from the "vagaries of local law." (*Republic of Nicaragua v. Standard Fruit Co.* (9th Cir. 1991) 937 F.2d 469, 478.)

Because forum-selection clauses serve these important purposes, they are often "a vital part of the agreement" as a whole and can "figur[e] prominently" in the negotiation of "monetary terms." (*Bremen*, supra, 407 U.S. at 14.) Indeed, business entities may "calculate the risk of bringing suit (or being sued) in another jurisdiction and include this risk in the price of their services." (*General Engineering Corp. v. Martin Marietta Alumina, Inc.* (3d Cir. 1986) 783 F.2d 352, 360.) Thus, "where parties have freely agreed upon a particular forum for their disputes, it is presumed that each party has been compensated by the bargain for any inconvenience it might suffer by resort to that forum." (*TUC Electronics, Inc. v. Eagle Telephonics, Inc.* (D. Conn. 1988) 698 F. Supp. 35, 39.) Courts thus view forum-selection clauses as presumptively enforceable.

Corporations routinely include forum-selection clauses to limit the costs of multi-forum litigation and preserve value for their shareholders. Just last year, the en banc Ninth Circuit recognized that a Delaware-incorporated company with headquarters in California was acting "consistent[ly] with a modern corporate trend" when it "inclu[ded] a forum-selection clause in its bylaws." (*Lee v. Fisher* (9th Cir. 2023) 70 F.4th 1129, 1137 (en banc) (*Lee*).) It observed that the 2000s brought an increase in litigation "brought by dispersed stockholders in different forums," and reasoned that because such "multiforum litigation could impose high costs and hurt investors," "many corporations adopted

forum-selection clauses in response." (*Ibid.* [internal quotation marks omitted].)

The benefits of forum-selection clauses are particularly important to small businesses, which have a vital interest in "keep[ing] the cost of potential disputes at a minimum," including by limiting the fora in which they must litigate disputes and by "bring[ing] a lawsuit or defend[ing themselves] as close to home as possible." (Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client* (2005) 6 Transactions: Tenn. J. Bus. L. 419, 419.) Forum-selection clauses are therefore an essential tool for small businesses to control and limit their litigation costs. (*Id.* at 434.) These clauses are especially critical when small businesses attempt to grow and diversify by expanding the geographical scope of their operations. Without the ability to control their litigation costs by limiting the fora in which litigation can take place, small businesses might be reluctant to undertake such expansion.

B. Companies often designate Delaware as the forum for resolving disputes because of its expertise in business litigation, and California courts have recognized that Delaware is an appropriate forum for such disputes.

The Delaware Division of Corporations reports that over "1,000,000 business entities have made Delaware their legal home," including over "66% of the Fortune 500." (*About the Division of Corporations*, <https://corp.delaware.gov/aboutagency> [as of Apr. 3, 2024].) Indeed, many of California's largest businesses choose to incorporate in Delaware precisely so they can access its Court of Chancery, which "has well-developed and predictable legal precedents" crafted by "judges who specialize in corporate law," and where the "prioritization of corporate-related cases means similar cases can be

decided more quickly." (Crail et al., *Why Incorporate In Delaware? Benefits & Considerations* (Feb. 15, 2024) Forbes <https://www.forbes.com/advisor/business/incorporating-in-delaware> [as of Apr. 3, 2024].)

Companies doing business in California and elsewhere often "designate Delaware as the forum [for disputes], perhaps out of admiration for the Delaware courts' expertise in corporate law." (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1632.) Indeed, because "Delaware is a foremost authority on corporate law. . . . California and many jurisdictions . . . look to Delaware for standards in unsettled areas of corporate law." (*In re L. Scott Apparel, Inc.* (C.D. Cal. 2020) 615 B.R. 881, 889; see also, e.g., *Kanter v. Reed* (2023) 92 Cal.App.5th 191, 208 ["California courts have routinely relied on corporate law developed in the State of Delaware . . . ."] [internal quotation marks omitted]; *Charter Township of Clinton Police & Fire Retirement System v. Martin* (2013) 219 Cal.App.4th 924, 942 [similar]; *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 791, fn. 5 [noting that Delaware caselaw is "instructive" with respect to California "shareholder derivate suits and demand futility"]; cf. *Greenwich Financial Services Distressed Mortg. Fund 3 LLC v. Countrywide Financial Corp.* (2d Cir. 2010) 603 F.3d 23, 30 [noting that "Delaware courts had special expertise" in "disputes concerning corporate governance"; *Swope v. Siegel-Robert, Inc.* (8th Cir. 2001) 243 F.3d 486 496 [noting "Delaware's expertise in analyzing issues of corporate law"].)

Accordingly, courts in California have not hesitated to enforce forum-selection clauses, like the one at issue in this appeal, specifying the Delaware Court of Chancery as the appropriate forum. (E.g.,

Bushansky v. Soon-Shiong (2018) 23 Cal.App.5th 1000, 1004 [affirming dismissal of a shareholder derivative action filed in San Diego Superior Court on forum non conveniens grounds where the defendant's certificate of incorporation specified the Chancery Court as the "sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation . . . ."]; *Drulias*, supra, 30 Cal.App.5th at 699, 700, fn. 2 [holding that a Delaware corporation's forum-selection bylaw specifying the Chancery Court as the "sole and exclusive forum" for "any action asserting a claim of breach of a fiduciary duty owed . . . [to] the Corporation's stockholders" is enforceable]; accord, e.g., *In re Facebook, Inc. Shareholder Derivative Privacy Litigation* (N.D. Cal. 2019) 367 F. Supp. 3d 1108, 1119 [dismissing shareholder derivative action on forum non conveniens grounds because of forum-selection clause in articles of incorporation specifying the Chancery Court as the "sole and exclusive forum" for fiduciary-duty breach claims].)

Given both California courts and businesses' esteem for Delaware law, it is no surprise that business contracts routinely specify Delaware as the forum for litigation related to those contracts. The Court of Appeal's refusal to enforce the parties' valid forum-selection clause here creates uncertainty as to the validity of thousands, if not millions, of similar forum-selection clauses.

II. Principles of Comity Militate Against Overriding a Forum-Selection Clause Based on California's Policy Preferences.

The principle of comity cautions against the application of the Court of Appeal's policy preferences to override forum selection clauses. After all, California would expect courts in its sister states not to frustrate an arms-length contract between two California corporations designating California as the forum for all disputes arising out of the

contract based on that state's policy preferences. So, too, is it inappropriate for California to impose its policy against predispute waivers of civil jury trials to override the choice of two Delaware corporations to litigate in Delaware.

In the international context, comity requires "the forum state [to] apply the substantive law of a foreign sovereign to causes of action which arise there." (*Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 134.) For example, in *Bremen*, the Supreme Court vacated a judgment from the Fifth Circuit that declined to enforce a contractual clause specifying the High Court of Justice in London as the appropriate forum for the dispute. (*Bremen*, supra, 407 U.S. at 20.) The Court noted that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." (*Id.* at 9.) The Ninth Circuit has similarly explained that while "[w]e are justly proud of our legal system[,]" "[c]omity . . . compels us to 'give the respect to the laws, policies and interests of others that [we] would have others give to [our] own in the same or similar circumstances.'" (*Mujica v. AirScan Inc.* (9th Cir. 2014) 771 F.3d 580, 608 [quoting *Michigan Community Services, Inc. v. N.L.R.B.* (6th Cir. 2002) 309 F.3d 348, 356].)

The same principle applies with respect to interstate commerce because "our Nation 'was and is a union of States, equal in power, dignity and authority.'" *Shelby County, Ala. v. Holder* (2013) 570 U.S. 529, 544 [quoting *Coyle v. Smith* (1911) 221 U.S. 559, 567].) California expects

other states to respect its "sovereign status" when adjudicating disputes involving California individuals and entities. (See *Franchise Tax Bd. of California v. Hyatt* (2016) 578 U.S. 171, 180 [explaining "that, in devising a special—and hostile—rule for California, Nevada has not 'sensitively applied principles of comity with a healthy regard for California's sovereign status'"] [quoting *Franchise Tax Bd. of California v. Hyatt* (2003) 538 U.S. 488, 489].) California courts must likewise balance "California's interest in applying its law with considerations of interstate comity, in order to avoid unnecessary conflicts of state law." (*Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1079 [internal quotation marks omitted].)

The Court of Appeal's refusal to enforce the forum-selection clause here violated this bedrock principle of interstate comity. The parties in this case—two Delaware corporations—had agreed by contract that their dispute was to be litigated in Delaware Chancery Court under Delaware law, selecting both the courts and the law of their home state. To minimize the prospect of plaintiffs suing "Delaware corporations in other jurisdictions in the hope of finding a forum" with more favorable law, Delaware has an expressed policy preference that "a Delaware Corporation [be able] to enact a forum selection bylaw." (*In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129 A.3d 884, 899.) The court below should have respected that policy and enforced the forum-selection clause adopted by the two Delaware corporations. Instead, the court overrode Delaware's policy choice based on *this state's* policy disfavoring

predispute jury waivers.[1] But as the Supreme Court has recognized, our federal structure prevents one State from effectively "impos[ing] its own policy choice on neighboring States." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 571; see also *Tenas v. Progressive Preferred Ins. Co.* (2008) 347 Mont. 133, 145 (conc. opn. of Rice, J.) [noting that failure to abide by principles of comity "impinge[s] on [another state's] policy and disrupts the harmonious interstate relations which we should seek to preserve as necessary to the operation of cooperative federalism"].)

III. The Court of Appeal's Opinion Invites Parties to Engage in Gamesmanship by Deliberately Filing Cases in Jurisdictions That Differ from Their Negotiated Forum-Selection Clauses.

A plaintiff who deliberately files a complaint in the wrong venue creates unnecessary litigation expenses for the defendant and unduly burdens the courts with pre-merits motion practice on venue. But plaintiffs have an incentive to engage in forum-shopping to find jurisdictions with more favorable substantive or procedural law. (See

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[1] Notwithstanding the Court of Appeal's absolutist view, this policy preference has <u>not</u> led to a blanket ban on the enforceability of predispute jury-trial waivers. (*EpicentRx*, supra, 95 Cal.App.5th at 903 [citing *Handoush v. Lease Finance Group, LLC* (2019) 41 Cal.App.5th 729, 736].) For example, courts in this state routinely enforce mandatory arbitration provisions even though predispute arbitration agreements are a de facto waiver of the parties' rights to a civil jury trial. (E.g., *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1198 ["California law now hold[s] that, in the absence of a specific attack on an arbitration agreement, such agreement generally must be enforced even if one party asserts the invalidity of the contract that contains it."]; *Yeh v. Superior Court of Contra Costa County* (2023) 95 Cal.App.5th 264, 279; *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 74; *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 630; *Nixon v. AmeriHome Mortgage Co., LLC* (2021) 67 Cal.App.5th 934, 952.)

Vivendi SA v. T-Mobile USA Inc. (9th Cir. 2009) 586 F.3d 689, 695 [noting that a plaintiff's forum-shopping choice may arise from "the habitual generosity of juries . . . in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum"] [internal quotation marks omitted].) The United States Supreme Court has warned that when a plaintiff "files suit in violation of a forum-selection clause," it would be "inequitable" for that plaintiff to take advantage of "state-law advantages" while engaging in such "gamesmanship." (*Atlantic Marine*, supra, 571 U.S. at 65.)

This Court has thus held that allowing a plaintiff to "use California law" to circumvent choice-of-law and forum-selection provisions would "undermine California's policy of respecting the choices made by parties to voluntarily negotiated agreements." (*Nedlloyd*, supra, 3 Cal.4th at 471.) Courts in other states have similarly concluded that "subjecting a party to trial in a forum other than the contractually chosen one amounts to . . . forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics." (*In re Lisa Laser USA, Inc.* (Tex. 2010) 310 S.W.3d 880, 883 [enforcing a forum-selection clause specifying Alameda County, California as the exclusive venue] [internal quotation marks omitted]; see also *Finley Resources, Inc. v. EP Energy E&P Co., L.P.* (Wyo. 2019) 443 P.3d 838, 846 [similar]; *IAC/InteractiveCorp v. Roston* (7th Cir. 2022) 44 F.4th 635, 645–46 ["[This Court's] approach to forum selection . . . disfavors gamesmanship and encourages litigation efficiency. We have warned against allowing plaintiffs to defeat forum selection clauses by choosing certain provisions to sue under or legal theories to press."]; *Noble House, L.L.C. v. Certain*

Underwriters at Lloyd's, London (5th Cir. 2023) 67 F.4th 243, 250 [noting that without rigorous enforcement of valid forum-selection clauses, a plaintiff "could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum" and that "[t]he law cannot promote such gamesmanship"] [internal quotation marks omitted]; *In re Facebook Biometric Information Privacy Litigation* (N.D. Cal. 2016) 185 F.Supp.3d 1155, 1168 ["trumping a forum-selection clause simply by filing outside the forum" is "venue gamesmanship"]; *Ameri-Fab, LLC v. Vanguard Energy Partners, LLC* (W.D. Tex. 2022) 646 F.Supp.3d 795, 804 ["[P]ermitting [Plaintiff] to unilaterally void a bargained-for forum-selection clause after-the-fact would only *encourage* gamesmanship."]; *Kebb Management, Inc. v. Home Depot U.S.A., Inc.* (D. Mass. 2014) 59 F.Supp.3d 283, 287 [noting that "when a plaintiff who is contractually obligated to file suit in a specific forum 'flouts' that duty," application of the original venue's law would "encourage gamesmanship"].)

Here, the plaintiff's "attempt[] to circumvent the forum selection clause and avoid litigating in Delaware" suggests that there is "potential gamesmanship at play." (*In re Facebook, Inc. Shareholder Derivative Privacy Litigation* (N.D. Cal., Jan. 6, 2020, No. 18-CV-01792-HSG) 2020 WL 60206, at *4.) And as this Court has noted, "[i]f a proposed rule would encourage gamesmanship . . . rejection of the rule is appropriate." (*Martinez v. Brownco Construction Co.*, (2013) 56 Cal.4th 1014, 1021.) To thwart any gamesmanship here and discourage such gamesmanship in future cases, this Court should reverse the Court of Appeal's decision and hold that courts cannot override valid forum-selection clauses based on California's policy preferences.

IV. The Internal-Affairs Doctrine Also Supports Reversal.

Although this Court presumably granted review in this case to decide whether courts must enforce forum-selection clauses regardless of whether the clause impliedly contains a predispute jury-trial waiver,[2] there is a narrower, alternative ground for reversal based on the internal-affairs doctrine.

That doctrine directs California courts to defer to the laws of a corporation's state of incorporation for "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 645 (*Edgar*).) As the Supreme Court has explained, the internal-affairs doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs . . . because otherwise a corporation could be faced with conflicting demands." (*Ibid.*) California courts echo the policy justifications for the internal-affairs doctrine, noting that "absent the internal affairs doctrine, 'a corporation could be faced with conflicting demands' concerning its own internal matters." (*Wong v. Restoration Robotics, Inc.* (2022) 78 Cal.App.5th 48, 75 (*Wong*) [quoting *Edgar*, supra, 457 U.S. at 645].)

The internal-affairs doctrine "is not merely a principle of conflicts law. It is also one of serious constitutional proportions—under due

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[2] This is the second time this Court has granted review in a case implicating the enforceability of a forum-selection clause that includes a predispute jury trial waiver. (see *Handoush v. Lease Finance Group* (Cal. 2020) 258 Cal.Rptr.3d 363 [granting petition for review].) In *Handoush*, this Court dismissed the petition after receiving a letter from the petitioner suggesting that it could not "pursue this litigation during the pendency of separate New York proceedings." (*Handoush v. Lease Finance Group* (Cal. 2020) 267 Cal.Rptr.3d 202.)

process, the commerce clause and the full faith and credit clause—so that the law of one state governs the relationships of a corporation to its stockholders . . . in matters of internal corporate governance." (*McDermott Inc. v. Lewis* (Del. 1987) 531 A.2d 206, 216 (*McDermott*).) California courts recognize that "[a]pplying local internal affairs law to a foreign corporation just because it is amenable to process in the forum or because it has some local shareholders or some other local contact is apt to produce inequalities, intolerable confusion, and uncertainty, and intrude into the domain of other states that have a superior claim to regulate the same subject matter." (*State Farm Mutual Automobile Insurance Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 443–44 [quoting *McDermott,* supra, 531 A.2d at 216].) Thus, "a court facing [a] motion to enforce corporate bylaws 'will consider, as a first order issue, whether the bylaws are valid under the chartering jurisdiction's domestic law.'" (*Wong*, supra, 78 Cal.App.5th at 75 [quoting *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* (Del.Ch.Ct. 2013) 73 A.3d 934, 938].)

Here, the forum-selection clause contained within EpicentRx's articles of incorporation governs the corporation's internal affairs. (See *Lee*, supra, 70 F.4th at 1154 [rejecting a challenge to a Delaware forum-selection clause in the bylaws of a company incorporated in Delaware, but headquartered in California because the challenged bylaws were part of the corporation's internal affairs].) The case involves a shareholder suing a corporation and its affiliates for breaches of fiduciary duty, among other causes of action, alleging "misappropriation of investor funds, ma[king] statements that were false or misleading in light of the misappropriation, fail[ure] to maintain accurate books and

records, and improperly block[ing the shareholder] from accessing [the corporation's] books and records." (*EpicentRx*, supra, 95 Cal.App.5th at 896.) These allegations involve quintessential internal affairs related to the "relationships among or between the corporation and its current officers, directors, and shareholders." (*Edgar*, supra, 457 U.S. at 645; see *In re Fedders North America, Inc.* (Bankr. D. Del. 2009) 405 B.R. 527, 539 ["The courts have long recognized that few, if any, claims are more central to a corporation's internal affairs than those relating to alleged breaches of fiduciary duties by a corporation's directors and officers."].) The internal-affairs doctrine thus requires the enforcement of the forum-selection clause in Defendant's articles of incorporation.

Enforcing that provision would not be prejudicial to the plaintiff shareholder. Indeed, "the reasonable expectation a stockholder . . . should have is that [a Delaware corporation's] board may adopt a forum selection bylaw designating Delaware as the exclusive forum for intracorporate disputes." (*Drulias*, supra, 30 Cal.App.5th at 709.) Overriding the Defendant's choice here as to where corporate governance issues must be litigated would create substantial uncertainty by causing every Delaware corporation to consider the enforceability of its bylaws in every jurisdiction in which it could possibly be sued. The internal-affairs doctrine is designed to avoid such unpredictability in matters of corporate governance.

Thus, even if this Court declines to hold that *all* valid forum-selection clauses must be enforced, regardless of whether that enforcement might contravene California public policy, it should nevertheless reverse based on the internal-affairs doctrine and hold that

courts must respect forum-selection clauses included in a company's articles of incorporation.

CONCLUSION

For these reasons, this Court should reverse the decision of the court below.

Dated: April 3, 2024

Respectfully submitted,

/s/ Robert E. Dunn

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CERTIFICATE OF WORD COUNT

I hereby certify that the attached amicus curiae brief consists of 4,688 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: April 3, 2024

/s/ Robert E. Dunn
Robert E. Dunn

PROOF OF SERVICE

I, Robert E. Dunn, declare:

1. I am a resident of the State of California and over the age of eighteen years and not a party to the within action. My business address is 1999 S. Bascom Ave., Suite 1025, Campbell, CA 95008.

2. On April 3, 2024, I served the following documents, **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** and **AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS AND PETITIONERS**, via electronic transmission through TrueFiling, on the court's electronic filing system to the emails on file:

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San Diego Superior Court
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2024,
at Campbell, California.

/s/ Robert E. Dunn
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