IN THE UTAH COURT OF APPEALS

Fernando Volonte, individually and on behalf of all others similarly situated, *Plaintiff-Appellant*, vs. Domo, Inc., Joshua G. James, Bruce Felt, Fraser Bullock, Matthew R. Cohler, Dana Evan, Mark Gorenberg, Nehal Raj, Glenn Solomon, Morgan Stanley & Co., LLC, Credit Suisse Securities (USA) LLC, Allen & Co., LLC, William Blair & Company LLC, UBS Securities LLC, Cowen and Company LLC, and JMP Securities LLC, *Defendants-Appellees*.	Appellate Case No. 20210399-CA

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

On Appeal from the Fourth Judicial District Court
County of Utah, State of Utah
Honorable Darold McDade, Trial Court Civil No. 190401778

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INTRODUCTION

The Chamber of Commerce of the United States of America ("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. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community—and this is just such a case. Private securities litigation imposes a significant burden on the Chamber's members and adversely affects their access to capital markets. Chamber members have adopted, or may consider adopting, charter provisions that require stockholders to bring claims under the Securities Act of 1933 ("Securities Act") in federal court only. The Chamber and its members thus have a strong interest in the question presented here: whether such federal forum provisions ("FFPs") are valid and enforceable as a matter of federal and state law.

In this case, the District Court correctly reached the same result as that reached by every other court to have considered the validity and enforceability of an FFP: that the FFP is valid and enforceable under federal and state law. This Court should affirm. FFPs are highly beneficial to corporations, shareholders, and

the public more generally. Contrary to plaintiff's argument, nothing in federal law prohibits or otherwise restricts FFPs.

STATEMENT OF THE ISSUE

Whether the District Court correctly held that the FFP in Domo's bylaws is valid and enforceable under federal and state law.

Standard of Review: "A district court's decision to enforce a forum selection clause is reviewed for abuse of discretion." *Jacobsen Constr. Co. v. Teton Builders*, 2005 UT 4, ¶ 9, 106 P.3d 719. A district court's legal determination is reviewed for correctness. *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, ¶ 8, 110 P.3d 710. A district court's factual findings are reviewed for clear error. *Lodge at Westgate Park City Resort & Spa Condo. Ass'n v. Westgate Resorts, Ltd.*, 2019 UT App. 36, ¶ 15, 440 P.3d 793.

Preservation: This issue was preserved. R-1020-36; R-1164-71.

STATEMENT OF THE CASE

Amicus respectfully adopts by reference the Statement of the Case found in the Domo Defendants-Appellees' Principal Brief.

SUMMARY OF ARGUMENT

As empirical data confirms, FFPs are highly beneficial in a variety of ways. FFPs address and ameliorate a number of very serious practical problems created by recent shifts in the way that plaintiffs litigate Securities Act claims, while continuing to provide such plaintiffs with access to a speedy, expert, congressionally endorsed judicial forum in which those claims can be heard and

decided. And, in doing so, FFPs lift a burden that has fallen on corporations and shareholders alike and provide greater access to the capital markets, thus creating widely beneficial economic effects. That is no doubt why shareholders appear to favor the adoption of FFPs and to regard them as creating real economic value.

Plaintiff argues that any benefits associated with FFPs are irrelevant because Congress has already acted to bar such forum-selection arrangements. That is flatly incorrect. Plaintiff points to the anti-waiver and anti-removal provisions of the Securities Act, but neither provision has any application to FFPs. The anti-waiver provision has been definitively interpreted by the Supreme Court not to apply to forum-selection provisions, *see Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989), and the anti-removal provision says nothing about an arrangement under which certain claims must be brought in federal court in the first instance or suffer dismissal. Moreover, the two provisions examined together are not somehow greater than the sum of their parts. As the U.S. Supreme Court has made clear beyond question, judicial speculation about how Congress would have legislated if it ever *had* enacted a provision that encompassed FFPs is not a permissible way of interpreting a federal statute.

ARGUMENT

I. FFPs Have A Variety Of Beneficial Effects

A. After The Supreme Court's Decision In *Cyan*, Patterns Of Securities Act Litigation Changed In Harmful Ways

In recent years, patterns of Securities Act litigation changed dramatically, giving rise to tremendous expense and uncertainty for businesses and their shareholders. In particular, corporations subject to Securities Act claims frequently faced simultaneous suits in state and federal court, thus increasing litigation costs and risking inconsistent rulings. Those increased costs made it harder for corporations to obtain directors and officers ("D&O") liability insurance to protect corporate directors and officers from personal liability, and eventually led to a serious D&O coverage crisis. The result of those changes was to increase the costs associated with initial public offerings ("IPOs")—a state of affairs that created particular difficulties for smaller companies contemplating a stock issuance that would make their shares available for ownership by the public. And all of those burdens, taken together, inflicted more general economic damage, inhibiting growth and diverting corporate resources away from economically beneficial uses.

1. Several years ago, in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), the Supreme Court considered the effects of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") (112 Stat. 3227) on state-court jurisdiction over class actions alleging only Securities Act violations.

See Cyan, 138 S. Ct. at 1073. Leading up to the Supreme Court's decision, some courts had ruled that SLUSA deprived state courts of jurisdiction over class-action claims asserting violations of the Securities Act. But the Supreme Court disagreed. The Court held that SLUSA did not "strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933." *Id.* at 1066. The Court also held that when such an action is filed in state court, the defendant may not remove the action to federal court. The Securities Act contains a removal bar, and the Court concluded that the limited exception SLUSA added to that bar does not apply to Securities Act claims and so does not "empower defendants to remove such actions from state to federal court." *Id.*

Cyan had demonstrable effects in the real world: plaintiffs began litigating Securities Act cases in a different and much more burdensome way. For one thing, "the filing of 1933 Act cases in state courts escalated." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 114-15 (Del. 2020); *see also, e.g.*, Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi, 75 Bus. Law. 1319, 1322 (2020). In 2019, for example, "[t]he number of state 1933 Act filings . . . increased by 40 percent from 2018." *Sciabacucchi*, 227 A.3d at 102, 114-15 (citing Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 4 (2020)) (citations and internal quotation marks omitted).

In addition, there was an explosion in the incidence of parallel state and federal Securities Act cases against a single defendant based on a single nucleus of fact. From 2011 to 2013, defendants faced such parallel claims in only 7 percent of

cases. *See* Klausner *et al.*, *State Section 11 Litigation in the Post*-Cyan *Environment (Despite* Sciabacucchi*)*, 75 Bus. Law. 1769, 1775 (2020) (hereafter Klausner).[1] Between 2014 and March 2018, when the Supreme Court decided *Cyan*, that number grew to some degree, but defendants faced parallel Securities Act claims in state and federal court only 17 percent of the time. *See id.* Between the decision in *Cyan* and December 31, 2019, however, the situation was very different. An extraordinary 49 percent of all Securities Act claims filed during that period were filed in both state and federal court. *Id.*; *see also, e.g.*, Washington Legal Found. Amicus Br. 11, *Pivotal Software v. Superior Court of California* (S. Ct. Aug. 23, 2021, No. 20-1541) (examining large group of post-*Cyan* Securities Act cases filed in state court and finding that 41 of the 99 state-court cases examined involved a parallel Securities Act action filed in federal court and that a small number of law firms represented plaintiffs in many of those parallel cases); *Sciabacucchi*, 227 A.3d at 114-15.

All told, if cases involving parallel state and federal filings are included in the calculus, in the year and a half after *Cyan* fully 71 percent of Securities Act cases were filed in state court—whereas in the four years before *Cyan* only 35 percent of such cases were filed in state court. *See* Klausner, 75 Bus. Law. at 1775-76; *see also*

[1] Klausner's article derives its statistics from the Stanford Securities Litigation Analytics database and encompasses "securities class actions filed in federal and state court against publicly traded companies between January 1, 2011, and December 31, 2019, that allege misstatements or omissions related to public offerings of securities in violation of either section 11 or 12 of the Securities Act." Klausner, 75 Bus. Law. at 1771 n.7.

Sciabacucchi, 227 A.3d at 114-15. Put another way, just 29 percent of Securities Act cases commenced in the post-*Cyan* period were filed only in federal court. Klausner, 75 Bus. Law. at 1775-76. That is a significant drop from earlier periods. *Id.* (noting that Securities Act cases were filed only in federal court 88 percent of the time between 2011 and 2013 and 65 percent of the time between 2014 and the date of the *Cyan* decision). And none of those changes can be explained away by looking to the overall number of initial public offerings made during the relevant timeframe. *Id.*

2. Those shifts imposed a tremendous and harmful burden on corporations and their shareholders—one with economic effects extending far beyond the stock offerings that are the subject of Securities Act claims. The existence of those harms dispels any notion that the statistics set forth above somehow fail to represent a meaningful change in the way that plaintiffs litigated Securities Act cases. The change was real, and it did real damage.

First, when corporate defendants must defend against state *and* federal Securities Act suits based on the same nucleus of fact, and often must do so simultaneously, Securities Act litigation becomes "considerably more complicated and expensive" for those defendants. Locker & Smilan, *Carving Out IPO Protections*, Harvard Law School Forum on Corporate Governance (Feb. 25, 2020) (hereafter Locker), https://corpgov.law.harvard.edu/2020/02/25/carving-out-ipo-protections; *see also id.* (noting that such parallel Securities Act litigation makes settlement more difficult as well, "both because a settlement with plaintiffs

in one forum runs the risk of a challenge by the separate set of plaintiffs in the second forum, and because state cases may have to be settled even if the parallel federal case is dismissed"). Matters are made even worse by the fact that a defendant fighting such a "multi-front war," U.S. Chamber Institute For Legal Reform, *Containing The Contagion: Proposals To Reform The Broken Securities Class Action System* 12 (Feb. 2019), https://instituteforlegalreform.com/wp-content/uploads/media/Securites-Class-Action-System-Reform-Proposals.pdf, risks inconsistent rulings from the state and federal courts in question.

Moreover, because the cost of securities litigation to corporations and stockholders is generally high to begin with, all of that extra complexity and expense simply worsened an already difficult situation. As the Supreme Court has observed, securities cases present a "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (citation omitted); *see generally Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (noting the danger of permitting a securities plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value"). The time and effort that a corporate defendant spends defending against securities litigation, including meritless securities litigation, drains away corporate value that would otherwise be realized by shareholders. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class*

Action Litigation 5 (Feb. 2014) (hereafter Economic Consequences), https://instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-u-s-securities-class-action-litigation/.

Second, those increased costs created a crisis in the market for directors and officers ("D&O") insurance coverage. Corporations must carry such coverage in order to attract and retain directors and officers, who may face personal liability under the Securities Act. But in the wake of *Cyan*, as defendants' costs associated with Securities Act litigation rose, the cost of such insurance increased four-fold. *See* Huskins, *Will D&O Insurance Rates End the IPO Party?*, Woodruff Sawyer (Jan. 15, 2020) (hereafter Huskins), https://woodruffsawyer.com/do-notebook/do-insurance-rates-ending-ipo-party/ ("unprecedented rates of litigation against IPO companies," including parallel suits in state and federal courts, led to "unprecedented costs for D&O insurance for IPO companies" and then "increasing premiums for D&O insurance for all companies"); *see also, e.g.*, U.S. Risk, *State of the Public D&O Market*, https://www.usrisk.com/2021/06/state-of-the-public-do-market/. Insurers also "chopp[ed] coverage limits and requir[ed] IPO clients to pick up more costs before a policy kicks in," as well as "requiring companies to pay a percentage of the eventual loss." Barlyn, *D&O Insurance Costs Soar as Investors Run to Court Over IPOs*, Insurance Journal (June 18, 2019), https://www.insurancejournal.com/news/national/2019/06/18/529691.htm; *see also* Frankel, *The* Sciabacucchi *Effect: Delaware Ruling on Forum Provisions Is 'Stabilizing' D&O Insurance Market*, Reuters (Mar. 16, 2021) (hereafter Frankel),

https://www.reuters.com/article/legal-us-otc-d-o/the-sciabacucchi-effect-delaware-ruling-on-forum-provisions-is-stabilizing-do-insurance-market-idUSKBN2B82S8 (stating that D&O insurance "deductibles quintupled"). Those changes made D&O insurance cost-prohibitive for some companies and significantly drained the resources of others.

Third, the increased costs associated with an offering of securities to the public and any associated lawsuits put a drag on IPOs and even secondary offerings. Issuers became more reluctant to go public, or looked to mechanisms other than traditional IPOs if available. *See, e.g.*, Huskins ("[T]he cost of D&O insurance for an IPO company has already become so high that, for some companies, going public no longer makes sense."); Locker (noting possibility of self-help strategies and direct listings in lieu of an IPO).[2] When a company decides to offer shares to the public through an alternative mechanism like direct listing, certain investor protections may sometimes be lost because underwriters no longer serve a gate-keeping function. *See, e.g.*, Horton, *Spotify's Direct Listing: Is It a Recipe for Gatekeeper Failure?*, 72 SMU L. Rev. 177, 202-12 (2019) (in IPO

[2] It is no answer to suggest, as plaintiffs sometimes have in the past, that the absolute number of IPOs has generally increased year-over-year and that there has therefore been no harm caused by duplicative Securities Act litigation. That suggestion is logically flawed, because it fails to account for the companies that would have gone public but failed to do so because of the problems discussed in the text. It is also based on a factually inaccurate premise; for instance, the number of IPOs dipped in 2019, after *Cyan* and before adoption of FFPs. *See, e.g.*, Sara B. Potter, *U.S. IPO Market*, FACTSET (Jan. 7, 2021), https://insight.factset.com/u.s.-ipo-market-spacs-drive-2020-ipos-to-a-new-record.

context, underwriters have incentives to evaluate whether "the securities of this particular issuer" should "be offered to the public in the first instance" and whether "the proposed offering" will "prove profitable to . . . its investor clientele").

Finally, when defendants must bear the burden of the various difficulties described above, the economy as a whole suffers. As the Supreme Court has observed, "uncertainty and excessive litigation can have ripple effects." *Central Bank*, 511 U.S. at 189. Expending time and resources in litigating and settling duplicative securities cases and grappling with difficulties in obtaining D&O insurance not only negatively affects defendant corporations and their shareholders; it also more generally increases the cost of capital, discourages beneficial economic activity, and otherwise inflicts economic damage that is ultimately "passed along to the public." *SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., concurring); *see generally* Sen. Rep. No. 104-98, 1st Sess., at 4, 8, 14 (1995); Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 948 (1993) ("Unnecessary civil . . . liability diminishes the return to, and increases the cost of, capital."), *cited in Central Bank*, 511 U.S. at 189; *cf. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (abusive securities litigation may be "used to injure 'the entire U.S. economy'") (citation omitted). For example, a pharmaceutical company that expends funds to cover those kinds of costs thereby has fewer funds available to invest in the extraordinarily costly process of research and development of beneficial medications. *See, e.g.*,

Economic Consequences, at 20-21; DiMasi *et al.*, *Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs*, 47 J. Health Econ. 20, 31 (2016). And corporations in other economic sectors are similarly unable to deploy their resources in economically and socially beneficial ways.

B. FFPs Ameliorate Those Harms And Create A Number Of Economically Beneficial Effects

In light of all of the problems discussed above, some companies began including in certificates of incorporation or corporate bylaws FFPs designating federal court as the exclusive forum for claims under the Securities Act. A number of companies with recent IPOs have taken that path. *See* Laide, *Companies' Response to Delaware Supreme Court Upholding Federal Forum Provisions*, Harvard Law School Forum on Corporate Governance (Nov. 11, 2020), https://corpgov.law.harvard.edu/2020/11/11/companies-response-to-delaware-supreme-court-upholding-federal-forum-provisions/.

1. By directing all claims under the Securities Act into federal court, FFPs address and ameliorate the various harms above—and, in doing so, benefit corporations, shareholders, and the public. FFPs eliminate the possibility of parallel state and federal Securities Act suits, as well as the risk of inconsistent outcomes in state and federal court. They thereby relieve defendants of the costs and burdens associated with defending against parallel suits. In doing so, they bring the costs associated with D&O insurance down and remove an obstacle to proceeding with an IPO. And, more generally, they enable corporations to

concentrate resources and effort on delivering value to shareholders rather than defending against a wave of duplicative and inefficient Securities Act litigation.

Examining the consequences of the Delaware Supreme Court's March 18, 2020, decision upholding the validity of FFPs under Delaware law provides some empirical proof that FFPs actually yield all of those benefits. In *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020), that court—in the first case involving a challenge to an FFP—concluded that FFPs are facially valid under Section 102(b) of Delaware's General Corporation Law. *Id.* at 114. The court explained that Delaware corporation law "allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise." *Id.* at 116. The court also observed that FFPs do not violate federal law or policy. *Id.* at 132-34.

In the wake of that decision, the price of D&O insurance for companies about to go public began "stabilizing." Frankel. Analysts directly attributed the new "calm in the market" to the Delaware Supreme Court's decision "allow[ing] corporations to adopt provisions requiring shareholders to bring Securities Act claims in federal court." *Id.*; *see also id.* (employee at D&O insurance brokerage opining that "there is a straight line from the lower risk of liability and defense costs from state-court IPO litigation to a newly stable market for D&O insurance" and referring to FFPs as a "magic pill"); Greenwald, *'Federal Forum' Ruling Could Cut Defense Costs, D&O Rates*, Business Insurance (Mar. 24, 2020), https://www.businessinsurance.com/article/20200324/NEWS06/912333675/%

E2%80%98Federal-forum%E2%80%99-ruling-could-cut-defense-costs,-D&O-rates-Matthew-B-Salzberg,-e.

In addition, duplicative state-court Securities Act filings went down. Of "24 [Securities Act] suits filed after *Sciabacucchi*, 14 were filed only in federal court, reversing the trend of more Section 11 class actions being filed in state court," and "only 8% of cases in 2020 were filed in state court alone—down from 24% in 2019." Frankel; *see* Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* 1, 12, 14 (2021), https://bit.ly/3zb1CfO; *see also* pp. 5-7, *supra* (providing pre-*Sciabacucchi* statistics).[3]

2. FFPs create those positive benefits without inflicting any meaningful negative consequences on Securities Act plaintiffs, because a federal forum is fully adequate for litigation of any plaintiff's claims under the Securities Act.

Congress affirmatively provided that federal district courts have jurisdiction over claims under the Securities Act. *See* 15 U.S.C. § 77v. If Congress had believed that there was some significant disadvantage associated with litigation in a federal venue, Congress presumably would have written the jurisdictional provision differently, or would have amended the jurisdictional provision at some later date.

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[3] Statistics covering the period after the COVID-19 pandemic began may be affected by the unusual events of the pandemic—for instance, the number of Securities Act cases declined overall during that period. *See* Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* 1, 21; Cornerstone Research, *Securities Class Action Filings: 2020 Year in Review* 1 (2021), https://bit.ly/3yaOki7. Still, the increase in federal-only filings is notable. *See* Cornerstone Research, *Securities Class Action Filings: 2021 Midyear Assessment* 12, 14.

Cf., e.g., *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020). Congress's choice to select and retain federal court as an available venue for Securities Act litigation necessarily demonstrates the acceptability of such a venue.

Moreover, as a practical matter, there is no reason to believe that plaintiffs' securities-law rights cannot be vindicated successfully in federal court. It is almost always true that the federal court where a plaintiff would bring a Securities Act case is located not far from the relevant state court, is just as accessible to witnesses and to counsel as the state court is, and draws from a jury pool very similar to the one from which the state court draws. And, more generally, Securities Act claims have been successfully litigated by plaintiffs in federal courts, including federal courts in Utah, for many decades. *See, e.g.*, Cornerstone Research, *Securities Class Action Filings: 2019 Year in Review* 16 (2020) (dismissal rate for federal securities class actions is approximately 50 percent), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review. Although federal court procedures are of course somewhat different than state court procedures, plaintiffs certainly have a full and fair opportunity to be heard in federal court, where—by any measure—litigation is efficient, just, and reasonably speedy. *See, e.g.*, U.S. Courts, *Statistical Tables for the Federal Judiciary* (2021), table C-5, https://www.uscourts.gov/statistics/table/c-5/statistical-tables-federal-judiciary/2021/06/30 (for one-year period ending June 30, 2021, median time from filing to case disposition in District of Utah was 12.6 months).

Finally, to avoid duplicative litigation, it makes far more sense to select federal court as the exclusive venue for Securities Act claims than to select state court as the exclusive venue for those claims. Plaintiffs may bring Securities Act claims together with other securities-law claims, under different statutes, over which federal courts have *exclusive* jurisdiction—for instance, claims under Rule 10b-5, which is promulgated under the Securities Act of 1934 and proscribes fraud in connection with securities transactions. *See* 15 U.S.C. § 78aa (giving federal courts "exclusive" jurisdiction over Rule 10b-5 claims and any other claims that arise from the Securities Act of 1934 or "the rules and regulations thereunder"); 17 C.F.R. § 240.10b-5; *see also, e.g.*, *Schueneman v. Arena Pharm., Inc.*, 2020 WL 3129566, at *1 (S.D. Cal., June 12, 2020) (discussing case involving both a Securities Act claim and a Rule 10b-5 claim). A complaint in a case involving a Rule 10b-5 claim cannot be brought in state court, and an FFP could not legally require it to be brought there. Federal court is therefore the only choice of forum that decreases the possibility of parallel, overlapping state-court and federal-court litigation of federal securities-law claims.

3. Given that FFPs confer benefits on shareholders and others without any downside, it is not surprising that shareholders recognize the value of FFPs and favor their inclusion in corporate charters.

When the Delaware Chancery Court initially considered FFPs, it found—in the decision later reversed by the Delaware Supreme Court in *Sciabacucchi*—that FFPs were impermissible. The effect of that decision on stock prices for companies

with FFPs in their charters demonstrates that stockholders value FFPs and are willing to pay for that value. One study determined that the Delaware Chancery Court's decision was "associated with a large negative stock price effect for companies that had FFPs in their charters." Aggarwal *et al.*, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 Harv. Bus. L. Rev. 383, 383 (2020). According to that study, the price of those issuers' equity securities meaningfully decreased at the relevant time—a decrease that is likely attributable to the issuance of the decision. *Id.* at 429-32, tables 6-9; *see id.* at 409 (noting that, using a two-day event window, there was a stock price effect of approximately 7 percent, which "suggests that the decision reduced the total market capitalization of a firm" with an FFP "by 7 percent"); Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi, Rock Center for Corporate Governance, Working Paper No. 241, at 24-25 (2019) (hereafter Grundfest, *Limits of Delaware Corporate Law*), https://www.ssrn.com/abstract=3448651 (discussing Aggarwal study). And certainly it is clear that the FFP-hostile Chancery Court decision did not "*positively* affect[] the stock price" of issuers with FFPs. *Id.* (emphasis added).

Institutional Shareholder Services Inc., the influential proxy advisory firm that advises hedge funds, mutual funds, and similar organizations on shareholder votes, has directly expressed the view that FFPs have value for shareholders. Late last year, that firm issued a policy recommendation to "[g]enerally vote for federal forum selection provisions in the charter or bylaws that specify 'the district courts

of the United States' as the exclusive forum for federal securities law matters." ISS, *Americas: Proxy Voting Guidelines, Updates for 2021*, at 19 (Nov. 12, 2020), https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.

It is also not surprising that every court that has considered whether FFPs are valid and enforceable has concluded that they are. In *Sciabacucchi*, in the course of upholding FFPs as valid under Delaware law, the Delaware Supreme Court expressed the view that other states should similarly uphold FFPs because of "[t]he need for uniformity and predictability" and because FFPs "do not violate principles of horizontal sovereignty." *Sciabacucchi*, 227 A.3d at 135-37. In California, every trial court to have addressed an FFP has enforced it. *See In re Uber Technologies, Inc. Sec. Litig*. (Super. Ct. S.F. County, Nov. 16, 2020, No. CGC-19-579544), https://bit.ly/3sCpIO9; *Wong v. Restoration Robotics* (Cal. Ct. of Appeal, No. A161489, appeal pending); *In re Dropbox, Inc. Securities Litigation* (Cal. Ct. of Appeal, No. A161603, appeal pending); *In re Sonim Technologies, Inc. Sec. Litig*. (Super. Ct. San Mateo County, Dec. 7, 2020, No. 19-CIV-05564), https://www.dandodiary.com/wp-content/uploads/sites/893/2020/12/Sonim-Technologies.pdf. And in New York and New Jersey, trial courts have recently ruled that FFPs are valid and must be enforced. *See* Aufses *et al.*, *New York Court Joins Other State Courts in Dismissing Securities Act Claims in Favor of Federal Forum Provision*, JDSupra (Sept. 28, 2021), https://www.jdsupra.com/legalnews/new-york-court-joins-other-state-courts-6980004/ (discussing New

York trial court decision in *Hook v. Casa Systems, Inc.*); *Kuehl v. electroCore, Inc.*, No. L-000876-19 (Superior Ct. of New Jersey, Somerset Cty., Dec. 14, 2021), at 40-48. This Court should reach the same result.

II. Contrary To Plaintiff's Argument, FFPs Do Not Violate Federal Securities Law

Plaintiff suggests that Congress already determined that plaintiffs *must* be allowed to bring Securities Act claims in state court, regardless of whether plaintiffs independently cede their ability to do so. *See* Appellant's Br. 34-35. That argument is premised on the Securities Act's anti-waiver and anti-removal provisions. *See* 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."); 15 U.S.C. § 77v(a) ("[N]o case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

Plaintiff's argument is wrong—and badly so. The Supreme Court has made clear time and time again that if the text of a federal statutory provision is unambiguous, the task of interpreting that provision is at an end. *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (where federal "statutory text is plain and unambiguous," a court "must apply the statute according to its terms"); *Dodd v. United States*, 545 U.S. 353, 357 (2005) (a court "must presume" that Congress "says in a statute what it means and means in a statute what it says there") (quoting

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)); *see also generally Atl. Coast Line R. Co. v. Burnette* 239 U.S. 199, 201 (1915) (state court addressing federally created rights must adhere to the "limit[s]" of those rights). After all, Congress does not pursue every statutory purpose to its uttermost. Rather, Congress lays out whatever limitations it has in mind in the words that it writes, so that its enactments go "so far and no further." *Cyan*, 138 S. Ct. at 1073 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014)). And Congress legislates against the backdrop of those fundamental interpretive principles. *See generally Bond v. United States*, 572 U.S. 844, 857 (2014).

A text-focused examination of the provisions on which plaintiff relies reveals that they are simply inapplicable here. As for the anti-waiver provision, which voids an arrangement "binding any person acquiring any security to waive compliance" with any part of the Securities Act, 15 U.S.C. § 77n, the Supreme Court has already held in *Rodriguez* that the provision is inapplicable to procedural arrangements like forum-selection clauses. *See Rodriguez*, 490 U.S. at 481 ("[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that [the anti-waiver provision] is properly construed to bar any waiver of these provisions."); *see also Shearson/American Express, Inc. v. McMahon* 482 U.S. 220 (1987) (reaching same conclusion as to a different securities statute).

The forum-selection provision at issue in *Rodriguez* was an arbitration clause, not an FFP—but that does not make *Rodriguez* any less applicable here.

Indeed, in practice an FFP provides a would-be plaintiff scope for obtaining resolution of a Securities Act claim that is just as wide—if not wider—than the scope that an arbitration agreement affords. Parties who agree to arbitrate Securities Act claims consent to forgo a merits resolution in *any* court, thus narrowing the available fora for resolution of that dispute down to one: arbitration. An FFP likewise provides for only one forum for resolution: federal court, a judicial forum. It would be odd indeed if the anti-waiver provision were inapplicable when a Securities Act plaintiff gives up entirely any right to judicial resolution on the merits, but applicable so as to bar an FFP that permits a Securities Act plaintiff to bring suit in federal court. *See CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 102 (2012).

The anti-removal provision is, if anything, even less relevant to FFPs. As this case illustrates, when an FFP applies and a plaintiff nevertheless seeks to bring a Securities Act claim in state court, the proper remedy is not removal of the action to federal court; it is dismissal of the action for failure to abide by a binding forum-selection provision. Defendant here did not seek to remove this case, because it had no need to do so. The fact that a federal statute prevents removal of state-court Securities Act claims to federal court is therefore entirely beside the point.

Congress wrote a provision that addresses only removal and says nothing at all about a private forum-selection arrangement that restricts certain claims to a federal forum. There is no warrant to hypothesize about whether the Congress that enacted the anti-removal provision would have addressed FFPs if that Congress

had thought about the issue. *See Cyan*, 138 S. Ct. at 1073. In any event, it would be perfectly rational for Congress to prevent a defendant from overriding a plaintiff's choice of forum through removal while at the same time giving full effect to a forum-selection provision. A plaintiff necessarily has *notice* of a forum-selection provision before bringing suit—and a plaintiff who knows that such a provision exists can choose not to enter or remain in any relationship that would be governed by the provision. That makes forum selection a very different matter than removal.

Plaintiff appears to suggest (without arguing the point directly) that the anti-removal provision somehow takes on greater breadth if read in conjunction with the anti-waiver provision or the provision that, as a background principle, gives state and federal courts concurrent jurisdiction over Securities Act claims. *See* Appellant's Br. 20, 34-35. But nothing about those other provisions changes the fact that the anti-removal provision is limited to barring removal, which is not at issue in an FFP case. And nothing about those other provisions has anything at all to say about a forum-selection clause like an FFP, which—like an arbitration clause—simply reflects a binding procedural arrangement for resolving disputes in particular cases. Trying to somehow add all of these irrelevant provisions together therefore does nothing to advance plaintiff's position.

In the end, plaintiff's argument boils down to a plea for this Court to "add words to the law" that Congress wrote. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). Indeed, the nature of plaintiff's plea is laid bare by

plaintiff's description of the anti-removal provision as a guarantee that a defendant cannot under any circumstances "change the forum," Appellant's Br. 34—a description that bears essentially no resemblance to Congress's much more modest bar on "remov[al]" of claims from state to federal court, 15 U.S.C. § 77v(a). But editing the text of the Securities Act to (effectively) insert a new anti-forum-selection-clause provision is not a permissible mode of federal statutory interpretation. Plaintiff's argument that the Securities Act renders FFPs unenforceable therefore must be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm.

DATED this 20th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with:

(A) Rule 24(g) of the Utah Rules of Appellate Procedure in that the text of this Amicus Brief, including headings, footnotes, and quotations, but excluding cover information, list of parties, tables, signature blocks, certificate of compliance, and proof of service, contains 5601 words as calculated using the Word Count function of Microsoft Word, which was used to prepare this brief.

(B) Rule 21 of the Utah Rules of Appellate Procedure in that the brief does not contain private information.

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