No. 21-15923

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOELLE LEE, derivatively on behalf of The Gap, Inc.
Plaintiff-Appellant,
v.
ROBERT J. FISHER, ET AL.,
Defendants-Appellees,
v.
THE GAP, INC.,
Nominal Defendants-Appellee.

On Appeal from the U.S. District Court
for the Northern District of California
Case No. 3:20-cv-06163-SK
The Honorable Sallie Kim

BRIEF OF *AMICI CURIAE* PROFESSORS JOSEPH A. GRUNDFEST AND MOHSEN MANESH IN SUPPORT OF DEFENDANTS-APPELLEES

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November 23, 2022

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Complaint	Verified Shareholder Derivative Complaint, *Lee v. Fisher, et al.*, No. 3:20-cv-06163-SK (N.D. Cal. Sept. 1, 2020), ECF No. 1
DGCL	Delaware General Corporation Law
Exchange Act	Securities Exchange Act of 1934
Fed. R. App. P.	Federal Rules of Appellate Procedure: Ninth Circuit Rules
Panel	Clifton, J.; Smith, J.; and Reiss, C. (District Judge)
Rule 10(b)-5	17 CFR 240.10b-5
SEC	United States Securities and Exchange Commission
Section 10(b)	Section 10(b) of the Securities Exchange Act of 1934
Section 115	Delaware General Corporation Law Section 115
Section 14(a)	Section 14(a) of the Securities Exchange Act of 1934
Securities Act	Securities Act of 1933

STATEMENT OF INTEREST[1]

Amici are professors of corporate and securities law. Joseph A. Grundfest is the William A. Franke Professor of Law and Business (Emeritus) at Stanford Law School, and a former Commissioner of the SEC. Professor Grundfest invented the intra-corporate forum selection provision that animates this litigation.[2] Mohsen Manesh is a professor at the University of Oregon School of Law specializing in corporate law and in the application of forum selection and arbitration provisions. *Amici* have jointly authored scholarship directly relevant to this litigation.[3]

[1] None of the parties to this case or their counsel authored this brief in whole or in part. None of the parties to this case or their counsel contributed money that was intended to fund preparing or submitting this brief. No one other than *amici* and their undersigned counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to *amici* filing this brief pursuant to Fed. R. App. P. 29(2).

[2] *See* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 Bus. Law. 325 (2013). Professor Grundfest therein expressly reserved his view as to the application of intra-corporate forum selection provisions to Exchange Act claims precisely because of the Act's anti-waiver and exclusive jurisdiction provisions. *See, e.g.*, *id.* at 410 n.101. This brief addresses those questions and supports enforcement of intra-corporate forum selection to implied derivative Section 14(a) claims.

[3] Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split but Never Reversed: Borak and Federal Court Derivative Litigation* (Nov. 11, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4274616.

INTRODUCTION

Nothing in federal or Delaware law prohibits this Court from enforcing the Defendant corporation's forum selection provision. As a foundational matter, there is no private right of action to bring a derivative claim under Section 14(a). The derivative Section 14(a) claim is implied, not express. It is a creature of the judicial imagination rooted in *Borak*'s dicta, not in any Supreme Court holdings. *See J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). This implied claim's remedies duplicate state law, and the claim's very existence, as well as its essential metes and bounds, is contingent on state not federal law.

The Supreme Court commands that implied private rights be narrowly construed. Enforcing an implied private right based on dicta that generate redundant remedies in a cause of action that is existentially contingent on state law, not on federal law, is not narrow construction. It is sprawling overreach. The Complaint should be dismissed.

In the alternative, if this Court accepts the existence of an implied derivative right of action, it should affirm the ruling below, because the Exchange Act's anti-waiver provision applies only to "provisions of this Chapter." 15 U.S.C. § 78cc(a). The "provisions of this Chapter" do not include an implied right to sue derivatively on someone's else's behalf. The anti-waiver provision therefore cannot prevent enforcement of the forum selection provision.

Declining to invent implied derivative rights of action under Section 14(a) also does not deny plaintiff effective relief. She can prosecute direct actions in state or federal court, and derivative actions in Delaware. Further, Section 115 is also not an impediment to enforcing the forum selection provision because its plain text makes it inapplicable to this dispute. The Delaware Supreme Court's recent decision in *Salzberg v. Sciabaccucci* makes this point clear. 227 A.3d 102 (Del. 2020). The Seventh Circuit erred in *Seafarers Pension Plan v. Bradway* in holding to the contrary. 23 F.4th 714, 718 (7th Cir. 2022). Indeed, the forum selection provision is plainly enforceable under Delaware law.

ARGUMENT

I. THE NARROW CONSTRUCTION DOCTRINE

Section 14(a) direct and derivative rights of action are implied. They have no basis in the statutory text of the Exchange Act. They are creatures of the judicial imagination.[4] As the Second Circuit recently explained, "judicially created private rights of action should be construed narrowly." *Menora Mivtachim Ins. Ltd. v. Frutarom Indus.*, 49 F.4th 790, 794 (2d Cir. 2022); *cf. Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for

[4] *Cf. Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391 (1970) ("The [Exchange] Act makes no provision for private recovery for a violation of § 14(a)"); *Borak*, 377 U.S. at 432 ("[The] language [of Section 14(a)] makes no specific reference to a private right of action").

federal tribunals.") (citation omitted).[5] Courts are required to "give narrow dimensions to a right of action Congress did not authorize." *Menora Mivtachim*, 49 F.4th at 801 (quoting *Janus Cap. Grp.*, 564 U.S. at 142 n.7). Indeed, "[c]oncerns with the judicial creation of a private cause of action caution against its expansion[,]" and "[t]his conclusion is consistent with the narrow dimensions we must give to a right of action Congress did not authorize[.]" *Stoneridge*, 552 U.S. at 165, 167. The Supreme Court and lower courts have on multiple occasions narrowly construed both the Section 10(b) and Section 14(a) implied private rights

[5] *See also, e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (referencing *Sandoval*, 532 U.S. at 286-87 and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975) in narrowly construing a judicially created private cause of action in the civil rights context); *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"); *Janus Cap. Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135, 142-48 (2011) (declining to expand Rule 10b-5 liability beyond the "maker" of a false or misleading statement); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 159-65 (2008) (declining to expand Rule 10b-5 to encompass scheme liability for secondary actors); *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 aiding and abetting fraud); *Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1102-03 (1991) (in reviewing a Section 14(a) claim, declining to "extend the scope of *Borak* actions beyond the ambit" of the Court's earlier decisions); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (declining to expand Rule 10b-5 to encompass breaches of fiduciary duty); *Blue Chip Stamps*, 421 U.S. at 749 (declining to expand Rule 10b-5 standing to encompass potential purchasers or sellers); *Menora Mivtachim*, 49 F.4th at 794 (declining to extend Section 10(b) standing to purchasers of securities in the acquiring company, because "judicially created private rights of action should be construed narrowly"); *Fidel v. Farley*, 392 F.3d 220, 237 (6th Cir. 2004) (declining to expand a Section 10(b) claim to "revive aider and abettor liability in contravention of the Supreme Court's holding in [*Central Bank*]").

of action to dramatically limit standing to assert either claim. *See, e.g.*, *supra* at n.5.

Borak is the only Supreme Court support for an implied derivative claim. But *Borak*'s logic is overtly purposive and implements an interpretive approach that has been resoundingly repudiated by the Supreme Court.[6] *Borak* nowhere engages with the text or legislative history of Section 14(a) because neither support *Borak*'s conclusion.[7] *Borak* is thus characterized as a "derelict"[8] opinion that relies on an "abandoned"[9] interpretative technique rooted in a repudiated "*ancien regime*."[10]

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[6] *See, e.g.*, *Sandoval*, 532 U.S. at 278 (holding that "[*Borak*'s] understanding [of implied rights of action] was abandoned in *Cort v. Ash*, 422 U.S. 66, 78"); *see also supra* at n.5 (referencing Supreme Court opinions declining to apply *Borak*'s analysis).

[7] *Cf. Va. Bankshares*, 501 U.S. 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.").

[8] *Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting).

[9] *Sandoval*, 532 U.S. at 287.

[10] *Id.* at 287; *see also* Transcript of Oral Argument at 40:1-10, *Emulex v. Varjabedian*, 139 S. Ct. 1407 (U.S. Apr. 15, 2019) (Roberts, C.J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-459_5ie6.pdf (referring to *Borak* as a "mistake" that "[the Court] shouldn't expand"); *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"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) ("Since our decision in *Borak*, we 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.'") (quoting

II. ENFORCING AN IMPLIED DERIVATIVE SECTION 14(a) PRIVATE RIGHT OF ACTION IS NOT NARROW CONSTRUCTION

Enforcing a derivative Section 14(a) private right of action is not narrow construction for three independent reasons. First, the *Borak* plaintiff's claim was direct, not derivative. Because *Borak*'s holding was limited to direct claims everything in *Borak* recognizing implied derivative claims is non-controlling dicta. Elevating expansive, purposive dicta to the level of a controlling holding is not narrow construction. Second, a federal derivative Section 14(a) claim duplicates state law remedies. Creating redundant remedial regimes is not narrow construction. Third, an implied federal derivative claim exists only because of and

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Sandoval, 532 U.S. at 287); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (expressly rejecting *Borak*'s appeal to the "broad remedial purposes" of the Exchange Act and refusing to imply a private right of action under *Cort* test); *Le Vick v. Skaggs Cos.*, 701 F.2d 777, 779 (9th Cir. 1984) ("The Court drove the final nail in the coffin of *Borak* less than six months later in *Transamerica Mortg. Advisors, Inc. v. Lewis*, . . . It is thus beyond dispute that the analysis upon which our court in *Stewart* based its decision [*Borak*] has been rejected by the Supreme Court."); *KBR v. Chevedden*, 2011 U.S. Dist. LEXIS 139257, at *8 (S.D. Tex. Dec. 5, 2011) (referring to *Borak* approach to determining whether a statute implies a private right of action as "obsolete"); *Halebian v. Berv*, 631 F. Supp. 2d 284, 300 n.11 (S.D.N.Y. 2007) (expressly declining to apply *Borak* with respect to a Section 20(a) of Exchange Act claim and "conclu[ding] that . . . newer decisions lead to one conclusion . . . '[s]ince Congress did not create a private right of action by statute, the SEC cannot create one by regulation'"); Riley T. Svikhart, *Student Note*, *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."); 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) ("*Borak* would not survive under the new standard, but so far the Court has treated [it] as a historical anomaly, regretfully wrong but nevertheless valid.").

is defined by state law. Implying a federal right that is existentially contingent on state law is not narrow construction.

A. Respecting *Borak*'s Expansive Dicta as Holdings Is Not Narrow Construction

A "remark in [a case] is obviously not controlling [when it] com[es] . . . [from] an opinion that did not present the [relevant] question." *United States Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 463 n.11 (1993) (Souter, J.).[11] Moreover, "[q]uoting . . . dictum multiple times . . . cannot convert it into case law," *United States v. Dixon*, 509 U.S. 688, 706 (1993) (Scalia, J.), and "statements [that] are dicta, to be sure,...[are] not binding on [the Court] as *stare decisis*." *Id.* at 714 (Rehnquist, J., concurring). Indeed, this Circuit recognizes that "statements…not necessary to the decision…have no binding or precedential impact[.]" *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995).

The plaintiff in *Borak* asserted a **direct** Section 14(a) claim. There was no derivative claim before the Court in *Borak*. The "sole question" before the *Borak* Court was "whether [the Exchange] Act authorizes a federal cause of action for

[11] *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017) (Kennedy, J.) (issue "referenced . . . only in dicta [was] unnecessary to the announcement or application of the rule it established"); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 242 (1990) (White, J.) ("discussion [that] is wholly extraneous to the actual holding in th[e] case…is unnecessary to the decision and is pure dictum."); *Best Life Assurance Co. v. Comm'r of Internal Revenue*, 281 F.3d 828, 834 (9th Cir. 2002) (citing Black's Law Dictionary definition of dictum as a "statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential'").

rescission or damages to a corporate stockholder" under Section 14(a). 377 U.S. at 428.[12] Therefore, only those parts of *Borak* addressing the implied **direct** Section 14(a) claim are "necessary to the result." Everything else in *Borak*, notably its references to derivative Section 14(a) claims, is unnecessary to the result and is therefore dicta.

Misinterpreting *Borak*'s dicta as though they are controlling holdings is not narrow construction. Narrow construction limits *Borak*'s precedential effect to its holding that supports the implication of a direct claim and does not improperly elevate dicta regarding derivative claims to the status of a holding.

B. Implying Federal Derivative Remedies That Duplicate State Law Remedies Is Not Narrow Construction

Every remedy at law or in equity in a federal derivative claim is equally available in a state derivative proceeding. State courts can order financial payments and therapeutic provisions just as effectively as can federal courts.[13] No

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[12] In addition, the complaint was captioned as direct, not derivative, and plaintiffs themselves describe their complaint as direct, not derivative. *See Borak v. J. I. Case Co.*, 317 F.2d 838, 842 (7th Cir. 1963), *aff'd*, 377 U.S. 426 (1964) ("plaintiff amended his complaint in an attempt to allege the denial of his preemptive right to participate in the issuance of Case shares and an injury to himself, individually as a shareholder of Cast [sic]"). The opinion below also describes the claims as direct. *Borak*, 317 F.2d at 845 ("We hold that count 1 of the complaint does state a cause of action on behalf of the stockholders individually.").

[13] *See, e.g.*, *In re The Boeing Co. Deriv. Litig.*, 2022 WL 861729 (Del. Ch. Mar. 22, 2022) (ordering Boeing to pay over $200 million related to its failed oversight of 737 Max); Transcript of Aug. 18, 2020 Settlement Hearing, *Stein v. Blankfein*, No. 2017-0354 (Del. Ch. Sept. 4, 2020), Dkt. 137 (approving over $4 million settlement for challenge to director compensation); *Julian v. E. States Constr. Serv.*,

meaningful remedial advantage is gained by inventing an implied federal derivative claim that generates redundant remedies. Even more, the federal remedy's redundant nature undercuts *Borak*'s purposive rationale: *Borak* reasoned that an implied federal private right was necessary to provide stockholders with an effective Section 14(a) remedy. *Borak*, 377 U.S. at 431-32 ("While th[e] language [of the statute] 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."). But as courts have observed, that conclusion is based on a false premise because plaintiffs can always pursue state derivative claims that offer identical remedies.[14] Implying a duplicative remedy regime is not narrow construction.

2009 Del. Ch. LEXIS 5 (Jan. 14, 2009) (in a derivative suit, ordering defendants to return over $1.5 million in bonuses); *Seinfeld v. Coker*, 847 A.2d 330 (2000) (approving a derivative settlement paying $2.5 million to Bank of America); *Citron v. Burns*, 1985 Del. Ch. LEXIS 382 (Feb. 4, 1985) (approving settlement including corporate therapeutics).

[14] *See, e.g.*, *In re Wells Fargo & Co. S'holder Deriv. Litig.*, 2022 U.S. Dist. LEXIS 20949, at *21 (N.D. Cal. Feb 4, 2022) (dismissing Section 14(a) claim and declining to exercise supplemental jurisdiction over remaining state law claims because "there are no apparent considerations weighing in favor of" doing so since plaintiff could pursue remedies in state court); *City of Detroit Police & Fire Ret. Sys. v. Hamrock*, 2021 U.S. Dist. LEXIS 43717, at *19-20 (D. Del. Mar. 9, 2021) ("After the Court dismisses the 14(a) claim, the remaining causes of action in the Complaint—breach of fiduciary duty of loyalty . . . and unjust enrichment—are Delaware state law claims" for which the court should decline to exercise supplemental jurisdiction over).

C. Implying Federal Derivative Claims That Are Existentially Dependent on State Law Is Not Narrow Construction

The existence and contours of the federal derivative claim rest on state, not federal, law. *Kamen v. Kemper Financial Services, Inc.* holds that "demand in derivative action is substantive and thus law of state of incorporation governs." 500 U.S. 90, 107-108 (1991). Further, "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." *Burks v. Lasker*, 441 U.S. 471, 475-78 (1979). And, "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[.]" *Kamen*, 500 U.S. at 108 (citing *Burks,* 441 U.S. at 471).

Federal courts also look to state law for the definition of fiduciary breach, standards defining director independence, and myriad other rules that are outcome

determinative in derivative litigation.[15] The federal derivative claim is thus nothing more than a mechanism for obtaining a state law remedy in federal court.[16]

More fundamentally, as Judge Easterbrook observed in his dissent in *Seafarers*, if a state decided to eliminate derivative actions, there would be no federal derivative claim to be brought. 23 F.4th at 729 (noting that "[i]t is state law . . . that determines . . . when investors can step into a corporation's shoes" to sue derivatively and recognizing that "Delaware [could] abolish derivative suits"). The federal derivative claim thus depends existentially on state law.

Inventing an implied private right of action that is existentially contingent on state law is not narrow construction.

D. Implied Direct Section 14(a) Claims Are Easily Distinguished

Unlike Plaintiff's derivative claim, an implied direct Section 14(a) claim is not based on dicta and does not rely on state law. *Borak*, 377 U.S. at 428 (stating

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[15] *See, e.g.*, *La. Mun. Police Emps. Ret. Sys. v. Wynn*, 829 F.3d 1048, 1053 (9th Cir. 2016) (noting that "[t]he law of a corporation's state of incorporation governs whether shareholders have adequately alleged demand futility[]" in a derivative suit); *In re BofI Holding, Inc. S'holder Litig.*, 382 F. Supp. 3d 992, 1009 (S.D. Cal. May 23, 2019) (citing Delaware Supreme Court for the standards to plead a *Caremark* oversight claim); *Klein v. Ellison*, 2021 U.S. Dist. LEXIS 97965, at *7-8 (N.D. Cal. May 24, 2021) (looking to *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004) for the standard for pleading lack of director independence).

[16] *See Smith v. Carrillo*, 2019 U.S. Dist. LEXIS 205836, at *2 n.1 (D. Del. Nov. 26, 2019) (characterizing Section 14(a) derivative claim "as a thinly-pled basis for bringing the case in federal court" when all other claims were based in state law); *see also Hamrock*, 2021 U.S. Dist. LEXIS 43717, at *20 (dismissing Section 14(a) claim on same grounds as in *Smith v. Carrillo*).

the question before the court); *cf. Mills*, 396 U.S. at 383 ("In *Borak*, which came to this Court on a dismissal of the complaint, the Court limited its inquiry to whether a violation of § 14 (a) gives rise to 'a federal cause of action for rescission or damages[.]'"). This Court can therefore reserve its views as to the continued vitality of implied direct Section 14(a) claims while holding that derivative Section 14(a) claims lack standing. There would then be no need to address the validity of the forum selection provision.

III. THE EXCHANGE ACT'S ANTI-WAIVER PROVISION DOES NOT APPLY

The Exchange Act's anti-waiver provision voids "any condition, stipulation, or provision binding any person to waive compliance with any **provision of this Chapter** or any rule or regulation thereunder[.]" 15 U.S.C. § 78cc(a) (emphasis added). But no "provision of this Chapter" creates a derivative Section 14(a) claim. *See supra* at 3. Nor does any rule or regulation. The right itself originates in state law, not in the letter of the Exchange Act. *Supra* at 10-11. In *Seafarers*, Judge Easterbrook noted that any *implied* right of action—derivative or direct—is necessarily not a "provision of this Chapter." *See Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting) ("the anti-waiver clause … is limited to the [Exchange] Act's substantive standards"). It cannot be found anywhere in the legislative text and is a judicial construct. *Id.*

It is an even greater stretch to argue that a *derivative* right of action—a right to sue on behalf of a third party, *i.e.* the corporation—is part of the "provisions of this Chapter." Moreover, if the state of incorporation were to abolish derivative actions, no derivative actions could be maintained under federal law alone. *A fortiori*, these actions are not "the provisions of this Chapter," because state-legislatures exercise sole and dispositive control over their existence.

It is also not narrow construction to treat an implied derivative right as though it is an actual, congressionally debated, bicamerally enacted, presidentially approved "provision of this Chapter." Granting equal dignity to an implied derivative right as though it is an actual "provision of this Chapter" requires a further act of judicial imagination that creates an impermissibly expansive double implication. First the derivative right itself is implied from dicta (*see supra* at n.12) and is then further implied to be an actual provision of the Chapter. Double implication is doubly inconsistent with narrow construction.

IV. DECLINING TO INVENT DERIVATIVE SECTION 14(a) CLAIMS DOES NOT DENY SHAREHOLDERS EFFECTIVE RELIEF

Even if implied derivative Section 14(a) claims survive narrow construction, Defendant corporation's forum selection provision should be enforced. The fear, as voiced in *Borak*, that denying derivative standing is "tantamount to a denial of private relief" is unfounded. As Judge Easterbrook recognized in dissent in *Seafarers*, shareholders retain the right to bring *both* (1) a federal securities class

action to recover any damage they suffered personally from a violation of Section 14(a) *and* (2) a derivative action under state corporate law to recover any damage suffered by the corporation. *See Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting).

This Court, sitting *en banc*, has recognized that forum selection clauses are readily enforced when plaintiffs have an effective remedy in the alternative forum. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (holding English choice of law and forum clause did not violate Exchange Act and Securities Act anti-waiver provisions: "We disagree with the dramatic assertion that 'the available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law.' . . . [plaintiffs] have recourse against [defendants] for fraud, breach of fiduciary duty, or negligent misrepresentation."). So too here. Whether the court denies standing or enforces the forum selection provision, the result is the same: Plaintiff can pursue effective, equivalent remedies in a respected alternative forum. There is nothing unfair about litigating Delaware law claims involving stockholders of a Delaware chartered corporation in a Delaware court. It therefore cannot be said that shareholders are "deni[ed] . . . private relief" without derivative standing under Section 14(a). Indeed, the duplicative nature of federal and state derivative remedies underscores this obvious point. *See supra* at 8-9.

More fundamentally, the essence of Plaintiff's claim is that, in deciding how to vote their shares, Defendant's proxy statement misled the corporation's shareholders.[17] But that is an inherently direct claim. Indeed, in evaluating a nearly identical claim in *New York City Employees' Retirement System v. Jobs*, a panel of this Court held that where shareholders are "deprived of the right to a fully informed vote," the claim is direct, not derivative, because "[the] claimed injury is independent of any injury to the corporation and implicates a duty of disclosure owed to shareholders." 593 F.3d 1018, 1022-23 (9th Cir. 2010).

To arrive at this conclusion, *Jobs* recognized that "[t]he characterization of a claim as direct or derivative is governed by the law of the state of incorporation." *Id.* at 1022. In Delaware, where the Defendant corporation is incorporated, the law is unambiguous: "[W]here 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). As the Court of Chancery explains, "where a shareholder 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." *In re Tyson Foods, Inc.*, 919 A.2d 563, 601 (Del. Ch. 2007).

[17] *See, e.g.*, Complaint ¶¶ 144, 227.

The requisite deference to Delaware law thus reinforces the conclusion that precluding Plaintiff's derivative claim in this case does not waive any of her Exchange Act rights. As the precedents of both this Court and Delaware establish, Plaintiff may, and actually should, bring this claim as a direct action.

V. DEFENDANT'S FORUM PROVISION IS ENFORCEABLE UNDER DELAWARE LAW

Relying on *Seafarers*, Plaintiff claims that Defendant's forum provision is invalid under Section 115. Section 115 authorizes forum provisions in corporate charters and bylaws that "require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims" be brought in Delaware courts. 8 Del. C. § 115.

As the panel explained, Plaintiff's failure to raise Section 115 in the district court or in her opening brief on appeal means that she has waived any reliance on that provision. *Roley v. Google LLC*, 40 F.4th 903, 911 (9th Cir. 2022) (where "[plaintiff] did not present [an] argument to the district court, or in his opening brief on appeal[,]" the court "therefore decline[d] to address it"); *Kaufmann v. Kijakazi*, 32 F.4th 843, 847 (9th Cir. 2022) ("Claimant forfeited this constitutional argument by failing to raise it to the district court").[18] But even if Plaintiff had not

[18] In contrast, the question of standing to bring a federal claim, a question of subject matter jurisdiction, may be raised at any time. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 70 (1978) (question of whether "the [federal] cause of action alleged is so *patently without merit* as to justify . . . the court's dismissal for want of jurisdiction"); *Albrecht v. Lund*, 845 F.2d 193, 194

waived the argument, it would not change the outcome, because the Seventh Circuit's application of Section 115 in *Seafarers* is demonstrably incorrect.

The Delaware Supreme Court's decision in *Salzberg* makes clear that Section 115 is irrelevant to a forum provision governing a Section 14(a) claim, and confirms that the Defendant corporation's provision is valid and enforceable. 227 A.3d at 109.

A. Section 115 Is Irrelevant

Salzberg considered the validity of a corporate forum provision requiring that any Securities Act claim be brought in federal courts, and precluding shareholders from bringing Securities Act claims in state courts that would otherwise enjoy concurrent jurisdiction. 227 A.3d at 107. "[R]ecognizing that corporate charters are contracts among a corporation's stockholders," *Salzberg* upheld the federal forum provision, explaining that "the rules for determining the validity of forum-selection provisions in the contractual context lend themselves well to the corporate charter context." *Id.* at 116, 134-135.

Salzberg also explained that Section 115 *neither authorizes nor prohibits* a forum provision governing federal securities law claims. *Id.* at 118-20. Instead,

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(9th Cir. 1988) ("A challenge to the federal courts' jurisdiction may be raised at any point during the proceedings"); *see also Attorneys Tr. v. Videotape Comput. Prods., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996) ("Of course, '[a] party may raise jurisdictional challenges at any time during the proceedings.' . . . We, therefore, will consider the jurisdictional issue, even though it was raised on appeal for the first time.") (citation omitted).

Section 115 merely authorizes forum provisions regulating "internal corporate claims," which *Salzberg* interpreted to mean shareholder claims "requiring the application of Delaware corporate law as opposed to federal law." *Id.* at 120 n.79; *accord id.* at 133 n.146. Because "[Securities Act] claims are not 'internal corporate claims,' Section 115 does not apply." *Id.* at 120.

Therefore, if a forum provision "govern[s] . . . claims that do not fall within the definition of 'internal corporate claims,'" Section 115 is irrelevant.[19] In ruling otherwise, *Seafarers* fixated on Section 115's legislative history, which stated that Section 115 was "*not intended to authorize* a provision that purports to foreclose suit in a federal court based on federal jurisdiction." 23 F.4th at 720 (emphasis added) (quoting Sen. 75, 148th Gen. Assemb., 1st Reg. Sess. (Del. 2015)). Relying on that language, the divided *Seafarers* panel reasoned that "[b]y eliminating federal jurisdiction over the [plaintiff's] exclusively federal derivative claims, [the defendant corporation's] forum bylaw forecloses suit in a federal court based on

[19] *See 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."); *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."); *id.* at 119 ("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.").

federal jurisdiction. That's exactly what Section 115 was *not intended to authorize*." *Id.*

The flaw in this reasoning is obvious: it conflates "*not intended to authorize"* with "*intended to prohibit*." *Salzberg* authoritatively explains that, because federal securities law claims are *not* "internal corporate claims," and because Section 115 concerns *only* "internal corporate claims," Section 115 *neither authorizes nor prohibits* forum provisions governing federal securities law claims. Section 115 is silent on the question and thus irrelevant to analysis of Defendant's forum provision.

B. Defendant's Forum Provision Is Valid and Enforceable against Shareholders

Instead of looking to Section 115, *Salzberg* held that a forum provision covering federal securities law claims is authorized under DGCL Sections 102(b)(1) and 109(b), which together afford Delaware corporations broad contractual freedom to fashion charters and bylaws. *Salzberg*, 227 A.3d at 119. *Salzberg* thus confirms that a forum provision governing derivative Section 14(a) suits is, in fact, valid under Delaware law.

Indeed, just like the Securities Act claims at issue in *Salzberg*, Section 14(a) claims "aris[e] out of the Board's disclosures to current and prospective stockholders." *Id.* at 114. It follows that just as a forum provision governing Securities Act claims is permissible under Delaware law, a forum provision

governing Section 14(a) claims "easily fall[s] within" the broad scope of DGCL Sections 102(b)(1) and 109(b) and is, therefore, facially valid. *Id.*

The only limit that Delaware law places on a forum provision authorized by DGCL Sections 102(b)(1) and 109(b) is based in equity, because even a facially valid forum provision is unenforceable if it would operate inequitably as applied to shareholders. *See id.* at 134-35. But enforcing a forum provision directing all derivative lawsuits to Delaware courts raises no serious equitable concern. Indeed, federal courts are already bound to apply Delaware law in federal derivative litigation. It would be curious in the extreme to argue that it is inequitable to refer a plaintiff to the same courts upon which federal courts rely to define the contours of the federal derivative claim.

Further, by precluding derivative Section 14(a) claims, Defendant's forum provision does not force Plaintiff to waive the right to pursue a remedy against Defendants. It simply bifurcates Plaintiff's litigation options. If Plaintiff seeks a remedy for proxy statement misrepresentations, then she may bring a direct action, individually or as a class, in federal court asserting federal securities claims. If, instead, Plaintiff seeks redress for alleged harms to the corporation, then she may bring a derivative action in Delaware Chancery asserting state claims. Given these alternatives, there is no reason to deny enforceability of an otherwise lawful forum provision directing derivative shareholder suits to Delaware courts. *Cf. id.* at

114-16 (holding that a corporate forum provision that precludes federal securities claims in state court is valid where those same claims may still be brought in federal court).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court dismiss the Complaint for lack of a cognizable derivative right of action and therefore standing. While panels in this Circuit have recognized the implied derivative Section 14(a) claim, this Court, sitting *en banc*, has never addressed the question. Holding that Plaintiff lacks a derivative right of action would create a circuit split. *See*, *e.g.*, *Seafarers*, 23 F.4th at 730 (enforcing a Section 14 derivative cause of action). We are, however, confident that the Supreme Court would be favorably inclined to an interpretation of Section 14(a) that denies Plaintiff an implied derivative right of action, and would enforce the forum selection provision.

In the alternative, if Plaintiff is allowed to pursue her implied derivative claim, this Court should affirm the opinion below for the reasons stated therein and further hold that the Exchange Act's anti-waiver provision is inapplicable to implied private rights of action because they are not "provisions" of the Exchange Act. This Court should also hold that Section 115 does not prevent enforcement of the forum selection provision at issue, and that the provision is entirely consistent with Delaware law.

DATED: November 23, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29-2(c)(3) because it contains 5,689 words, excluding the items exempted by Fed. R. App. P. 32(f).

The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2022, I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

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