No. 21-15923

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOELLE LEE,
derivatively on behalf of The Gap, Inc.,
Plaintiff-Appellant,

v.

ROBERT J. FISHER, *et al.*,
Defendants-Appellees,

and

THE GAP, INC.,
Nominal Defendant-Appellee.

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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, CONSUMER FEDERATION OF AMERICA, AND BETTER MARKETS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC BY THE FULL COURT

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICI CURIAE[1]

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

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

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

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

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

Amici have a strong interest in preventing the unwarranted expansion of tools, including forum-selection clauses, that shield corporations from federal statutory liability and from accountability for harm to investors and consumers. Amici submit this brief to explain that the majority opinion of the limited en banc court would wrongly deprive shareholders of access to meaningful remedies.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the rare circumstance in which the Court's full en banc review is needed: a 6-to-5 decision by a limited en banc court acknowledging that it creates a conflict among the circuits.

Section 14(a) of the Securities Exchange Act of 1934 (Exchange Act) prohibits material misstatements and omissions in proxy statements. 15 U.S.C. § 78n(a). Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." *Id.* § 78cc(a). And Section 27(a) gives federal courts "exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by" the Act. *Id.* § 78aa(a).

In this case, Noelle Lee brought a derivative action alleging violations of Section 14(a) and seeking relief on behalf of the company. The forum selection clause in The Gap's bylaws, however, requires "any derivative action or proceeding brought on behalf of the Corporation" to be adjudicated in the Delaware Court of Chancery. Accordingly, as the limited en banc court understood, if enforceable, the clause wholly precludes litigation of derivative actions asserting Exchange Act claims. *See Lee v. Fisher*, 2023 WL 3749317, at *6 (9th Cir. June 1, 2023).

A forum-selection clause is unenforceable where "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *see also Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088 (9th Cir. 2018). Nonetheless, by a vote of 6 to 5, the Court held that The Gap's forum selection clause does not violate the Exchange Act's antiwaiver provision and is enforceable. At the same time, the slim majority acknowledged that its decision squarely conflicts with the Seventh Circuit's opinion in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022).

To reach its conclusion, the majority stated that The Gap's forum selection clause does not violate the antiwaiver provision because "Lee can enforce Gap's compliance with the substantive obligations of § 14(a) [15 U.S.C. § 78n(a)] by bringing a direct action in federal court." *Lee*, 2023 WL 3749317, at *6. As the five dissenting judges explained, the majority erred by giving short shrift to the distinctions between direct and derivative actions, which address different harms and provide distinct forms of relief. Unlike direct shareholder suits, the remedies available

through derivative actions, such as corporate governance reforms and any monetary payment, flow to the corporation. The majority's decision thus deprives shareholders of substantive entitlements to remedies available under the Exchange Act only through a derivative action. In denying shareholders the ability to assert derivative claims and obtain the relief available only through those claims, the majority's opinion contradicts the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

Because—as the majority recognized, *see Lee*, 2023 WL 3749317, at *4—corporations are increasingly adopting clauses similar to The Gap's, the outcome of this case will have broad effect. And because exclusive federal jurisdiction is not limited to the Exchange Act, the outcome will affect the ability to enforce a range of federal statutes—including the antitrust laws, ERISA, and others.

This Court should grant en banc review by the full court to eliminate the circuit split unnecessarily created by the majority's erroneous opinion.

ARGUMENT

The en banc majority opinion held that Lee's derivative claim could properly be brought as a direct action against The Gap under Section 14(a) and Rule 14a-9. *Lee*, 2023 WL 3749317, at *6. The opinion reasons that the allegations would state a direct claim because "Lee and other shareholders suffered the alleged harm—a proxy nondisclosure injury in violation of § 14(a) that interfered with their voting rights and choices—and would receive the benefit of the remedy—the equitable or injunctive relief sought in the complaint." *Id*. According to the majority, Lee's ability to obtain some form of relief for a violation of Section 14(a) through a direct action means that an bylaws foreclosing her from bringing a derivative action do not waive any "substantive" rights under the Exchange Act. The majority's decision, however, ignores that "direct and derivative stockholder actions are distinct, with different purposes and different remedies." *Id.* at *24 n.2 (S. Thomas, J., dissenting). By depriving shareholders of the remedies available for a Section 14(a) violation in a derivative action, the forum selection clause abridges substantive rights under the Exchange Act.

I. Section 14(a) derivative claims offer meaningful relief that is not available through direct claims.

A. In a direct action, the plaintiff shareholder, on behalf of herself and, usually, a class of shareholders, seeks damages, typically as compensation for loss in stock value, based on securities law violations, fraud, or other causes of action. *See*, *e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014). In contrast, a derivative action allows an individual shareholder "to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own," *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949), by asserting a cause of action *on behalf of the corporation*, against its officers, directors, or third parties.

The two types of suits are not interchangeable: Whether a stockholder's claim is direct or derivative "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004); *see New York City Employees' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010) (in a case under Section 14(a), citing

Tooley), *overruled in non-relevant part*, *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012).

Here, Lee brings a derivative claim: She alleges that, due to the failure to disclose material information, the company engaged in discriminatory hiring and compensation practices, and that *the company* has incurred and will continue to incur substantial costs related to remediating that harm. And the equitable or injunctive relief sought in her complaint is not available through a direct action, because such relief "flow[ ] only to the corporation," rather than to Lee and other shareholders. *Lee*, 2023 WL 3749317 at *23 (S. Thomas, J., dissenting) (quoting *Tooley*, 845 A.2d at 1036).

B. The relief available under derivative actions reflects the claims' distinct and important role. Corporate governance reforms, such as amending corporate charters and bylaws, increasing oversight and monitoring of business units, and increasing reporting from business units, are often sought as relief in derivative suits. For example, in 2017, after it came to light that Wells Fargo employees had illicitly created millions of deposit and credit card accounts for customers without the customers' knowledge or consent, *see generally* Hearing of House Fin.

Servs. Comm. 114-109 (Sept. 29, 2016), shareholders brought a derivative action alleging, among other things, claims under Section 14(a) of the Exchange Act and SEC Rule 14a–9. *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1088 (N.D. Cal. 2017). The lawsuit resulted in a settlement that provided significant benefits, including corporate governance reforms,[2] "clawbacks" (that is, stock grant forfeitures, reduced compensation, and return of incentive compensation by certain officers and directors),[3] and a substantial payment by the insurer to the company.[4] If Wells Fargo's bylaws had contained a provision like The Gap's, enforcement of the provision would have barred the suit from proceeding; the company would have escaped accountability under the Exchange Act, and the corporate governance reforms and clawbacks would likely not have happened.[5]

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

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

[4] *See id*. at 9.

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

Derivative suits have been successful in achieving substantial relief in numerous other instances of corporate misconduct. *See*, *e.g.*, *Emps. Ret. Sys. of City of St. Louis v. Jones*, 2022 WL 14160253, at *1 (S.D. Ohio Aug. 23, 2022) (approving settlement of a derivative action alleging claims under Section 14(a) against certain directors and officers of FirstEnergy Corp. for "their roles in orchestrating the 'HB6 scandal'—a large bribery, racketeering, and pay-to-play scheme with Ohio politicians—at substantial cost to the Company's long-term interests"; settlement included a large payment from the insurer and a series of corporate governance reforms); *In re Pinterest Derivative Litig.*, 2022 WL 484961, at *2–*5 (N.D. Cal. Feb. 16, 2022) (granting preliminary approval of a settlement of a Section 14(a) derivative claim arising from allegations of widespread race and sex discrimination; noting that the settlement will benefit the company and its shareholders by, among other things, promoting pay transparency, encouraging equitable hiring practices, and requiring regular internal audits and reports to the board on the progress of the reforms); Jonathan Stempel, *BofA director settlement over Merrill triples to $62.5 mln–source*, Reuters, Jan. 11, 2013

(describing settlement in derivative action resulting in corporate governance reforms and payment "to the bank, not to shareholders").

Importantly, if enforceable, forum selection clauses such as The Gap's effectively foreclose all Exchange Act causes of action that can be brought derivatively. For example, in addition to derivative claims under Section 14(a) of the Exchange Act and SEC Rule 14a–9, the *In re Wells Fargo* case discussed above involved derivative claims under Section 10(b) and SEC Rule 10b–5 (which prohibit, in connection with the purchase or sale of any security, manipulation or deception in contravention of SEC regulations), Section 20A (which prohibits insider trading), and Section 29(b) (which provides equitable remedies allowing for the voiding of contracts where the performance involves violation of any provision of the Exchange Act). *See* 282 F. Supp. 3d at 1088. All of those claims are within the exclusive jurisdiction of federal courts under Section 27(a) of the Act, 15 U.S.C. §§ 78aa(a). Therefore, the plaintiffs would have been barred from seeking relief on behalf of the corporation through a derivative action asserting those claims if Wells Fargo had a forum-selection clause similar to the one here.

C. Despite the many derivative cases providing meaningful relief under Section 14(a), the majority suggests that the derivative cause of action originally recognized in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), is no longer good law. *See*, *e.g.*, *Lee*, 2023 WL 3749317 at *13 ("[A]fter the decision in *Borak*, the Supreme Court's jurisprudence has evolved in a way that calls into question *Borak*'s statement about derivative § 14(a) actions."). As the Supreme Court has very recently reiterated, though, "a lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 2023 WL 4187749, at *2 (U.S. June 27, 2023) (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989), and rejecting the argument that the Court had "implicitly overruled" a prior decision).

Moreover, "[i]t is well established that [a Section 14(a) claim] may be brought derivatively, because 'interference with the processes of corporate democracy results in direct harm to the corporation [as well as] to shareholders who were actually deceived.'" *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1075 (C.D. Cal. 2008) (quoting *Gaines v. Haughton,* 645 F.2d 761, 774 (9th Cir. 1981), *overruled*

on other grounds, Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984)); *see In re Trump Hotels Shareholder Derivative Litig.*, 2000 WL 1371317, at *10 (S.D.N.Y. Sept. 21, 2000). Indeed, the Supreme Court has explained that, "as [the Court] held in [*Borak*], '[t]o hold that derivative actions are not within the sweep of the [right of action existing under Section 14(a)] would … be tantamount to a denial of private relief.'" *Burks v. Lasker*, 441 U.S. 471, 475 (1979) (quoting *Borak*, 377 U.S. at 432)). In short, *Borak* "remains good law," and Lee's claims fall within its recognition of derivative Section 14(a) claims. *Lee*, 2023 WL 3749317 at *27 (S. Thomas, J., dissenting).

II. A forum selection clause that bars litigation of derivative claims is void.

As the five dissenting judges noted, "[t]he antiwaiver provision of the Exchange Act voids Gap's forum-selection bylaw because the bylaw deprives … Lee of the ability to bring her derivative claim under § 14(a) of the Exchange Act in any forum—thereby resulting in complete waiver of the claim." *Lee*, 2023 WL 3749317, at *22 (S. Thomas, J., dissenting). Because Lee's claim is derivative, it is irrelevant that she "could theoretically bring [some other] direct action" that cannot afford her the relief she seeks. *Id.* at *23 (S. Thomas, J., dissenting).

Section 29(a) provides that any "condition, stipulation, or provision" that "waives compliance with any provision" of the Act is "void." 15 U.S.C. § 78cc(a). As the Supreme Court has held, the anti-waiver provision "prohibits waiver of the substantive obligations imposed by the Exchange Act." *McMahon*, 482 U.S. at 228. Such waiver occurs whenever an agreement "weaken[s] [the parties'] ability to *recover* under the [Exchange] Act," and provides "grounds for voiding the agreement under § 29(a)." *Id*. at 230–31 (emphasis added).

The majority mistakenly held that, "[l]ike the arbitration clause in *McMahon*, Gap's forum-selection clause does not waive Gap's compliance with any substantive obligation" because "[a] shareholder can enforce Gap's statutory duty to comply with § 14(a) by means of a direct action in federal court." *Lee*, 2023 WL 3749317, at *8. That reasoning contradicts *McMahon*, which holds that a forum selection clause is void whenever the forum it designates is "inadequate to enforce" the substantive Exchange Act claims that, absent the clause, a party could assert. *McMahon*, 482 U.S. at 229. And *McMahon*'s focus on the ability to *recover* as the measure of whether the provision at issue reflects an unenforceable waiver of substantive rights makes clear that a provisions

that bars substantive remedies available under the Act is an impermissible waiver. *See id.* at 231–33.

Requiring the adjudication of Exchange Act claims in a forum that lacks any power to adjudicate them does not just "weaken" the substantive right to recover under the Act, it eliminates the right altogether as to remedies available only derivatively. The Gap's forum selection clause thus deprives investors of "an adequate means of enforcing the provisions of the Exchange Act." *Id.* at 229; *see McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1051 (2d Cir. 1995) (stating that contract provisions that "would bar [a] plaintiff from commencing a securities law claim" are paradigmatic examples of the waivers barred by Section 29(a)). "The statutory framework of the … 1934 Act[ ] compels the conclusion that individual securityholders may not be forced to forego their rights [to bring actions] under the federal securities laws due to a contract provision." *Id.* at 1051; *accord Pasternack v. Shrader*, 863 F.3d 162, 171 (2d Cir. 2017).

In holding that Section 29(a) does not bar enforcement of agreements to arbitrate Exchange Act claims, *McMahon* explained that an agreement to assert Exchange Act claims in another competent forum

"does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)," so long as "[that forum] is adequate to vindicate Exchange Act rights." *McMahon*, 482 U.S. at 228, 238. As the Court subsequently described its holding, "parties to an arbitration agreement could waive the right to have their Exchange Act claims tried in federal court and agree to arbitrate the claims." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 385 (1996).

Likewise, any interest in enforcement of forum-selection clauses does not support their use to deprive litigants of substantive rights. Indeed, a forum-selection clause "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022). Any federal policy in favor of enforcing choice-of-forum agreements—even the Federal Arbitration Act's statutory policy of enforcing the "specialized kind" of forum-selection provision embodied in an agreement to arbitrate—stops when that predispute agreement abridges a substantive right. *See id*. And even in the absence of an anti-waiver provision like section 29(a), a predispute agreement may not effect a "waiver of a party's right to pursue statutory remedies." *Am. Exp. Co. v. Italian Colors Rest.*,

570 U.S. 228, 236 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (emphasis removed). That is, it is irrelevant whether Lee could bring a different, direct claim under Section 14(a). A clause need not waive every potential claim that a plaintiff might assert under the Exchange Act for it to waive "the substantive obligations imposed by the [Act]" and violate the anti-waiver provision. *McMahon*, 482 U.S. at 228. It is sufficient that it denies the plaintiff a forum that is competent to vindicate her Exchange Act claims and thus waives her "right to pursue statutory remedies" that she would otherwise have had. *Italian Colors Rest.*, 570 U.S. at 236.

The Gap's forum selection clause is not, as the en banc court held, "[a]n agreement to use a particular *procedure* for bringing a claim—arbitration instead of litigation, or a direct action instead of a derivative action." *Lee*, 2023 WL 3749317 at * 8 (emphasis added). A derivative action brought pursuant to section 14(a) addresses particular kinds of harms and provides particular kinds of relief. *See supra* pp. 7–8. The Gap's forum selection clause does not provide a procedure or a forum to vindicate Lee's derivative claims, but bars them entirely; it thus prevents shareholders like Lee from suing over derivative harms and, in turn, from

receiving relief—be that relief awarded in a judicial forum, in arbitration, or in any forum competent to vindicate Exchange Act rights. Because The Gap's forum selection clause precludes litigation of Lee's derivative claims entirely, it "weaken[s] [her] ability to recover under the [Exchange] Act," and provides "grounds for voiding the agreement under § 29(a)." *McMahon*, at 230–31.

The en banc panel majority's contrary holding, in addition to threatening the ability to bring derivative actions under the Exchange Act, also threatens to cut off other types of claims. Forum-selection clauses placed in employment contracts, pension plans, or contracts governing commercial transactions could foreclose statutory rights of action over which federal courts have exclusive jurisdiction, including: claims by companies under the federal antitrust laws, 15 U.S.C. § 15(a); many claims by participants in ERISA plans, 29 U.S.C. §§ 1132(a)(1), 1132(e)(1); intellectual property disputes under the copyright, patent, or trademark laws, 28 U.S.C. § 1338(a); claims by employees under the Trafficking Victims Protection Act, 18 U.S.C. § 1595(a), *e.g.*, *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430 (E.D.N.Y. 2017); and admiralty claims, 28 U.S.C. § 1333. Under the majority's

reasoning, as long as such a forum-selection clause did not eliminate *all* remedies for the underlying conduct at issue, the defendant could enforce it to bar the specific remedies available under applicable federal statutes—a result directly at odds with the Supreme Court's repeated admonitions that arbitration agreements and other forum-selection clauses may not waive a party's right to pursue non-waivable statutory remedies. *See Viking River Cruises*, 142 S. Ct. at 1919; *Italian Colors Rest.*, 570 U.S. at 236.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc by the full court.

Respectfully submitted,

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July 3, 2023

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Circuit Rule 29-2(c)(2) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 3,645 words.

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

July 3, 2023

/s/ Allison M. Zieve
Allison M. Zieve

CERTIFICATE OF SERVICE

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

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