No. 21-15923

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOELLE LEE,
derivitably on behalf of THE GAP, INC.,
Plaintiff-Appellant,

vs.

ROBERT J. FISHER, et al.,
Defendant-Appellees,

vs.

THE GAP, INC.,
Nominal Defendant-Appellee.

On Appeal from the U.S. District Court
for the Northern District of California
No. 3:20-cv-06163-SK (Hon. Sallie Kim)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT NOELLE LEE

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 Sixth Street NW
Suite 200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

November 14, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certify that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 14th day of November 2022.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ..... **i**

TABLE OF CONTENTS ..... **ii**

TABLE OF AUTHORITIES ..... **iii**

IDENTITY AND INTEREST OF AMICUS CURIAE **1**

SUMMARY OF ARGUMENT **1**

ARGUMENT **4**

I. THE FORUM-SELECTION BYLAW UPHELD BY THE DISTRICT COURT IS INVALID AND UNENFORCEABLE AS APPLIED TO THIS ACTION BECAUSE OF MULTIPLE VIOLATIONS OF APPLICABLE PUBLIC POLICY **4**

A. Enforcement of the Forum-Selection Bylaw at Issue Deprives Plaintiff of Any Forum in Which to Pursue Her Federal Statutory Rights. 5

B. The Gap Bylaw Violates the Anti-Waiver Provision of the Securities Exchange Act of 1934. 7

C. Forum-Selection Precedents Similarly Forbids Selection of a Forum to Discourage or Abrogate a Plaintiff's Cause of Action. 10

D. Gap's Bylaw Also Constitutes an Impermissible Prospective Waiver of Federal Statutory Rights Regardless of Available State Law Remedies. 11

II. *FORUM NON CONVENIENS* REQUIRES AN ADEQUATE ALTERNATIVE FORUM HAVING JURISDICTION TO ADJUDICATE PLAINTIFF'S FEDERAL STATUTORY CLAIMS ... **15**

III. THE FORUM-SELECTION BYLAW IN THIS CASE VIOLATES PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS **17**

CONCLUSION.....**20**

CERTIFICATE OF COMPLIANCE **21**

CERTIFICATE OF SERVICE **21**

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)..... 13, 14

Am. Dredging Co. v. Miller, 510 U.S. 443 (1994) 16

Am. Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) 14

Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49 (2013)15, 16

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 10, 11, 17

Christopher v. Harbury, 536 U.S. 403 (2002).....18

Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).....20

Fouad on behalf of Digital Soula Sys. v. State of Qatar, 846 F. App'x 466 (9th Cir. 2021) 18

Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911 (9th Cir. 2019) 8, 11

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 13

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).....16

Imamura v. Gen. Elec. Co., 957 F.3d 98 (1st Cir. 2020).....16

In re Adamson Apparel, Inc., 785 F.3d 1285 (9th Cir. 2015).....8

In re Bridgestone/Firestone, Inc., 420 F.3d 702 (7th Cir. 2005).....16

Lee v. Fisher, 34 F.4th 777, 779–80 (9th Cir. 2022) 6, 7, 15

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 18, 19

Lueck v. Sundstrand Corp., 236 F.3d 1137 (9th Cir. 2001) 15

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).....16

Richards v. Jefferson Cty., 517 U.S. 793 (1996) 18

Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) 9

Seafarers Pension Plan on behalf of Boeing Co. v. Bradway, 23 F.4th 714, 720 (7th Cir. 2022) 6

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007) 16

St. Hubert v. United States, 140 S. Ct. 1727 (2020).....18

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976).....8

UFCW Loc. 1500 Pension Fund v. Mayer, 895 F.3d 695 (9th Cir. 2018) 9

United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 18

United States v. Chavez-Vernaza, 844 F.2d 1368 (9th Cir. 1987) 6

Yei A. Sun v. Advanced China Healthcare, Inc., 901 F.3d 108 (9th Cir. 2018)7, 9, 10

Statutes

15 U.S.C. § 77v.....9

15 U.S.C. § 78aa 6

15 U.S.C. § 78cc 7

15 U.S.C. § 78n 2, 5, 17

28 U.S.C. § 1404 15

28 U.S.C. § 1406 16

8 Del. Code § 115 6

Other Authorities

3 William Blackstone, *Commentaries* *23, *109 (1765 19

Fed. R. Civ. Pro. 12(b)(3) 16

Pl.'s Opening Br., Oct. 7, 2021 5

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.[1]

This Court's rehearing en banc is of acute interest to AAJ members, many of whom represent clients seeking to vindicate federal rights enshrined by Congress in federal law. If affirmed, the lower court's decision will invite corporations to evade the very accountability Congress intended by enacting federal private causes of action.

SUMMARY OF ARGUMENT

1. The Gap bylaw at issue in this case should be declared invalid and unenforceable as applied to this action because it both deprives a plaintiff of *any*

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

opportunity at all to bring her federal cause of action and vindicate her federal statutory rights and licenses a corporation to avoid the substance of a federal cause of action through a forum-selection clause.

Plaintiff brought this derivative action in federal district court under Section 14(a) of the Securities Exchange Act of 1934 seeking to improve diversity in Gap. Inc.'s corporate leadership after finding that the corporate leadership had misrepresented their existing diversity efforts. The Exchange Act creates a private right of action for stockholders and vests exclusive jurisdiction over such actions in federal district courts. However, Defendants seek enforcement of a corporate bylaw that requires derivative actions be filed only in the Delaware Court of Chancery. Because the parties do not dispute that the Delaware court cannot hear Plaintiff's derivative action, enforcement of this forum-selection bylaw would deprive Plaintiff of any opportunity to pursue her substantive statutory cause of action in *any* forum, state or federal. Both the Exchange Act and precedent prohibit enforcement of the bylaw when it has that result. The panel then erred in affirming dismissal of Plaintiff's action on *forum non conveniens* grounds.

Forum-selection provisions may not be enforced if they violate strong public policy. In this instance, the lower court failed recognize that any public policy favoring enforcement of Gap's bylaw is far outweighed by both congressional design and the more fundamental policy that Plaintiff be afforded the opportunity to

effectively vindicate her federal statutory rights. Indeed, forum-selection caselaw itself recognizes that the selection of a forum should not serve as an instrument to discourage vindication of a litigant's rights. The Supreme Court of the United States has expressly, forcefully, and repeatedly declared that forum-selection provisions that fail to assure a vital forum for a dispute must be condemned as violating public policy.

At bottom, both the Exchange Act and the Supreme Court have made clear that this overriding public policy demands that a plaintiff have the opportunity to pursue her *federal statutory causes of action* to vindicate federal statutory rights. State law remedies that may be similar are not sufficient. The relevant federal policy favoring enforcement of forum-selection agreements is a policy that favors efficient dispute resolution, not easy dispute avoidance.

2. In addition, dismissal in this case does not comport with the doctrine of *forum non conveniens*, which is the only basis available for dismissal of Plaintiff's action. An essential element for dismissal on *forum non conveniens* is the existence of an adequate alternative forum that has jurisdiction over the subject matter of a plaintiff's claim. Here, because the Delaware Court of Chancery has no subject-matter jurisdiction over Plaintiff's statutory cause of action for violation of the Exchange Act, that court cannot serve as an adequate alternative forum. Indeed, because the Gap bylaw points to the Delaware Court of Chancery as the *sole* forum

for Plaintiff's derivative federal cause of action, there exists no adequate alternative forum. The district court therefore erred in basing dismissal on *forum non conveniens* grounds.

3. Even apart from the strong public policy that mandates preservation of the opportunity for Plaintiff to effectively vindicate her federal substantive rights, enforcement of the forum-selection provision in this case would also violate Plaintiff's constitutional rights to due process and access to the courts — a heavy constitutional thumb on the scale of weighing the bylaw's validity. There is no question that forum-selection provisions are subject to judicial scrutiny for fundamental unfairness, particularly where they might be misused to deprive plaintiffs of their day in court to pursue their legitimate claims.

Ultimately, the district court's position leaves Plaintiff with an explicit federal right that lacks a remedy — and a means by which a corporation may avoid the accountability that Congress requires of it to shareholders by means of a forum-selection bylaw. That result cannot stand.

ARGUMENT

I. THE FORUM-SELECTION BYLAW UPHELD BY THE DISTRICT COURT IS INVALID AND UNENFORCEABLE AS APPLIED TO THIS ACTION BECAUSE OF MULTIPLE VIOLATIONS OF APPLICABLE PUBLIC POLICY.

AAJ addresses this Court on the central issue presented for en banc review: the enforceability of a private corporate bylaw that effectively deprives a plaintiff of any opportunity to vindicate her federal statutory rights.

A. Enforcement of the Forum-Selection Bylaw at Issue Deprives Plaintiff of Any Forum in Which to Pursue Her Federal Statutory Rights.

Plaintiff Noelle Lee has brought this suit as a derivative action on behalf of Gap, Inc. ("Gap") in federal district court in California, alleging that in proxy statements to shareholders, company directors and officers misrepresented their efforts to promote diversity. She brought suit under Section 14(a) of the Securities Exchange Act of 1934 ("the Exchange Act"), codified at 15 U.S.C. § 78n(a), seeking injunctive relief that would increase the representation of minorities in corporate leadership. Defendants moved to dismiss on the ground that Gap's corporate bylaws require that any derivative action be brought only in the Chancery Court of Delaware.[2] The district court granted the motion.

---

[2] The bylaw states, in pertinent part:

> The Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action or proceeding asserting a claim of breach of a fiduciary duty owed by any director, officer, employee or agent of the Corporation to the Corporation or the Corporation's stockholders.

Pl.'s Opening Br. 8 (Oct. 7, 2021).

Thereafter, a panel of this Court affirmed. The panel acknowledged, along with Defendants, that, because Congress gave federal district courts exclusive jurisdiction over claims for violations of Exchange Act,[3] "if [Gap's] forum-selection clause is enforced, Lee will not be able to bring her derivative Section 14(a) claim in the Delaware Court of Chancery." *Lee v. Fisher*, 34 F.4th 777, 779-80 (9th Cir. 2022).[4] Enforcement would thus deprive plaintiff of *any* opportunity to bring her

---

[3] In particular, 15 U.S.C. § 78aa provides,

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have 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 this chapter or the rules and regulations thereunder.

[4] There are additional reasons why the forum-selection clause deprives Lee of her derivative claim. Gap is incorporated under the Delaware General Corporation Law, which provides that corporate bylaws "may require, *consistent with applicable jurisdictional requirements*, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. Code § 115 (emphasis added). Gap's bylaw plainly contravenes the jurisdictional requirements imposed by 15 U.S.C. § 78aa, which vests exclusive jurisdiction in federal district courts, *see supra* note 3, and is therefore not valid as a matter of Delaware law. The Seventh Circuit recently explored that issue and other aspects of Delaware law that undermine the bylaw's validity, correctly holding that such a forum-selection clause cannot displace a shareholder's right to go to federal court. *See Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022). Amicus suggests that this Circuit adhere to its strong policy that "absent a strong reason to do so, we will not create a direct conflict with other circuits." *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987), and submits that no strong reason to rule differently from the Seventh Circuit exists.

federal statutory causes of action in *any* forum. Nevertheless, the panel determined that "the strong presumption in favor of enforcing forum-selection clauses" was conclusive in this case and that plaintiff had "not met her heavy burden to show that enforcing Gap's forum-selection clause contravenes strong federal public policy." *Id.* at 782. The court then held that the district court properly dismissed plaintiff's action on *forum non conveniens* grounds. *Id.*

AAJ submits that the lower court grievously erred.

B. The Gap Bylaw Violates the Anti-Waiver Provision of the Securities Exchange Act of 1934.

The panel recognized correctly held that a forum-selection clause that contravened "'strong public policy of the forum in which suit is brought'" will not support transfer. *Lee*, 34 F.4th at 780 (quoting that *Yei A. Sun v. Advanced China Healthcare, Inc*., 901 F.3d 1081, 1088 (9th Cir. 2018)). However, the panel and the district court failed to give proper weight to the text of the Exchange Act, which explicitly provides:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.

15 U.S.C. § 78cc(a).

In upholding the validity of a forum-selection clause despite historic disfavor, the Supreme Court recognized that the public-policy exception to implementation

applies when that policy is declared "by statute or by judicial decision." *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15 (1972). This Court utilized that guidance in *Gemini Techs., Inc. v. Smith & Wesson Corp*., 931 F.3d 911, 916 (9th Cir. 2019), to void a forum-selection clause.

However, the district court and the prior panel gave the federal statute's clear expression of public policy enacted little weight when compared to generic precedent that favors enforcement of forum-selection clauses based on a mistaken reading of what *Advanced China* requires. In doing so, the court violated a cardinal principle this Court has expressed that, "when faced with a clearly drafted statute, we are not at liberty to deviate from the text in favor of a generalized notion of public policy." *In re Adamson Apparel, Inc*., 785 F.3d 1285, 1295 (9th Cir. 2015). Favorable treatment of forum-selection clauses, as a general matter (although not applicable here for reasons discussed *infra*), cannot overcome such an explicit statement of congressional policy without according the drafter of the clause an insensible veto over federal law, a result not mandated by *Advanced China*.

Section 14(a) of the Exchange Act authorizes a private right of action designed to protect shareholders from misstatements or omissions generated by corporate management and thereby undermining a shareholder's informed decisions. *See TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438, 448 (1976). By placing "an unmistakable focus" on shareholders, Congress created an express private remedy

to enforce substantive private rights through Section 14(a). *See UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018) (citations and internal quotation marks omitted). The Exchange Act's anti-waiver provision, then, expresses overriding public policy that this substantive right cannot be alienated, particularly by the corporation whose shareholder's rights were abridged.

While a forum-selection clause may only affect the locus of the forum and be unobjectionable on that ground alone, *see Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229-230 (1987), the inquiry goes further. The new forum is valid only "so long as the prospective litigant effectively may vindicate its statutory cause of action." *Id*. at 240. (citation omitted).

The Supreme Court gave the same construction to the identical anti-waiver provision of the Securities Act of 1933, 15 U.S.C. § 77v(a). In *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989), the Court concluded that, because Congress granted concurrent jurisdiction to state and federal courts, waiver of the federal judicial forum was permissible only if the new forum "does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act." *Id.* at 482.

Viewed in proper context, *Advanced China* does not require a different result. There, this Court upheld a forum-selection contract that required investors to bring their claims for violations of Washington securities law in California. This Court

explicitly stated that enforcement would not deprive plaintiffs of the ability to pursue any of their statutory claims. The grant of dismissal in that case barred defendants from arguing either that California securities laws or that Washington securities laws could not be applied to the dispute. *Advanced China*, 901 F.3d at 1085-86, 1092. Consequently, this Court stated, plaintiffs "will have an opportunity to pursue both their Washington and California securities claims without opposition from the defendant" in the selected forum. *Id.* at 1092.

That is not the case here. The Gap bylaw did not simply limit to possible courthouses open to Plaintiff; it closed the door to every possible forum where she might effectively vindicate her substantive rights under the Exchange Act. The explicit statutory text prohibits that result.

C. Forum-Selection Precedents Similarly Forbids Selection of a Forum to Discourage or Abrogate a Plaintiff's Cause of Action.

In *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972), the Supreme Court held that forum-selection clauses were "prima facie valid" even if not "historically . . . favored." *Id*. at 9-10. Subsequently, the Court emphasized that such clauses "are subject to judicial scrutiny for fundamental fairness." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991). It described any clause that selects a particular forum "as a means of discouraging [a party] from pursuing legitimate claims" or otherwise "directly prevent[s] the determination of claims against [its drafter] to reflect a "bad-faith motive" and "causes plaintiffs unreasonable hardship

in asserting their rights and therefore violates Congress' intended goal in enacting [the relevant statute]." *Id*. at 595-96.

Under any fair reading of the Court's forum-selection precedents, public policy favoring the validity of forum-selection clauses must yield to concepts of fundamental fairness, which the Gap by-law cannot meet, but also to express congressional policy, as represented by the Exchange Act's anti-waiver provision. When the district court elevated forum selection over these countermanding considerations, it erred and must be reversed.

D. Gap's Bylaw Also Constitutes an Impermissible Prospective Waiver of Federal Statutory Rights Regardless of Available State Law Remedies.

Bremen held that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." *Bremen*, 407 U.S. at 15. This Court has declined to enforce a similar forum-selection agreement applying that standard. *See Gemini Techs.*, 931 F.3d at 916-17.

The district court in this case erred in failing to recognize that the public policy at stake in this case is far more fundamental than allowing private parties to choose the court that will adjudicate their disputes. Plaintiff here was not merely deprived of the opportunity to pursue her federal cause of action in the federal district court of her choice. She was not only deprived of a federal court forum as Congress expressly provided. In this case, the confluence of the exclusive federal jurisdiction

over Plaintiff's statutory causes of action and the bylaw's insistence upon a single state court as exclusive forum such claims robs a plaintiff of *any opportunity* to effectively vindicate her statutory rights under the Exchange Act. That result, the Supreme Court has forcefully and repeatedly declared, must be rejected as a violation of public policy.

In every case where the Supreme Court has validated a forum-selection clause, it has done so only after being satisfied that the new forum would not cause a party to "forgo the substantive rights afforded by the statute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985). The key factor, the Court emphasized, is that the new forum must afford the prospective litigant a means to "*effectively may vindicate its statutory cause of action*" so that the underlying "statute will continue to serve both its remedial and deterrent function." *Id.* at 637 (emphasis added). Notably, the Supreme Court identified the opportunity to vindicate the *federal statutory cause of action* as essential to serve public policy; a state law remedy, even if similar, is not sufficient.

And if the selected forum, because of applicable law, cannot "take cognizance of the statutory cause of action," what opportunity will plaintiffs have to vindicate their substantive rights? *Id.* at 637 n. 19. The Court made clear that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, *we*

would have little hesitation in condemning the agreement as against public policy." *Id.* (emphasis added). A stronger statement of federal public policy that would be violated by enforcement of the Gap bylaw can scarcely be imagined.[5]

Similar statements material to this cause of action are found in other decisions of the Supreme Court. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991) (statutory causes of action under the Exchange Act "are designed to advance important public policies" and may be moved out of the federal judicial forum only "[s]o long as the prospective litigant effectively may vindicate [his or her] *statutory cause of action*") (emphasis added). *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (recognizing that a "prospective waiver of a party's right to pursue statutory remedies" would be condemned "as against public policy.") (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

Over the years, the Court has consistently reaffirmed this principle and has made clear that public policy is not satisfied by the mere availability of some redress under state law for an alleged wrong. It demands an opportunity for a plaintiff to pursue her federal statutory cause of action to obtain federal statutory remedies. For example, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), refused to

[5] The Court's strong statement of public policy is wholly consistent with "[t]he Congressional purpose of providing an accessible forum for imposing the Act's standards." *Kane v. Cent. Am. Min. & Oil, Inc.*, 235 F. Supp. 559, 565 (S.D.N.Y. 1964).

enforce an arbitration agreement because the plaintiff would be impermissibly deprived of his federal cause of action, "regardless of whether certain [enforceable state] contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." *Id.* at 53-54.

More recently, in *Am. Exp. Co. v. Italian Colors Restaurant,* 570 U.S. 228 (2013), the Court again reaffirmed the *Mitsubishi* '"effective vindication exception" to the public policy favoring enforcement of forum-selection clauses. *Id.* at 235. Justice Scalia, writing for the majority, explained that this exception "finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies." *Id.* at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n. 19) (emphasis in original).

That is precisely the case here. The misrepresentations that are the heart of Plaintiff's action are central to her substantive rights under the Exchange Act. By preventing any court from entertaining Plaintiff's derivative action, Plaintiff is prevented from vindicating the substantive right established by the Exchange Act in conveying a cause of action to shareholders. The lower court's decision upholding Gap's bylaw then effectively cedes to a corporation a right to violate federal law with impunity through a forum-selection clause.

In short, the federal policy favoring enforcement of forum-selection agreements, based on judicial decisions, is a policy that favors efficient dispute resolution; not easy dispute avoidance.

II. *FORUM NON CONVENIENS* REQUIRES AN ADEQUATE ALTERNATIVE FORUM HAVING JURISDICTION TO ADJUDICATE PLAINTIFF'S FEDERAL STATUTORY CLAIMS

Because the Delaware state court identified in the Gap bylaw had no subject-matter jurisdiction to hear this case, the district court erred in dismissing plaintiff's action under the doctrine of *forum non conveniens*. Dismissal on the basis of *forum non conveniens* requires a court to consider: "(1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favors dismissal." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). While a panel of this court correctly stated that dismissal under the doctrine of *forum non conveniens* is the only "appropriate way to enforce a forum-selection clause pointing to a state or foreign forum." *Lee*, 34 F.4th at 780 (quoting *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 60 (2013)), in this case, *forum non conveniens* is not an available basis for dismissal because there is no adequate alternative forum.

Since the enactment of 28 U.S.C. § 1404(a), which permits transfer to an alternative federal district court "where the case could have been brought," the common-law doctrine of *forum non conveniens* continues to apply "in rare instances

where a state or territorial court serves litigational convenience best." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). The Supreme Court has explained that "a forum-selection clause does not render" the party's forum of choice "wrong" or "improper" within the meaning of 28 U.S.C. § 1406(a) or Fed. R. Civ. Pro. 12(b)(3), and, within the federal system, must be transferred under § 1404(a), rather than dismissed. *Atlantic Marine*, 571 U.S. at 59.

Of course, the very concept of a more convenient forum "presupposes at least two forums" in which defendant could be sued. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947). The Supreme Court subsequently expanded upon this requirement, indicating that a federal district court has discretion to dismiss on *forum non conveniens* grounds only "when an alternative forum has jurisdiction to hear the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Dismissal on that basis "would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Id.* at 255 n.22. The Court has consistently restated this principle. *See Sinochem Int'l Co.*, 549 U.S. at 429-30; *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994). *See also In re Bridgestone/Firestone, Inc.*, 420 F.3d 702, 704 (7th Cir. 2005) ("The district court should not deem itself inconvenient, however, unless the defendant is able to identify an adequate alternative forum. . . . After all, it is tough to argue [for dismissal on that basis] when the plaintiff has no other options."); *Imamura v. Gen. Elec. Co.*, 957 F.3d 98, 108 (1st Cir. 2020) (Courts

"generally deem" the alternative foreign forum available if the forum is able to exercise both personal jurisdiction over the defendant as well as subject matter jurisdiction over the dispute.").

In the Securities Exchange Act of 1934, Congress both created a private right of action to enforce substantive rights under the Act and vested the U.S. district courts with exclusive jurisdiction to adjudicate those causes of action. The Gap bylaw therefore offers no alternative forum. Dismissal under the doctrine of *forum non conveniens* was therefore in error.

III. THE FORUM-SELECTION BYLAW IN THIS CASE VIOLATES PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

Finally, AAJ contends that enforcement of the forum-selection bylaw in this case, with the result that plaintiff would find every courthouse in the country — federal and state — closed to her, violates due process and the right of access to the courts.

The Supreme Court has emphasized that non-negotiated forum selection clauses "are subject to judicial scrutiny for fundamental fairness," particularly where they might be employed "as a means of discouraging [potential plaintiffs] from pursuing legitimate claims." *Shute*, 499 U.S. at 595. Thus, the *Bremen* Court declared, a forum-selection clause, even if "freely bargained for and contravenes no important public policy," cannot be enforced if the party "will for all practical

purposes be deprived of his day in court." 407 U.S. at 16, 18; *see also Fouad on behalf of Digital Soula Sys. v. State of Qatar*, 846 F. App'x 466, 469 (9th Cir. 2021) (same). Such a result, the Supreme Court cautioned, "would be unfair, unjust, or unreasonable." *Id*. Yet, that that is the Gap bylaw presently before this Court.

Americans have long revered the constitutional right to access to their courts as one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). It is "part of our 'deep-rooted historic tradition that everyone should have his own day in court,'" *St. Hubert v. United States*, 140 S. Ct. 1727, 1730 (2020) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)). Multiple constitutional provisions guarantee access to the courts for plaintiffs to vindicate a recognized cause of action. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

The constitutional guarantee of due process, in particular, protects both defendants and "plaintiffs attempting to redress grievances" in court. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). In that case, plaintiff alleged that he was fired from his job because of his disability. Because plaintiff's action under the state fair employment practices statute required state fair employment commission action, and because the commission failed to act within the prescribed time period, the Commission was without subject-matter jurisdiction, and plaintiff's action was dismissed. *Id.* at 426-27. The Supreme Court, through Justice Blackmun,

emphasized that plaintiffs have a property interest in their statutory causes of action. *Id*. at 431. The Court concluded that enforcement of the limitations period, because it had the effect of extinguishing plaintiff's statutory cause of action, violated due process. *Id*. at 433. Enforcement of the Gap bylaw accomplishes the same impermissible result.

The Founders were also familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" by access to "a legal remedy by suit or action at law." 3 William Blackstone, *Commentaries* *23, *109 (1765).

Chief Justice John Marshall, echoing Blackstone, restated this principle for Americans in a cornerstone decision:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

The result of the district court's ruling in this case, if permitted to stand, will be that plaintiffs seeking to pursue causes of action under the Securities Exchange Act of 1934 — and almost certainly future plaintiffs seeking vindication of other rights created by Congress with either exclusive jurisdiction in the courts of the United States or other impediments to vindicating congressionally declared rights — will find they have no courthouse open to them at all. As the Second Circuit

recently stated in a different context, "If our courts were closed to plaintiffs' claims, no other forum would hold these defendants to account for these [Anti-Terrorism Act] violations." *Atchley*, 22 F.4th at 234. The district court's unwarranted approval of defendants' use of a private corporate bylaw to render toothless the remedies Congress incorporated in the Exchange Act does not comport with the "traditional notions of fair play and substantial justice" embodied in the Due Process Clause. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,* 141 S. Ct. 1017, 1024 (2021).

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

/s/ Jeffrey R. White
Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 Sixth Street NW, Suite 200
Washington, DC 20001
(202) 617-5620
Jeffrey.White@justice.org

Counsel for Amicus Curiae

Dated: November 14, 2022

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29-2 because this brief contains 4,693 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Date: November 14, 2022

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, hereby certify that on November 14, 2022, electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users:

Francis A. Bottini, Jr.
Yury Kolesnikov
Albert Y. Chang
Bottini & Bottini, Inc.
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037

Elizabeth L. Deeley
Morgan E. Whitworth
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111

William J. Trach
Latham & Watkins LLP
200 Clarendon Street
Boston, MA 02116

Roman Martinez
Susan E. Engel
Michael Clemente
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004

/s/ Jeffrey R. White
JEFFREY R. WHITE