
“CHECKMATE FOR DEFENDANTS”: THE EXCHANGE ACT’S ANTI-WAIVER PROVISION AND FORUM SELECTION BYLAWS

PHILLIP A. SMITH*

In an effort to reduce the volume of litigation brought against them, corporations have embraced the forum selection clause—a contractual clause that stipulates certain types of litigation brought against the company must be brought within the company’s jurisdiction of choice. To thwart derivative lawsuits brought under the Securities Exchange Act of 1934, some corporations have devised forum selection clauses that stipulate any derivative suit brought against the corporation must be brought in the state courts of Delaware. Because state courts do not possess jurisdiction to hear cases where violations of the Exchange Act are at issue, these clauses effectively prohibit shareholders from suing the corporations derivatively under the Exchange Act.

*The validity of these clauses has produced a circuit split. Specifically, in *Seafarers Pension Plan ex rel. In Boeing Co. v. Bradway*, the Seventh Circuit held that Boeing’s forum selection clause violated the Exchange Act’s anti-waiver provision and was therefore void. Alternatively, the Ninth Circuit in *Lee ex rel. The Gap, Inc. v. Fisher* upheld the validity of such a forum selection clause.*

This Note argues that these types of forum selection clauses do run afoul of the Exchange Act’s anti-waiver provision and are therefore void. Further, it argues that preventing shareholders from bringing forward derivative suits weakens their ability to recover, and that direct suits and derivative suits address different harms.

* J.D. Candidate, 2025, University of Illinois College of Law; B.J., 2018, University of Missouri. I want to thank Professor Verity Winship for her invaluable guidance and input throughout the writing process. Any errors or flaws in this work are mine alone. This Note is dedicated to my father, Paul, my mother, Maria, my brother, Will, and my partner, Natalie. Thank you for the endless love and support, throughout both life and law school.

TABLE OF CONTENTS

I.	INTRODUCTION	1054
II.	BACKGROUND.....	1056
	A. <i>Shareholder Lawsuits Under the Securities Exchange Act of 1934</i>	1056
	1. <i>Direct Shareholder Lawsuits</i>	1056
	2. <i>Derivative Shareholder Lawsuits</i>	1057
	3. <i>How Direct and Derivative Suits Differ</i>	1058
	4. <i>Direct Claims, Derivative Claims, and § 14(a) of the Exchange Act</i>	1060
	B. <i>The Exchange Act’s Anti-Waiver Provision</i>	1061
	C. <i>Forum Selection Clauses</i>	1063
	D. <i>Circuit Split</i>	1064
III.	ANALYSIS	1065
	A. <i>The Seventh Circuit’s Opinion in Seafarers</i>	1065
	B. <i>The Ninth Circuit’s Opinion in Lee</i>	1068
	C. <i>Comparing the Seventh and Ninth Circuits’ Analysis</i>	1073
	1. <i>Section 115 of the DGCL</i>	1073
	2. <i>The Exchange Act’s Anti-Waiver Provision</i>	1074
	3. <i>Applicable Precedents</i>	1074
	4. <i>Broad vs. Narrow Interpretations of the Exchange Act’s Plain Language</i>	1077
IV.	RECOMMENDATION	1079
	A. <i>Forum Selection Bylaws Violate the Exchange Act’s Anti-Waiver Provision</i>	1079
	B. <i>Precedent Cases Support Finding Forum Selection Bylaws to Be Invalid</i>	1082
V.	CONCLUSION.....	1083

I. INTRODUCTION

Over the last decade, the amount of shareholder litigation brought in federal court has increased.¹ Derivative suits brought by shareholders under the Exchange Act are a particularly appealing vessel for shareholder litigants.² In response, academics, judges, and some practitioners have focused on how courts

1. See Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 11, 2021), <https://corpgov.law.harvard.edu/2021/03/11/recent-trends-in-securities-class-action-litigation/> (showing that the total number of federal filings of security class action lawsuits peaked in 2018) [<https://perma.cc/U4NU-T4QG>].

2. *Legal Costs and Derivative Settlements Continue to Rise*, ALLIANZ (July 2022), <https://commercial.allianz.com/news-and-insights/expert-risk-articles/claims-report-22-directors-and-officers-insurance.html> [<https://perma.cc/P2MS-JYM2>].

and legislatures can efficiently adjudicate these claims.³ The corporations defending themselves from these suits, however, are focused on an entirely different question—how can they make these lawsuits disappear?⁴ These corporations and their legal teams have crafted a number of tactics, but an increasingly popular solution is to implement forum selection clauses into the corporation’s bylaws.⁵

A particular strain of these forum selection bylaws is the subject of a circuit split between the Seventh and Ninth Circuits.⁶ The goal of these bylaws is to preclude shareholders from bringing derivative lawsuits under the Securities Exchange Act (“Exchange Act”) by mandating that such suits must be brought in the Delaware state courts, which do not have jurisdiction to hear Exchange Act claims and are obligated to dismiss the claims.⁷ In *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, the Seventh Circuit held that Boeing’s bylaw containing a forum selection clause mandating derivative suits be brought in Delaware was invalid.⁸ Then, in *Lee ex rel. The Gap, Inc. v. Fisher*, the Ninth Circuit held that a nearly identical bylaw was enforceable and that the plaintiff’s federally filed suit must be dismissed due to a lack of jurisdiction.⁹ In acknowledging that its ruling diverged from the Seventh Circuit’s holding in *Seafarers*, the Ninth Circuit reasoned that the forum selection clause’s requirement to bring derivative claims against the Gap in Delaware state court did not modify the corporation’s substantive obligations under the Exchange Act and therefore did not violate the Exchange Act’s provision.¹⁰ By upholding a forum selection clause that forces the plaintiff to bring a claim in a court that cannot hear the claim, the Ninth Circuit’s ruling sets a precedent for how corporations can craft bylaws that are lethal to derivative shareholder lawsuits under § 14(a) of the Exchange Act.¹¹

This Note will argue that these bylaws do, in fact, violate the Exchange Act’s anti-waiver provision because they run counter to the plain language and history of the anti-waiver provision.¹² Further, these bylaws substantially weaken shareholders’ ability to recover because they dispossess shareholders of an entire form of action.¹³ Additionally, direct claims are not interchangeable

3. See Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 501 (2016); John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 189–90 (2021) (“[Forum selection] provisions bring a welcome measure of efficiency and predictability to litigation arising out of contractual relationships.”).

4. See Jonathan Herpy, *Strategies for Preventing Shareholder Disputes*, FORBES (Jan. 25, 2021, 8:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/01/25/strategies-for-preventing-shareholder-disputes/?sh=49b56d5164fd> [<https://perma.cc/D8GT-3RBX>].

5. See Winship, *supra* note 3, at 487.

6. See generally *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022); *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129 (9th Cir. 2023) (en banc).

7. Mohsen Manesh & Joseph A. Grundfest, *A Consequential Circuit Split Casts Doubt on Whether Borak Is Still Good Law*, CLS BLUE SKY BLOG (June 23, 2023), <https://clsbluesky.law.columbia.edu/2023/06/23/a-consequential-circuit-split-casts-doubt-on-whether-borak-is-still-good-law/> [<https://perma.cc/4XQG-QH9B>].

8. 23 F.4th at 728.

9. 70 F.4th at 1159.

10. *Id.*

11. Manesh & Grundfest, *supra* note 7.

12. See discussion *infra* Section IV.A.

13. See discussion *infra* Section IV.A.

with derivative claims under the Exchange Act because derivative and direct claims address different harms.¹⁴ As a result, allowing companies to waive shareholders' abilities to bring derivative claims under the Exchange Act amounts to a functional waiver of the substantive obligations that § 14(a) and Rule 14a-9 of the Exchange Act impose on corporations.¹⁵

Part II of this Note will provide a brief background on the history of derivative claims, the Exchange Act's anti-waiver provision, the rise of forum selection clauses, and will introduce the current circuit split pertaining to forum selection clauses that preclude derivative shareholder litigation under § 14(a) of the Exchange Act.¹⁶ Part III of this Note analyzes the current circuit split over whether these forum selection bylaws are invalid because they violate the Exchange Act's anti-waiver provision.¹⁷ Part IV argues that if the Supreme Court chooses to review this issue, the Court should not follow the Ninth Circuit's reasoning in *Lee* because the majority ignores the plain language and legislative history of the anti-waiver provision, fails to recognize that the bylaw weakens the shareholders' ability to recover, misinterprets case law concerning forum selection clauses, and incorrectly substitutes direct claims for derivative claims.¹⁸

II. BACKGROUND

Whether precluding derivative suits brought under the Exchange Act through a forum selection clause violates the Exchange Act's anti-waiver provision is not a straightforward and accessible issue. The issue sits at the nexus of numerous complex and technical areas of law, including federal securities law, federal administrative law, and federal and state corporate law. This Part will provide background information on derivative suits, some provisions of the Exchange Act, and forum selection clauses to understand what is at issue in the circuit split.

A. *Shareholder Lawsuits Under the Securities Exchange Act of 1934*

1. *Direct Shareholder Lawsuits*

A shareholder direct suit ("direct suit") is one that a shareholder may bring directly against a company "by virtue of or in connection with [their] status as a

14. See discussion *infra* Section IV.A.

15. See discussion *infra* Section IV.A.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part IV.

shareholder.”¹⁹ When a shareholder brings a direct suit, the shareholder seeks to assert a right that belongs to them as a shareholder.²⁰

For example, an individual who owns stock in a corporation has a right to inspect the corporate books and records.²¹ If the corporation did not allow the shareholder to inspect its books, that shareholder could sue the corporation to compel its directors to acquiesce and allow the shareholder to exercise their inspection right.²²

The mechanism and scope of direct suits vary widely, and parties to a direct suit are similarly extensive.²³ Shareholders can bring direct suits against the company, controlling shareholders, directors, or any other shareholder.²⁴ Successful direct suits result in either monetary outcomes (*e.g.*, the defendant paying the shareholder-plaintiff damages) or non-monetary outcomes, which could entail orders to remove directors, orders to perform some specific act (*e.g.*, allowing the company’s shareholders to vote on a proposed buyout),²⁵ or judicial invalidation of past or pending corporation actions, among others.²⁶

2. *Derivative Shareholder Lawsuits*

Alternatively, shareholders can bring shareholder derivative lawsuits (“derivative suits”).²⁷ The derivative suit is a legal mechanism that “address[es] agency problems that exist between shareholders and management.”²⁸ In derivative suits, the shareholder “takes the place of the company in litigating to obtain a legal outcome.”²⁹ What this means, practically, is that the shareholder-plaintiff steps into the company’s shoes and asserts a legal action on the company’s

19. Alan K. Koh, *Direct Suits and Derivative Actions: Rethinking Shareholder Protection in Comparative Corporate Law*, 21 WASH. U. GLOB. STUDS. L. REV. 391, 398 (2022) (quoting Alan K. Koh & Samantha S. Tang, *Direct and Derivative Shareholder Suits: Towards a Functional and Practical Taxonomy*, in COMPARATIVE CORPORATE GOVERNANCE 431, 438 (Afra Afsharipour & Martin Gelter eds., 2021)).

20. James An, *The Distinction Between Direct and Derivative Shareholder Claims*, GEO. WASH. L. REV. (forthcoming) (manuscript at 1) (on file at <https://ssrn.com/abstract=4545220>) [<https://perma.cc/PL7M-G6RB>].

21. *Distinguishing Between Direct and Derivative Shareholder Suits*, 110 U. PA. L. REV. 1147, 1147 (1962).

22. *Id.*

23. Koh, *supra* note 19, at 399.

24. *Id.*

25. *See, e.g.*, Alison Frankel, *Sculptor M&A Judge Orders Hearing on \$720 Million Rithm Bid, Chides Och Group*, REUTERS (Nov. 2, 2023, 2:54 PM), <https://www.reuters.com/legal/transactional/column-sculptor-ma-judge-orders-hearing-720-mln-rithm-bid-chides-och-group-2023-11-02/> [<https://perma.cc/VC87-7RWN>].

26. Koh, *supra* note 19, at 399.

27. *Id.* at 400–01.

28. Stephen P. Ferris, Tomas Jandik, Robert M. Lawless & Anil Makhija, *Derivative Lawsuits as a Corporate Governance Mechanism: Empirical Evidence on Board Changes Surrounding Filings*, 42 J. FIN. & QUANTITATIVE ANALYSIS 143, 144 (2007).

29. Koh, *supra* note 19, at 400–01 (quoting Koh & Tang, *supra* note 19, at 448 (citing Samantha S. Tang, *Corporate Avengers Need Not Be Angels: Rethinking Good Faith in the Derivative Action*, 16 J. CORP. L. STUDS. 471, 471 (2016))).

behalf.³⁰ Therefore, it is necessary that the company has a cause of action that it could have pursued on its own behalf.³¹

For example, imagine a director of a corporation has improperly converted the company's assets. This action directly harms the corporation because company assets have been converted and are no longer available for use. The company's shareholders are harmed too, but their harm is indirect.³² The conversion of the assets could theoretically lead to bad press and questions about leadership at the corporation, which could reduce the stock's value and leave shareholders with a corresponding loss.³³ The corporation may, of course, sue the director to recover its converted assets, and doing so might preserve the corporation's stock value, thus redressing the shareholders' injury.³⁴ But the corporation might refrain from pursuing the cause of action, in which case, the shareholders can sue the director on the company's behalf to recover the assets.³⁵ If the suit succeeded, the assets would be restored and the shareholders' harm redressed, just like if the corporation had elected to pursue its cause of action.³⁶

3. *How Direct and Derivative Suits Differ*

One key difference between derivative suits and direct suits is that a shareholder-plaintiff who brings a derivative suit cannot receive damages.³⁷ Because derivative suits are brought on behalf of the company, any monetary compensation that might result from a derivative suit belongs to the company, not the individual shareholder.³⁸ The only monetary benefit that shareholder-plaintiffs could realize through a derivative suit is indirect, as the court might order the company to take some action to resolve the suit that could increase the value of the shareholder-plaintiff's shares.³⁹

Given that derivative suits only bring indirect benefits to shareholders, some types of claims are more naturally brought as derivative claims as opposed to direct claims.⁴⁰ For example, Delaware courts have held that derivative claims are a more natural form for shareholder litigation in situations where a proxy statement concerning a potential acquisition is misleading.⁴¹ In this sense, the harms that direct and derivative suits are used to address can be quite different.⁴²

30. *Id.*

31. *Id.* at 401.

32. *Distinguishing Between Direct and Derivative Shareholder Suits*, *supra* note 21, at 1147.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Koh, *supra* note 19, at 401.

38. *Id.* at 400–02.

39. *Id.*

40. Ann M. Lipton, *What a Week Yesterday Was*, BUS. L. PROF BLOG (June 2, 2023), https://lawprofessors.typepad.com/business_law/2023/06/what-a-week-yesterday-was.html [https://perma.cc/938J-456Q].

41. *Id.*

42. *Id.*

Further, derivative suits can be employed to drive change within a corporation, even if that change is not explicitly outlined in a complaint or settlement agreement.⁴³ Shareholders, especially those of large public corporations, hold two relevant powers: voting and suing.⁴⁴ This means that shareholders are severely limited in the types of actions they can take against a board of directors to exert influence over a corporation.⁴⁵ Derivative lawsuits, therefore, in theory, serve an important role for shareholders as a powerful weapon they can deploy from their limited arsenal.⁴⁶ Shareholders can use derivative suits as catalysts for change by exposing a firm’s agency problems to the public, and the threat of an ensuing derivative suit looming over the directors’ heads may deter certain actions from being taken.⁴⁷

But derivative suits are also the subject of criticism.⁴⁸ Because attorneys who represent plaintiffs are paid in the form of a fee award, they have more incentive to settle with the defendant.⁴⁹ As a result, shareholder plaintiffs run the risk of being tapped by entrepreneurial attorneys to serve as vessels to collect settlement fees.⁵⁰ Further, shareholder litigation more generally has been criticized as being an ineffective method of corporate governance because settlements requiring corporations to enact structural changes usually only propose cosmetic changes and there is little evidence that derivative suits specifically deter directors from pursuing courses of action.⁵¹ Still, most states require the court to approve any settlement in derivative suits, meaning shareholders “can expect at least some measure of corrective relief in the form of monetary payment or corporate governance or both.”⁵² Further, the Delaware Chancery Court has stated that the idea of disqualifying a plaintiff bringing a derivative lawsuit because their lawyer has an economic interest in the outcome would “impeach a cornerstone of sound corporate governance” and that economic influence is “inherent in private enforcement mechanisms.”⁵³

43. Ferris et al., *supra* note 28, at 144.

44. See Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1751 (2004).

45. See *id.*

46. See *id.* at 1756 (“Derivative suits were the earliest and principal constraint on director mismanagement.”).

47. Ferris et al., *supra* note 28, at 144.

48. See Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split, but Never Reversed: Borak and Federal Derivative Litigation*, 78 BUS. LAW. 1047, 1058–63 (2023) (discussing the consequences stemming from the rise in derivative claims brought under the Exchange Act).

49. Ferris et al., *supra* note 28, at 144.

50. *Id.*

51. Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 85 (1991).

52. Ferris et al., *supra* note 28, at 146.

53. *In re Fuqua Indus., Inc. S’holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999).

4. *Direct Claims, Derivative Claims, and § 14(a) of the Exchange Act*

Direct and derivative claims are merely two forms of shareholder litigation, but shareholders need statutory or judicial authorization to use these forms in a lawsuit against a corporation.⁵⁴ To bring a direct or derivative suit against a company for a statutory violation, that statute must provide shareholders with a private right of action to bring a lawsuit against the corporation in either direct or derivative format.⁵⁵ If the statute does not explicitly provide that shareholders may bring derivative or direct suits against a corporation for violating the statute, shareholders must rely on a judicial interpretation of the statute that permits these private rights of action.⁵⁶ This is called an implied private right of action.⁵⁷

One statute in which courts have read an implied private right of action is § 14(a) of the Exchange Act⁵⁸ and its implementing regulation, Securities Exchange Commission Rule 14a-9 (“Rule 14a-9”),⁵⁹ which concerns the issuance of proxy statements.⁶⁰ When a public company’s board of directors submits proposals to shareholders that require the shareholders’ vote, the company must comply with the Exchange Act’s proxy rules.⁶¹ Under these rules, the company must “provide certain disclosures in a proxy statement to its shareholders.”⁶² Further, the statute and its accompanying rule prohibit companies from issuing proxy statements that are “false and misleading with respect to any material fact.”⁶³ The regulation’s goal is to promote transparency in the voting process and ensure shareholders are fully informed about the issues they are voting on.⁶⁴ Congress does not want corporate actors to gain authority for proposed actions through deceptive or inadequate proxy statements.⁶⁵

The Exchange Act grants the Securities & Exchange Commission (“the Commission”) the power to enforce Rule 14a-9, as the Exchange Act grants the

54. *Private Right of Action*, DEMOCRACY DOCKET, <https://www.democracydocket.com/proa> (last visited Mar. 19, 2025) [<https://perma.cc/2R5F-RU4B>].

55. *Id.*

56. *Id.*

57. *Private Right of Action*, *supra* note 54.

58. See 15 U.S.C. § 78n; *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964). The section of the Exchange Act that deals with misleading proxy statements is § 78n, which Courts refer as “Section 14(a).” See *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1136 (9th Cir. 2023) (en banc).

The Exchange Act provision that forms the basis for Lee’s federal claim is § 14(a), which states: “It shall be unlawful for any person, . . . in contravention of such rules and regulations as the [SEC] may prescribe[,] . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security.”

15 U.S.C. § 78n(a)(1).

59. 17 C.F.R. § 240.14a-9(a).

60. 15 U.S.C. § 78n.

61. *Annual Meeting and Proxy Requirements*, SEC, <https://www.sec.gov/education/smallbusiness/going-public/annualmeetings> (last updated June 6, 2024) [<https://perma.cc/JZD5-FJMQ>].

62. *Id.*

63. 17 C.F.R. § 240.14a-9(a).

64. Mark S. Werbner, Comment, *Shareholders’ Remedies for Violation of Proxy Rule 14a-9*, 31 SW. L.J. 1125, 1125 (1978).

65. *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964).

Commission the power to enforce all rules under the Exchange Act.⁶⁶ The Supreme Court interpreted Rule 14a-9 as creating a private cause of action for affected shareholders in *J.I. Case Co. v. Borak*, which the Court decided in 1964.⁶⁷ In *Borak*, a stockholder brought a suit against J.I. Case Co., alleging that the company effected a merger through a false and misleading proxy statement in violation of § 14(a) of the Exchange Act and Rule 14a-9.⁶⁸ On appeal, the Court held that § 14(a) provided a private right of action to shareholders in “both derivative and direct causes.”⁶⁹

The Court elaborated that corporations providing misleading proxy statements do not directly inflict damage on shareholders but rather produce an injury that “flows from the damage done [to] the corporation.”⁷⁰ In recognizing that a misleading proxy statement tends to harm the corporation as a whole rather than individual shareholders, the Court emphasized that denying shareholders the right to bring derivative actions under § 14(a) would “be tantamount to a denial of private relief.”⁷¹ Finally, the Court reasoned that “[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action,” indicating there is a strong public policy rationale for permitting private § 14(a) actions.⁷²

B. *The Exchange Act’s Anti-Waiver Provision*

The anti-waiver provision, found in § 29(a) of the Exchange Act, 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.”⁷³

The anti-waiver provision’s language is broad and vague.⁷⁴ In the one sentence that makes up the entirety of the anti-waiver provision, the word “any” is used five times to qualify what aspects of a contract are covered (“[a]ny condition, stipulation, or provision), who the provision applies to (“any person”), and which provisions of the Exchange Act cannot be waived (“any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization”).⁷⁵ Additionally, Congress has provided little explanation or clarification as to the language’s meaning, and the legislative history surrounding Congress’s enactment of the anti-waiver provision is almost non-existent.⁷⁶

66. Werbner, *supra* note 64, at 1125.

67. See 377 U.S. at 430–31 (1964).

68. *Id.* at 427.

69. *Id.* at 431.

70. *Id.* at 432.

71. *Id.*

72. *Id.*

73. 15 U.S.C. § 78cc(a).

74. Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 824 (2009).

75. 15 U.S.C. § 78cc(a) (emphasis added).

76. Black, *supra* note 74, at 824. Congress lifted the language in the Exchange Act’s anti-waiver provision verbatim from the Securities Act of 1933, which was enacted the year before the Exchange Act. The legislative history of the Securities Act’s anti-waiver provision “is silent as to the statute’s scope.” See *id.* at 824 n.106.

Section 29(a)'s overarching coverage and lack of explanation suggest the anti-waiver provision should be viewed in conjunction with the Exchange Act's overarching purpose of protecting investors.⁷⁷ By providing an all-encompassing anti-waiver provision, it is clear Congress wanted to protect less-sophisticated parties from contracting away their statutory rights.⁷⁸ It is possible that putting limits on what contracting parties are able to negotiate keeps the parties within the federal government's regulatory framework and, ultimately, its control.⁷⁹

The Supreme Court endorsed the view that the Exchange Act's anti-waiver provision is meant to protect investors in *Shearson/American Express, Inc. v. McMahon*.⁸⁰ In *McMahon*, two customers of the brokerage firm Shearson/American Express Inc. sued the brokerage firm in the U.S. District Court for the Southern District of New York, alleging violations of the Exchange Act's antifraud provisions.⁸¹ The defendants moved to compel arbitration, citing an arbitration clause contained in the customer agreements that the plaintiffs had signed.⁸² The Court ultimately held that the arbitration clause did not violate the anti-waiver provision, reasoning that the Exchange Act's anti-waiver provision "only prohibits waiver of the *substantive* obligations imposed by the Exchange Act."⁸³ The Court made clear that whether a more-sophisticated party maneuvered a less-sophisticated party is irrelevant because the anti-waiver provision is more concerned with whether the agreement "weaken[s] [the party's] ability to recover under the [Exchange] Act."⁸⁴ Assuring that injured parties will enjoy an unprohibited ability to recover under the Exchange Act is the "central purpose" of the anti-waiver provision.⁸⁵

The *McMahon* decision is the only instance in which the Supreme Court has directly addressed the Exchange Act's anti-waiver provision.⁸⁶ After *McMahon*, lower federal courts have interpreted the Exchange Act's anti-waiver provision as forbidding corporations from waiving only their substantive

77. *Id.* at 824.

78. *Id.*

79. *Id.*

80. See 482 U.S. 220, 230–31 (1987) (reasoning that the Exchange Act's anti-waiver provision is concerned with whether an agreement between an investor in a company weakens the investor's ability to recover under the Exchange Act, which is "grounds for voiding the agreement under [the Exchange Act's anti-waiver provision]").

81. *Id.* at 222–23.

82. *Id.* at 223–24.

83. *Id.* at 228 (emphasis added).

84. *Id.* at 230 (quoting *Wilko v. Swan*, 346 U.S. 427, 432 (1953)).

85. Black, *supra* note 74, at 825.

86. But, there are two other instances where the Supreme Court has addressed the anti-waiver provision in the Securities Act of 1993. See *Wilko*, 346 U.S. at 437 (holding that a provision to arbitrate "waive[d] . . . judicial trial and review" and was therefore invalid under Section 14 of the Securities Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (holding that an arbitration clause did not force parties to forego their substantive rights under the Securities Act, thus overruling *Wilko*). As previously noted, the language in the Exchange Act's anti-waiver provision is taken verbatim from the Securities Act of 1993's anti-waiver provision. Black, *supra* note 74, at 824 n.106. Additionally, the Court's motivation in overruling *Wilko* was that its decision in *McMahon* was directly at odds with the holding in *Wilko*, and that "the [Securities Act] and [Exchange Act] should be construed harmoniously because they 'constitute interrelated components of the federal regulatory scheme governing transactions in securities.'" *Rodriguez de Quijas*, 490 U.S. at 484–85 (citation omitted).

obligations with the Exchange Act and have focused their analysis on whether a waiver is targeted at a shareholder’s procedural or substantive rights under the Exchange Act.⁸⁷

C. Forum Selection Clauses

In the early 2000s, a trend emerged of increased shareholder litigation to challenge a single corporate action.⁸⁸ Plagued with an increased barrage of lawsuits, corporations began exploring solutions to curb the blitz.⁸⁹ One solution that gained traction was forum selection clauses.⁹⁰

In 2010, the Delaware Court of Chancery wrote in its *In re Revlon, Inc. Shareholders Litigation* opinion that corporations were free to amend their charters to designate an exclusive forum for future disputes if the corporation “believe[d] that a particular forum would provide an efficient and value-promoting locus for dispute resolution.”⁹¹ This language spurred “rampant adoption” of such clauses in the charters and bylaws of companies incorporated in Delaware.⁹² Specifically, corporations implement these provisions to target duplicative shareholder litigation, where shareholders attempt to bring Delaware law-based claims in federal courts.⁹³ The goal is to force litigants to bring their claims in Delaware state courts, which have particular expertise in the “substantive law underlying [the litigants’] claims.”⁹⁴

Forum selection clauses are popular with corporations, in large part, because the Supreme Court ruled that forum selection clauses are presumptively enforceable in *M/S Bremen v. Zapata Off-Shore Co.*⁹⁵ But, the Court also provided that forum selection clauses may be disregarded if the plaintiff can show the clause is either unreasonable or that its enforcement would “contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.”⁹⁶

In applying this standard, it appears that courts are more likely to examine statutes than judicial decisions when determining if a forum selection clause violates public policy.⁹⁷ When statutory schemes have anti-waiver provisions,

87. Jill I. Gross, *The Customer’s Nonwaivable Right to Choose Arbitration in the Securities Industry*, 10 BROOK. J. CORP. FIN. & COM. L. 383, 403 (2016).

88. *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1137 (9th Cir. 2023) (en banc) (citing *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 944 (Del. Ch. 2013)).

89. *Winship*, *supra* note 3, at 501.

90. *Id.*

91. 990 A.2d 940, 960 (Del. Ch. 2010).

92. Amanda K. Williams, Note, *Closing a Loophole in Exchange Act Enforcement: A Framework for Assessing the Enforceability of Delaware Forum Selection Bylaws in the Context of Derivative § 14(a) Claims*, 90 U. CHI. L. REV. 2355, 2365–66 (2023).

93. Manesh & Grundfest, *supra* note 7.

94. Manesh & Grundfest, *supra* note 48, at 1056.

95. *See* 407 U.S. 1, 9–11, 15 (1972).

96. *See id.* at 15; John F. Coyle, *A Primer on Forum Selection Clauses*, TRANSNAT’L LITIG. BLOG (Mar. 26, 2022), <https://tlblog.org/a-primer-on-forum-selection-clauses> [<https://perma.cc/5NEE-N8LS>].

97. *See, e.g., Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (holding that the plaintiff successfully proved that a forum selection policy contravened a strong public policy by

courts will often decline to enforce a forum selection clause if the clause would effectively waive a right given under that statute in a way that would contravene public policy.⁹⁸

The Supreme Court placed considerable weight behind this notion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁹⁹ In *Mitsubishi*, the Court held that a clause compelling arbitration concerning federal antitrust claims in Japan was valid.¹⁰⁰ But, the Court drew a line, cautioning that “in the event th[at] choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party’s right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy.”¹⁰¹ In an extension of this logic, federal courts have recognized that the Exchange Act’s anti-waiver provision may bar forum selection clauses that waive rights in violation of that provision.¹⁰²

D. Circuit Split

Concerns over derivative claims, forum selection clauses, and the Exchange Act’s anti-waiver provision have come to a head, resulting in a circuit split.¹⁰³ The Seventh Circuit held a forum selection clause that prevented shareholders from bringing derivative suits in response to a misleading proxy statement violated the Exchange Act’s anti-waiver provision and was therefore invalid.¹⁰⁴ In contrast, the Ninth Circuit found a similar forum selection clause to be valid.¹⁰⁵

As it currently stands, the type of bylaw at issue in *Seafarers* and *Lee* is valid when Ninth Circuit law is applied and invalid when Seventh Circuit law is applied.¹⁰⁶ This has massive practical implications. If a corporation is sued in any federal court within the Ninth Circuit, that court will be bound by precedent to uphold any forum selection clause contained within the corporation’s bylaws

“identif[ying] an Idaho statute that clearly states a strong public policy”); *Lakeside Surfaces, Inc. v. Cambria Co.*, 16 F.4th 209, 220–21 (6th Cir. 2021) (holding that a forum selection clause was invalid because a Michigan state statute contained a “prohibition on forum-selection clauses” which demonstrated a strong public policy and “enforcing the forum-selection clause here would clearly contravene that policy”); *Davis v. Oasis Legal Fin. Operating Co.*, 936 F.3d 1174, 1181 (11th Cir. 2019) (holding that a forum selection clause was invalid because “Georgia statutes establish a clear public policy against out-of-state lenders using forum selection clauses to avoid litigation in Georgia court” and enforcing the forum selection clause at issue would contravene that public policy).

98. Coyle, *supra* note 96. For a discussion of how courts analyze cases where forum selection clauses conflict with anti-waiver statutes, see John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1113–21 (2021).

99. *See* 473 U.S. 614, 638 (1985).

100. *Id.* at 639–40.

101. *Id.* at 637 n.19.

102. Coyle, *supra* note 96.

103. *See* Manesh & Grundfest, *supra* note 7.

104. *See* *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022).

105. *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1159 (9th Cir. 2023) (en banc).

106. *See* Manesh & Grundfest, *supra* note 7.

that resembles the bylaw at issue in *Lee*.¹⁰⁷ Alternatively, if a corporation with the forum selection bylaw at issue is sued in a federal court within the Seventh Circuit, the court would strike down the bylaw as invalid.¹⁰⁸

III. ANALYSIS

This Part analyzes the Seventh and Ninth Circuit’s differing approaches to resolving whether the waiver of derivative suits is valid under the Exchange Act’s anti-waiver provisions. First, this Part examines the Seventh Circuit’s reasoning, which focuses more on interpreting the issue under Delaware law.¹⁰⁹ Then, this Part examines the Ninth Circuit’s reasoning, which directly addresses the Exchange Act’s anti-waiver provision.¹¹⁰

A. *The Seventh Circuit’s Opinion in Seafarers*

The first case in the circuit split, *Seafarers*, was decided by the Seventh Circuit in 2022.¹¹¹ After two fatal crashes involving aircraft designed and manufactured by Boeing, a shareholder brought a derivative suit under the Exchange Act against current and former officers and directors of Boeing, alleging that misleading and false statements were made in the company’s proxy materials.¹¹² But in its corporate bylaws, Boeing had a forum selection clause that asserted any derivative suit brought on behalf of Boeing was to be brought in Delaware’s Court of Chancery.¹¹³ Because the Delaware Court of Chancery lacks jurisdiction to hear derivative claims brought under federal law, the bylaw effectively killed *Seafarers*’ action.¹¹⁴ In holding that the bylaw was invalid, the Seventh Circuit addressed the Exchange Act’s anti-waiver provision, Delaware state law, and federal precedent dealing with forum selection clauses.¹¹⁵

The Boeing Company, an international aerospace company headquartered in Illinois and incorporated in Delaware, faced serious ramifications after two of its 737 MAX airplanes crashed.¹¹⁶ The first crash occurred in 2018 off the coast of Indonesia, killing everyone on board.¹¹⁷ The second crash occurred in 2019 in Ethiopia, again, killing everyone on board.¹¹⁸ Between the two crashes, 346 lives were lost.¹¹⁹ Following the crashes, the U.S. Federal Aviation Administration

107. See 70 F.4th at 1159; Manesh & Grundfest, *supra* note 7.

108. See *Seafarers*, 23 F.4th at 720; Manesh & Grundfest, *supra* note 7.

109. See discussion *infra* Section III.A.

110. See discussion *infra* Section III.B.

111. 23 F.4th at 714.

112. *Id.* at 717.

113. *Id.* at 717–18.

114. *Id.* at 718.

115. See *infra* notes 129–48 and accompanying text.

116. Eric M. Johnson, *Timeline: Boeing’s 737 MAX Crisis*, REUTERS (Nov. 18, 2020, 9:03 AM), <https://www.reuters.com/article/idUSKBN27Y1RZ/> [https://perma.cc/PK6L-W2VZ].

117. *Id.*

118. *Id.*

119. *Id.*

(“FAA”) grounded all Boeing 737 MAXs for over a year until the FAA was satisfied that Boeing had corrected problems with the planes’ flight control system.¹²⁰

Seafarers Pension Plan (“Seafarers”), a Boeing shareholder, brought a derivative suit against current and former officers and directors of Boeing under § 14(a) of the Exchange Act.¹²¹ The complaint alleged that Boeing’s directors and board members made materially misleading and false statements about the 737 MAX in the company’s 2017, 2018, and 2019 proxy materials.¹²² Seafarers further alleged that these misstatements caused shareholders to improperly reelect board members who “tolerated poor oversight of passenger safety, regulatory compliance, and risk management” during the 737 MAX’s development.¹²³ In response, the defendants moved to dismiss the claim, pointing to a forum selection clause in a Boeing bylaw that read:

With respect to any action arising out of any act or omission occurring after the adoption of this By-Law, unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation¹²⁴

Therefore, the forum selection clause, if applied, would have forced the plaintiff to bring the suit in Delaware state court.¹²⁵ But, because the suit was brought under the Exchange Act, a Delaware state court would have no jurisdiction to hear the action, as the Exchange Act confers jurisdiction exclusively to federal courts.¹²⁶ Put another way, if the forum selection clause applied, Boeing would have insulated itself from all forms of derivative suits brought under § 14(a) the Exchange Act.¹²⁷ Or—as the Seventh Circuit succinctly stated it—“checkmate for defendants.”¹²⁸

The Seventh Circuit began its analysis by briefly pointing out that the forum selection bylaw, if enforced, would violate the Exchange Act’s anti-waiver provision.¹²⁹ The majority observed that the forum selection bylaw’s application would be “difficult to reconcile” with the anti-waiver provision, “which deems void contractual waivers of compliance with the requirements of the [Exchange] Act.”¹³⁰

120. *Id.*

121. Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 23 F.4th 714, 717 (7th Cir. 2022).

122. *Id.*

123. *Id.* at 719–20.

124. *Id.* at 718.

125. *Id.* at 719–20.

126. 15 U.S.C. § 78aa

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 title 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 title or the rules and regulations thereunder.

127. *See Seafarers*, 23 F.4th at 720.

128. *Id.*

129. *Id.*

130. *Id.* at 719–20.

The majority then concluded that Boeing’s use of a forum selection provision in a bylaw to “foreclose entirely” the plaintiff’s derivative suit violated Delaware state law.¹³¹ Specifically, the majority focused on § 115 of the Delaware General Corporation Law (“DGCL”),¹³² which provides that “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.”¹³³ Boeing’s bylaw, the majority reasoned, was not “consistent with applicable jurisdictional requirements” because it was inconsistent with the jurisdictional requirements imposed by the Exchange Act.¹³⁴ For support, the majority pointed to the synopsis accompanying the DGCL’s 2015 amendments, which “cautioned” that § 115 “was not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction.”¹³⁵ Given Boeing’s bylaw effectively eliminated federal jurisdiction over the plaintiff’s federal derivative claims, the forum bylaw was inconsistent with the Exchange Act’s federal jurisdictional requirement and ran directly counter to § 115 of the DGCL.¹³⁶

Finally, the majority addressed how the forum selection clause at issue differed from those at issue in three other cases where forum selection clauses were held valid: *M/S Bremen v. Zapata Off-Shore Co.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, and *Bonny v. Society of Lloyd’s*.¹³⁷

In *Bremen*, the Seventh Circuit observed that the forum selection clause in contention concerned “a[] purely private contractual dispute.”¹³⁸ Critically, the case did not involve “any claim under a federal statute, let alone a federal statute with a non-waiver provision like Section 29(a) of the Exchange Act.”¹³⁹ The Seventh Circuit reasoned that it makes sense to view forum selection clauses as valid in private contractual disputes, but the same logic does not apply when the forum selection clause looks to waive a right that Congress has explicitly expressed as non-waivable.¹⁴⁰

The Seventh Circuit then compared the forum selection clause at issue to the required arbitration clause at issue in *Mitsubishi*, which provided that an antitrust claim arising under federal law must be arbitrated in Japan.¹⁴¹ The Seventh Circuit observed that the Supreme Court was only willing to uphold the clause “after being assured that the arbitration panel would apply United States antitrust law.”¹⁴² Critically, the Seventh Circuit highlighted that the Supreme Court

131. *Id.* at 721.

132. *Id.* at 721.

133. DEL. CODE ANN. tit. 8, § 115 (West, Westlaw through ch. 531 of the 152nd Gen. Assemb.).

134. *Seafarers*, 23 F.4th at 720.

135. *Id.*

136. *Id.*

137. *Id.* at 724–28; 407 U.S. 1, 15 (1972); 473 U.S. 614, 632–33 (1985); 3 F.3d 156, 162 (7th Cir. 1993).

138. *Seafarers*, 23 F.4th at 725.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

“issu[ed] a pointed warning against using an arbitration clause to avoid an otherwise-applicable federal statute, even one without an anti-waiver provision like the 1934 Exchange Act’s Section 29(a).”¹⁴³

Finally, the Seventh Circuit distinguished the forum selection clause from the one at issue in *Bonny*.¹⁴⁴ At issue in *Bonny* was a forum selection clause specifying that all contractual disputes were to be brought in England.¹⁴⁵ When a group of American investors tried to sue an English insurer in U.S. federal court, the insurer moved to dismiss the claim based on the forum selection clause.¹⁴⁶ The Seventh Circuit observed that while *Bonny* did allow a forum selection clause to be used in a suit brought under the Exchange Act, the clause was upheld because the court was satisfied that English law provided adequate remedies to protect the investors’ interests in the same way the Exchange Act would.¹⁴⁷

Ultimately, the Seventh Circuit refused to apply the forum selection clause in Boeing’s bylaw and reversed and remanded the action.¹⁴⁸

B. *The Ninth Circuit’s Opinion in Lee*

The year after the Seventh Circuit decided *Seafarers*, the Ninth Circuit issued its opinion in *Lee ex rel. The Gap, Inc. v. Fisher*.¹⁴⁹ In its 6-5 opinion, the en banc court narrowly upheld the validity of a forum selection bylaw containing nearly identical language to the one at issue in *Seafarers*.¹⁵⁰ The bylaw, which mandated that any derivative suit against the Gap must be brought in the Delaware Court of Chancery, effectively precluded the plaintiff-shareholder Lee from pursuing a shareholder derivative claim in federal court.¹⁵¹ In its opinion, the Ninth Circuit stated that barring shareholders from bringing derivative claims under § 14(a) of the Exchange Act has no impact on whether a company must comply with its substantive obligations.¹⁵² Further, the Ninth Circuit attacked the Supreme Court’s holding in *Borak* and implied that whether a shareholder even has a right to bring a derivative lawsuit under the Exchange Act is unclear.¹⁵³

The underlying action in *Lee* was a derivative suit filed against the Gap’s officers and directors in California district court.¹⁵⁴ The Gap is a clothing retailer

143. *Id.*

144. *Id.* at 726–27.

145. *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 158 (7th Cir. 1993).

146. *Id.* at 157–58.

147. *Id.* at 161.

148. *Seafarers*, 23 F.4th at 728.

149. 70 F.4th 1129, 1159 (9th Cir. 2023) (en banc).

150. *Id.* at 1159; Manesh & Grundfest, *supra* note 7 (“*Seafarers* held, over a dissent by Judge Easterbrook, that a corporate forum bylaw identical to the one at issue in *Lee* is unenforceable against a derivative *Borak* suit, both as a matter of Delaware law and under the Exchange Act’s anti-waiver provision.”).

151. *Lee*, 70 F.4th at 1136–38.

152. *Id.* at 1139.

153. *Id.* at 1146 (“Thus, the [*Borak*] Court’s discussion regarding derivative actions was ‘unnecessary to the announcement or application of the rule [*Borak*] established.’” (quoting *Murr v. Wisconsin*, 582 U.S. 383, 400 (2017))).

154. *Id.* at 1135.

headquartered in California and incorporated in Delaware.¹⁵⁵ The suit alleged that the Gap’s directors and officers made material misrepresentations about the company’s level of diversity and diversity policy in the company’s proxy materials in 2019 and 2020.¹⁵⁶ These alleged misstatements included “failure to consider diversity in nominating directors and hiring executives.”¹⁵⁷ The complaint also asserts that the Gap “deceived stockholders . . . by repeatedly making false assertions about [its] commitment to diversity.”¹⁵⁸ These misstatements allegedly led the shareholders to reelect board members, approve compensation packages for executives, and vote against hiring an independent board chairman.¹⁵⁹ The plaintiff sought injunctive and equitable relief on behalf of the Gap.¹⁶⁰

In response to the suit, the Gap moved to dismiss the suit based on a forum selection clause contained in the Gap’s bylaws, which provided that: “[u]nless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation”¹⁶¹ The district court granted the Gap’s motion to dismiss, which prompted Lee to appeal, arguing that the bylaw violated the Exchange Act’s anti-waiver provision and that its enforcement would be strongly against public policy, making it unenforceable under *Bremen*.¹⁶² The Ninth Circuit first heard the case on appeal in 2022 and ruled that Lee failed to meet her burden under *Bremen* of showing that the Gap’s forum selection bylaw strongly “contravene[d] strong federal public policy.”¹⁶³ The court then ordered that the opinion issued by the three-judge panel be vacated and the case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a).¹⁶⁴

The Ninth Circuit began its analysis by sharply rebuking Lee’s contention that the forum-selection clause at issue violated the Exchange Act’s anti-waiver provision.¹⁶⁵ In addition to the anti-waiver provision’s language, the Ninth Circuit used the Supreme Court’s language in *McMahon* as the bedrock for this argument.¹⁶⁶ The Court in *McMahon* reasoned that the anti-waiver provision merely prevented companies from waiving their “substantive obligations imposed by the Exchange Act.”¹⁶⁷ Using this language, the Ninth Circuit reasoned

155. *Id.* at 1136.

156. *Id.* at 1137.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1136.

162. *Id.* at 1135.

163. *Lee ex rel. The Gap, Inc. v. Fisher*, 34 F.4th 777, 782 (9th Cir. 2022), *rev’d en banc*, 70 F.4th 1129, 1139 (9th Cir. 2023).

164. *Lee ex rel. The Gap, Inc. v. Fisher*, 54 F.4th 608, 608 (9th Cir. 2022); FED. R. APP. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”).

165. *Lee*, 70 F.4th at 1139.

166. *Id.* at 1141.

167. *Id.* (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987)).

that in no way did the Gap's bylaw excuse the Gap from complying with its substantive obligations under the Exchange Act.¹⁶⁸

First, the Ninth Circuit addressed the plain language of the Gap's bylaw, observing that the forum selection clause could not be an express waiver of compliance because the clause itself did not "expressly state that [the] Gap need not comply with § 14(a) or Rule 14a-9 or the substantive obligations they impose."¹⁶⁹ While this specific line of reasoning seems pedantic—it would be unusual for a large corporation to explicitly state it was opting out of a federally imposed substantive obligation—the Ninth Circuit cited a previous Ninth Circuit case where it reasoned that a confidentiality agreement containing certain evidential restraints did not, based on its plain language, violate the anti-waiver provision because the agreement did not expressly waive any substantive obligations.¹⁷⁰

This brief foray into the forum selection clause's plain language sets up the Ninth Circuit for the main issue: whether a forum-selection clause that forces shareholders to preemptively waive their right to bring a derivative suit in any forum violates the Exchange Act's anti-waiver provision?¹⁷¹ Lee proposed two arguments that the court considered for why the bylaw does, in fact, violate the anti-waiver provision.¹⁷²

First, Lee argued that precluding shareholders from bringing a derivative suit in any forum against the Gap effectively means the Gap, its shareholders, directors, and officers have "agreed to waive compliance with the substantive obligations imposed by § 14(a) and Rule 14a-9."¹⁷³ The Ninth Circuit flatly rejected this proposition, arguing that Lee was still able to enforce the Gap's substantive obligations by bringing a direct suit in federal court.¹⁷⁴ Lee has a direct claim against the Gap, the court reasoned, because she suffered the harm of being denied her right to a fully informed vote and she could receive a remedy with a direct suit.¹⁷⁵ In support of its contention that Lee suffered a direct harm, the Ninth Circuit pointed to its own precedent holding that a group of shareholders that alleged they were deprived of the right to a fully informed vote had a direct claim, not a derivative one.¹⁷⁶ Because Lee still had the option to enforce the

168. *Id.* at 1141–42.

169. *Id.* at 1139.

170. *See* Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1041 (9th Cir. 2011) ("The Confidentiality Agreement merely precludes both parties from introducing evidence of a certain kind [It] doesn't purport to limit or waive their right to sue, Facebook's obligation not to violate Rule 10b–5 or Facebook's liability under any provision of the securities laws.").

171. *Lee*, 70 F.4th at 1139.

172. *Id.* at 1139–41.

173. *Id.* at 1139.

174. *Id.*

175. *Id.* at 1140.

176. *Id.* ("We have also recognized that a claim that 'shareholders were deprived of the right to a fully informed vote . . . is a direct claim' under Delaware law." (quoting *N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022–23 (9th Cir. 2010))).

Gap’s substantive obligations through a direct suit, the Ninth Circuit concluded there was no basis for claiming that the bylaw served as a waiver.¹⁷⁷

Second, Lee argued that, regardless of whether she could also bring a direct suit against the Gap, the bylaw still violated the Exchange Act’s anti-waiver provision because the Exchange Act affords her a right to bring a derivative suit against the Gap and its directors.¹⁷⁸ Preempting her ability to sue derivatively, Lee argued, “alone amounts to Gap ‘waiv[ing] compliance with [a] provision of [the Exchange Act] or any rule or regulation thereunder.’”¹⁷⁹

In response, the Ninth Circuit held up the Supreme Court’s reasoning in *McMahon*, comparing the arbitration clause in the case to the forum selection clause at issue.¹⁸⁰ The majority opinion echoed the Court’s reasoning in *McMahon* that foreclosing a “particular procedure for enforcing [substantive obligations]” is not equivalent to waiving the obligations themselves.¹⁸¹ Specifically, the majority compared the investors in *McMahon* to Lee, arguing both were subject to a “particular procedure for bringing a claim—arbitration instead of litigation, or a direct [suit] instead of a derivative action” but forcing litigators into specific channels did not constitute a substantive waiver of obligation.¹⁸² Ultimately, the majority opinion concluded that requiring Lee to bring a direct suit did not “weaken[] [her] ability to recover under the [Exchange] Act”¹⁸³ because Lee “[did] not explain how a direct [suit] would be harder to prosecute than a derivative . . . action in this context.”¹⁸⁴

The Ninth Circuit then addressed Lee’s argument that the forum selection clause was unenforceable under *Bremen* because of the strong public policy interest in allowing shareholders to bring derivative suits.¹⁸⁵ Lee contended that the Supreme Court’s decision in *Borak* made evident the public policy in favor of allowing shareholders to bring derivative suits because derivative suits for private enforcement of the proxy rules under § 14(a) are “a necessary supplement” to the Commission’s enforcement.¹⁸⁶

Once again, the majority opinion sharply disagreed with this argument, reasoning that *Borak* establishes no such public policy in favor of allowing shareholders to bring § 14(a) claims as derivative suits as evidenced by the case’s “historical context” and subsequent treatment.¹⁸⁷ Not only did the Ninth Circuit find the Court’s ruling in *Borak* concerning derivative claims and Rule 14a-9 to be nothing more than dicta,¹⁸⁸ the Ninth Circuit put a magnifying glass to every

177. *Id.*

178. *Id.* at 1141.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987)).

184. *Id.*

185. *Id.* at 1143.

186. *Id.* at 1144.

187. *Id.*

188. *Id.* at 1146.

mention of *Borak* in Supreme Court jurisprudence after the case was decided, arguing that the Court itself was continually chipping away at *Borak*'s supposedly eroding foundation.¹⁸⁹

Lee then argued that the forum selection bylaw constituted a waiver of her right to pursue statutory remedies under the Exchange Act, which the Supreme Court condemned in *Mitsubishi*.¹⁹⁰ Specifically, Lee cited the Court's language in footnote 19 of the opinion that it would have "little hesitation" in condemning a forum selection clause that would forestall a plaintiff from exercising their statutory rights under federal law.¹⁹¹

The Ninth Circuit rebuked this argument as well by pointing out that, where the arbitration clause at issue in *Mitsubishi* had "the potential to 'wholly . . . displace' federal antitrust law," the forum selection bylaw here would not wholly displace federal securities law because the shareholder can still bring a direct suit under the Exchange Act.¹⁹² The Ninth Circuit further reasoned that Congress did not give a statutory right to shareholders to bring derivative suits under the Exchange Act, but that this right only arose through judicial interpretation in *Borak*.¹⁹³

Finally, the Ninth Circuit reasoned that the Gap's forum selection bylaw did not violate § 115 of the DGCL.¹⁹⁴ The Ninth Circuit began its § 115 analysis by providing a comprehensive overview of the statute's enactment process before clarifying that Lee did not initially argue that the Gap's bylaw violated § 115 in her opening brief before the panel, but rather raised the arguments in her reply brief after the Seventh Circuit decided *Seafarers*.¹⁹⁵ The majority opinion first reasoned that § 115 was inapplicable to the issue before the court because the statute "does not address the validity of a forum-selection clause's effect on federal claims."¹⁹⁶ Instead, the majority opinion reasoned, § 115 deals with "internal corporate claims," which the majority reasons are claims that "aris[e] under the DGCL," according to the Supreme Court of Delaware's majority opinion in *Salzberg v. Sciabacucchi*.¹⁹⁷ Finally, the Ninth Circuit reads the jurisdictional provision in § 115's synopsis as "mean[ing] only that [§] 115 does not create a legislative safe-harbor for forum-selection clauses that requires claims to be brought in forums that lack jurisdiction over them."¹⁹⁸

Because the Ninth Circuit reasoned that *Borak*'s ruling concerning derivative suits under Rule 14a-9 was not binding and that the forum selection clause

189. *Id.* at 1143–50.

190. *Id.* at 1150–51.

191. *Id.* at 1150; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, 473 U.S. 614, 637 n.19 (1985).

192. *Lee*, 70 F.4th at 1151.

193. *Id.*

194. *Id.* at 1154–55.

195. *Id.* at 1151–54.

196. *Id.* at 1155.

197. *Id.* (citing *Salzberg v. Sciabacucchi*, 227 A.3d 102, 119 (Del. 2020)).

198. *Id.* at 1155–56.

did not violate the anti-waiver provision, the court held the forum selection clause to be valid.¹⁹⁹

C. Comparing the Seventh and Ninth Circuits’ Analysis

Before recommending which approach the Supreme Court should follow if it were to hear the case on appeal, it is useful to analyze where the Seventh and Ninth Circuits stand on the relevant issues that will be before the Court. There are several issues on which the Seventh and the Ninth Circuits squarely disagree—whether § 115 of the DGCL prohibits or allows the bylaws in dispute,²⁰⁰ whether the forum selection bylaws at issue violate the Exchange Act’s anti-waiver provision,²⁰¹ and how certain Supreme Court decisions should be interpreted.²⁰² Additionally, the Ninth Circuit discusses *McMahon* in detail and emphasizes that these bylaws do not amount to a waiver of the companies’ substantive obligations because shareholders can still pursue direct suits.²⁰³ This is a concern not mentioned by the Seventh Circuit’s majority opinion.²⁰⁴ Finally, there is an implicit tension between the Seventh and Ninth circuit concerning prior judicial interpretation of the Exchange Act’s plain language and how persuasive the courts find these interpretations.²⁰⁵

1. Section 115 of the DGCL

First, it should be noted that the Seventh Circuit and Ninth Circuit squarely disagree on whether the bylaws at issue violate § 115 of the DGCL, which provides that, “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.”²⁰⁶ The Seventh Circuit reasoned that Boeing’s bylaw violated § 115 because it was not “consistent with applicable jurisdictional requirements.”²⁰⁷ The Ninth Circuit took the opposite position, contending that § 115 was inapplicable to the Gap’s bylaw because a derivative suit brought under the Exchange Act is not an “internal corporate claim.”²⁰⁸

199. *Id.* at 1159.

200. See discussion *infra* Subsection III.C.1.

201. See discussion *infra* Subsection III.C.2.

202. See discussion *infra* Subsection III.C.3.

203. See *infra* note 230 and accompanying text.

204. See *infra* notes 231–32 and accompanying text.

205. See discussion *infra* Subsection III.C.4

206. DEL. CODE ANN. tit. 8, § 115 (West, Westlaw through ch. 531 of the 152nd Gen. Assemb.).

207. *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022).

208. *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1155 (9th Cir. 2023) (en banc) (“We reject Lee’s arguments regarding Section 115. First, *Salzberg* makes clear that ‘internal corporate claims,’ as defined in Section 115, refers only to claims brought under Delaware, rather than federal, law.”).

This direct conflict between the two courts is addressed in this Note for the sake of comprehensiveness, but this is not a matter the Supreme Court could issue a binding ruling on.²⁰⁹

2. *The Exchange Act's Anti-Waiver Provision*

The Seventh Circuit is of the opinion that a forum selection bylaw like the one at issue in *Seafarers* is a clear and straightforward violation of the Exchange Act's anti-waiver provision.²¹⁰ In fact, the Seventh Circuit was so certain of this, the majority opinion did not elaborate why the bylaw violates the anti-waiver provision beyond reasoning that enforcing the bylaw "would be difficult to reconcile with [the anti-waiver provision] of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act."²¹¹ While the Seventh Circuit did not explicitly state that it believes a shareholder waiving their right to sue derivatively under the Exchange Act amounts to a waiver of compliance, the implication of the majority opinion's reasoning supports that inference.²¹²

The Ninth Circuit took the opposite position in *Lee*, with the majority opinion providing a comprehensive explanation of why the bylaw at issue is not a violation of the anti-waiver provision.²¹³ The majority opinion reasoned that the bylaw's plain language is not an express waiver of substantive obligation and that barring a shareholder from bringing derivative suits is not an implied waiver of substantive obligations under the Exchange Act because shareholders are still able to bring direct suits.²¹⁴

3. *Applicable Precedents*

There are two precedent cases involving forum selection clauses that both the Seventh and Ninth Circuit address: *Mitsubishi*²¹⁵ and *Bremen*.²¹⁶ In discussing *Mitsubishi*, the two courts are directly opposed,²¹⁷ where with *Bremen* the courts interpret arguments that are based on different parts of the Court's

209. ROBYN PAINTER & KATE MAYER, THE WRITING CTR. AT GEORGETOWN UNIV. L. CTR., WHICH COURT IS BINDING? BINDING VS. PERSUASIVE CASES 5 (Kate Matthews revision, 2017) ("A decision of the U.S. Supreme Court, a federal court, is binding on state courts when it decides an issue of federal law, such as Constitutional interpretation."), <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>. [https://perma.cc/T9FQ-EQNG]. Because the issue of whether DGCL § 115 would invalidate the forum selection clauses at issue is a matter of interpreting Delaware state law, the U.S. Supreme Court could not issue a binding opinion on that issue. *Id.*

210. 23 F.4th at 720.

211. *Id.* at 719–20.

212. *See id.*

213. 70 F.4th at 1139–41.

214. *Id.*

215. *See Seafarers*, 23 F.4th at 725; *Lee*, 70 F.4th at 1150–51.

216. *See Seafarers*, 23 F.4th at 724–26; *Lee*, 70 F.4th at 1143–49.

217. *See infra* notes 220–25 and accompanying text.

reasoning.²¹⁸ Additionally, the Ninth Circuit wrote extensively about *McMahon*, a case which the Seventh Circuit’s majority opinion completely ignores.²¹⁹

The two courts’ interpretations of *Mitsubishi* are directly opposed. Specifically, the argument focuses on the Courts’ language in footnote 19, in which the Court warns 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.”²²⁰

The Seventh Circuit interpreted *Mitsubishi* to mean that when a plaintiff brings a suit in federal court under federal law, a forum selection clause requiring the action to be moved out of the federal court is acceptable if the new venue will still apply the federal law under which the plaintiff sued.²²¹ The Seventh Court further reasoned that the Court warned in footnote 19 that a prospective waiver of a party’s right to pursue statutory remedies under federal law would go against public policy, and that the waiver at issue in Boeing’s bylaw goes further beyond this warning because the Exchange Act specifically contains an anti-waiver provision.²²²

The Ninth Circuit directly opposed this interpretation of *Mitsubishi* in its majority opinion.²²³ In the Ninth Circuit’s interpretation, the Court’s warning in *Mitsubishi* was irrelevant to the bylaw at issue because, unlike with the clause at issue in *Mitsubishi*, there was no threat that federal securities law would be wholly displaced.²²⁴ Additionally, the majority opinion stated that shareholders do not have a statutory right to sue derivatively under the Exchange Act because this right was conferred to shareholders by way of judicial interpretation.²²⁵

Regarding *Bremen*, the Seventh and Ninth Circuits are not directly opposed because the two courts are interpreting different arguments from different parties concerning different parts of the opinion.

The Seventh Circuit’s *Bremen* analysis was prompted by an argument from the defendant, who cited *Bremen* as an example where the Supreme Court upheld a forum selection clause because forum selection clauses in contracts are “prima facie valid.”²²⁶ The Seventh Circuit distinguished the forum selection clause at

218. See *infra* notes 226–29 and accompanying text.

219. See *infra* notes 230–32 and accompanying text.

220. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, 473 U.S. 614, 637 n.19 (1985).

221. See *Seafarers*, 23 F.4th at 725 (“The Court did so, however, only after being assured that the arbitration panel would apply United States antitrust law . . .”).

222. *Id.* (“[The Court’s footnote 19] warning carries even more force in this case under the Exchange Act of 1934, with its anti-waiver provision.”).

223. See *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1150–51 (9th Cir. 2023) (en banc).

224. *Id.* at 1151 (“[U]nlike *Mitsubishi* . . . , where a forum-selection clause and choice-of-law provision had the potential to ‘wholly . . . displace’ federal antitrust law, . . . the forum-selection clause and exclusive jurisdiction provision at issue here have no such potential effect.”) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

225. *Id.* (“[W]hile Congress gave private individuals a statutory right to bring a private antitrust action, Congress did not provide such a statutory remedy for a derivative § 14(a) action . . .”).

226. *Seafarers*, 23 F.4th at 724 (“[D]efendants also argue that they seek only routine enforcement of a routine forum-selection clause in a contract, citing [*Bremen*] . . .”); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

issue in *Bremen* from the bylaw at issue in *Seafarers* by pointing out that the dispute in *Bremen* was “purely private” and “did not involve any claim under a federal statute, let alone a federal statute with a non-waiver provision like Section 29(a) of the Exchange Act.”²²⁷

The Ninth Circuit’s analysis of *Bremen*, however, is markedly different from the Seventh Circuit’s. In *Lee*, the shareholder argued that enforcing the forum selection bylaw would violate the strong public policy established by *Borak* of granting shareholders the right to litigate derivative claims under the Exchange Act in federal court.²²⁸ The Ninth Circuit uses this opportunity to strongly criticize the Court’s *Borak* decision before holding that the forum selection bylaw does not “contravene a strong public policy” of the federal forum.²²⁹

Finally, *McMahon* is not mentioned once in the *Seafarers* majority opinion, as the Seventh Circuit plainly stated that the anti-waiver provision “deems void contractual waivers of compliance,” and that this imposition is “difficult to reconcile” with the bylaw at issue.²³⁰ In fact, the only mention of *McMahon* in *Seafarers* comes from the dissenting opinion, where Judge Easterbrook holds up *McMahon* as evidence that the exclusivity of a federal court to hear Exchange Act complaints is something the contracting parties may waive.²³¹ Alternatively, the Ninth Circuit discussed *McMahon* at length in reasoning that the Exchange Act’s anti-waiver provision only prevents companies from waiving “substantive obligations imposed by the Exchange Act,” and because Lee could still bring a direct suit under the Exchange Act, the Gap’s forum selection bylaw did not violate the anti-waiver provision.²³²

227. *Seafarers*, 23 F.4th at 725.

228. 70 F.4th at 1143 (“We now turn to Lee’s argument that Gap’s forum-selection clause cannot be enforced . . . because doing so would violate the federal forum’s strong public policy of allowing a shareholder to bring a § 14(a) derivative action.”).

229. *Id.* at 1143–51 (“These jurisprudential shifts undermine any claim that there is a strong public policy favoring *Borak*’s dictum that shareholders can bring a derivative § 14(a) action.”).

230. 23 F.4th at 720.

231. *Id.* at 730 (Easterbrook, J. dissenting) (“*McMahon*’s reasoning means that other forum-selection agreements are permissible The provision in Boeing’s bylaws is just another forum-selection clause.”). This analysis of *McMahon* is not the only topic that Judge Easterbrook addresses in his dissent that is absent in the majority opinion and is later addressed in the Ninth Circuit’s majority opinion in *Lee*. The main proposition of Judge Easterbrook’s dissent, which the Ninth Circuit later endorses, is that the shareholder was not denied a right to relief because they were still able to bring a direct suit against Boeing’s directors. *Id.* at 729–30 (“Nor is the derivative claim necessary to enforce the federal rule, which is done through investors’ or the SEC’s direct suits.”). Judge Easterbrook’s influence on the Ninth Circuit is evident, as the majority opinion specifically calls out his dissent for proffering the idea that direct suits can stand in for derivative suits. *Lee*, 70 F.4th at 1158 (“The *Seafarers* majority did not mention the possibility of a direct § 14(a) action, even though Judge Easterbrook’s well-reasoned dissent pointed out this flaw”). The Ninth Circuit took these two ideas proposed by Easterbrook and melded them into one. *Id.* at 1139 (“We disagree, because Lee can enforce Gap’s compliance with the substantive obligations of § 14(a) by bringing a direct action in federal court. The forum-selection clause . . . [D]oes not impose any limitation on direct actions, and Lee can still bring her action against Gap under § 14(a) and Rule 14a-9 as a direct action.”).

232. *Lee*, 70 F.4th at 1138–39.

4. *Broad vs. Narrow Interpretations of the Exchange Act’s Plain Language*

While not explicitly stated by either circuit, there is an underlying tension between the Ninth and Seventh Circuits’ majority opinions concerning the plain language of the Exchange Act and judicial interpretation of that language.²³³ This tension reflects the two circuits’ ideas of how broadly or narrowly the Exchange Act should be interpreted.

The Ninth Circuit took the narrow approach. Its majority opinion in *Lee* relies on judicial interpretation that narrows the plain language of the Exchange Act. In expressing doubts over whether *Borak* was correct to read a private right to bring derivative suits into the Exchange Act, the Ninth Circuit made it clear that it favors a narrow interpretation. Specifically, the majority opinion held up the Supreme Court’s language in *Ziglar v. Abbasi*, which provided that a private right to action will not be “created through judicial mandate” if “a statute does not evince Congress’ intent ‘to create the private right of action asserted.’”²³⁴ Therefore, because § 14 of the Exchange Act does not explicitly provide for a private right of action to bring a derivative suit, the Ninth Circuit believed the Court in *Borak* improperly broadened the Exchange Act’s reach.²³⁵

The Ninth Circuit’s interpretation of *McMahon* is another instance where the majority opinion utilized judicial interpretation to justify a narrow reading of the Exchange Act’s broad language.²³⁶ The Exchange Act’s anti-waiver provision does not explicitly provide that a company’s board is only prohibited from waiving its substantive obligations under the Act, yet the Ninth Circuit found the Court’s *McMahon* interpretation convincing and used it to narrow the Exchange Act’s scope.²³⁷

There is, then, an internal tension in the Ninth Circuit’s attitude toward judicial interpretation of the Exchange Act. Judicial interpretation, like *Borak*, that interprets the Exchange Act’s plain language in a way that broadens the Exchange Act’s reach is disfavored for judicial interpretation that narrows its reach by qualifying its broad language and withholding private rights of action.²³⁸

Alternatively, the Seventh Circuit’s opinion in *Seafarers* represents the view that the Exchange Act’s language should be interpreted broadly, albeit impliedly.²³⁹ The majority opinion did not explicitly state or indicate that it favored a broad interpretation of the Exchange Act, but it cited *Borak* as the reason why

233. *Id.* at 1159 (Thomas, J., dissenting).

234. 582 U.S. 120, 121 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979)).

235. See 15 U.S.C. § 78aa; *Lee*, 70 F.4th at 1149 (“[T]he Court now views implied private rights of action with disapproval . . .”).

236. See 15 U.S.C. § 78cc; *Lee*, 70 F.4th at 1138.

237. See 15 U.S.C. § 78cc; *Lee*, 70 F.4th at 1138 (“The Supreme Court has interpreted § 29(a) as prohibiting ‘only . . . waiver of the substantive obligations imposed by the Exchange Act.’”) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987)).

238. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964) (reading an implied private right of action to sue derivatively into § 14(a) of the Exchange Act); *McMahon*, 482 U.S. at 228 (reasoning that the Exchange Act’s anti-waiver provision only prohibits a “waiver of the substantive obligations imposed by the Exchange Act”).

239. See *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 719 (7th Cir. 2022).

there is a private right of derivative action in § 14 without saying a critical word of the decision or contemplating whether its holding has been undermined by subsequent rulings.²⁴⁰ The Seventh Circuit also did not mention *McMahon*. Instead, it rephrased the anti-waiver provision’s language and asserted that Boeing’s bylaw would be “difficult to reconcile” with the plain language.²⁴¹ By not mentioning *McMahon*’s “substantive obligation” qualifier, the Seventh Circuit offered a full-throated endorsement of the Exchange Act’s plain language, read as broadly as possible.²⁴²

While § 14 of the Exchange Act does not say anything about a private right of action to bring direct or derivative suits, the *Borak* Court read this right into the Exchange Act.²⁴³ The Ninth Circuit explicitly criticized this interpretation, reasoning that a private right of action to bring a derivative suit should not be read into the plain language, while the Seventh Circuit implicitly supported it.²⁴⁴ But with the anti-waiver provision, the roles were flipped. The Ninth Circuit was adamant that *McMahon* was correct to add a “substantive obligation” qualifier to the plain language, while the Seventh Circuit favored only looking at the plain language.²⁴⁵ This dichotomy between when plain language should be favored and when judicial interpretation should be favored creates a tension between the two circuits that underlies their analysis of the forum selection bylaws.

TABLE 1

Seventh Circuit - <i>Seafarers</i>	Ninth Circuit - <i>Lee</i>
<ul style="list-style-type: none"> • Broad interpretation of the Exchange Act 	<ul style="list-style-type: none"> • Narrow interpretation of the Exchange Act
<ul style="list-style-type: none"> • Boeing’s bylaw is invalid under DGCL § 115 	<ul style="list-style-type: none"> • DGCL § 115 is not relevant to the Gap’s bylaw
<ul style="list-style-type: none"> • The bylaw at issue violates the Exchange Act’s anti-waiver provision 	<ul style="list-style-type: none"> • The bylaw at issue does not violate the Exchange Act’s anti-waiver provision because it does not waive substantive obligations (<i>McMahon</i>)
<ul style="list-style-type: none"> • <i>Mitsubishi</i> does not apply, but the Court warned about choice-of-law provisions with this effect in footnote 19 	<ul style="list-style-type: none"> • <i>Mitsubishi</i> applies, the warning in footnote 19 is inapplicable here
<ul style="list-style-type: none"> • <i>Bremen</i>’s “prima facie valid” language is not applicable because <i>Bremen</i> was about purely private disputes that didn’t involve federal statutes 	<ul style="list-style-type: none"> • This bylaw does not “contravene a strong public policy” per <i>Bremen</i> because <i>Borak</i> does not represent a strong public policy in favor of derivative suits under § 14(a)

240. *Id.* (“Section 14(a) may be enforced in private actions by shareholders asserting their own rights and in derivative actions asserting rights of a corporation harmed by a violation.” (citing *Borak*, 377 U.S. at 431–32)).

241. *Id.* at 720; *McMahon*, 482 U.S. at 228.

242. *Id.*

243. See *Borak*, 377 U.S. at 431–32; see generally 15 U.S.C. § 78n.

244. *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1149 (9th Cir. 2023) (en banc); see *Seafarers*, 23 F.4th at 720.

245. *Lee*, 70 F.4th at 1141–42 (citing *McMahon*, 482 U.S. at 228); see *Seafarers*, 23 F.4th at 720.

IV. RECOMMENDATION

It is entirely possible that the Supreme Court will revisit *Borak*.²⁴⁶ Ever since it decided *Borak* in 1964, the Supreme Court has qualified, clarified, and even disparaged the decision, with Chief Justice John Roberts lamenting in 2019 that “[*Borak*] was not the right approach,” and that the case “would not be decided the same way today.”²⁴⁷ Given the circuit split directly implicates *Borak*, with the Ninth Circuit writing extensively about the decision, the Supreme Court has the ability to address *Borak* head on by granting certiorari.²⁴⁸

This circuit split has enormous practical implications.²⁴⁹ If a bylaw containing a forum selection clause similar to the one used in *Seafarers* and *Lee* is validated by the Supreme Court, any corporation can implement such a bylaw and effectively preclude its shareholders’ ability to bring a federal derivative suit against the corporation under the Exchange Act.²⁵⁰ The Supreme Court holding that these kinds of bylaws are valid would, for all intents and purposes, eliminate federal derivative suits from being brought under § 14(a) of the Exchange Act.²⁵¹ In that way, holding these bylaws as valid would practically overturn *Borak* without the Court having to deal with the potential negative consequences of overturning precedent.²⁵²

If the Supreme Court is asked to resolve this circuit split, it should adopt a broad interpretation of the Exchange Act that reflects Congressional intent and the Exchange Act’s plain language, similar to the Seventh Circuit’s interpretation in *Seafarers*. But, the Supreme Court needs to go further than the Seventh Circuit by explaining why waiving derivative claims amounts to a waiver of “substantive obligations” because it weakens the shareholder’s ability to recover. Further, the Supreme Court should endorse the Seventh Circuit’s interpretation of *Mitsubishi* and should reject the Ninth Circuit’s *Bremen* analysis concerning the importance of *Borak*.

A. *Forum Selection Bylaws Violate the Exchange Act’s Anti-Waiver Provision*

The forum selection bylaws at issue in *Seafarers* and *Lee* violate the Exchange Act’s anti-waiver provision’s plain language. The Supreme Court should interpret the anti-waiver provision’s language broadly and should avoid narrowing the scope of its applicability like the Ninth Circuit in *Lee*.

246. See Manesh & Grundfest, *supra* note 7 (“[I]t seems likely that the Supreme Court will revisit *Borak* – even if the plaintiffs in *Lee* don’t seek cert[iorari].”).

247. *Id.*

248. *Lee*, 70 F.4th at 1143–50.

249. See Manesh & Grundfest, *supra* note 7.

250. See *id.*

251. *Id.* (“In the Ninth Circuit, corporations may now use a forum bylaw to force all derivative claims into Delaware Chancery and, thus, eliminate federal derivative *Borak* suits altogether.”).

252. See *J.I. Case Co. v. Borak*, 377 U.S. 426, 431–32 (1964) (reasoning that the Exchange Act gives shareholders the right to bring private causes of action in the form of a derivative suit).

Section 29(a) plainly reads that “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.”²⁵³ The language of the provision is extremely broad; it uses the word “any” five times, indicating the provision’s scope is broad and sweeping.²⁵⁴ At any point, Congress could have chosen to put words of limitation in the provision to limit the provision’s scope, but, instead, Congress chose to reiterate five times within the provision’s language that the provision’s protections are meant to be all encompassing.²⁵⁵ The Court has reasoned that the use of the word “any” in a federal statute “suggests a broad meaning,” and there is no reason such a broad meaning would not apply to the Exchange Act as well.²⁵⁶

This broad interpretation is consistent with the Exchange Act’s purpose of protecting investors.²⁵⁷ To prevent more sophisticated investors from contracting out of compliance with the full force of the Exchange Act, Congress needed to use broad language to reinforce that investors were obliged to comply with every provision and rule of the Act.²⁵⁸

The Ninth Circuit improperly constrained the reach of the anti-waiver provision. The majority opinion gave the provision’s language a mere cursory glance, choosing instead to focus its attention on *McMahon*’s language that the anti-waiver provision prohibits companies from waiving compliance with “substantive obligations.”²⁵⁹ But in drafting the anti-waiver provision’s language, Congress did not provide that only substantive obligations of the Exchange Act were prohibited. Rather, it used the word “any” to reinforce the intended expansive coverage of the Exchange Act.²⁶⁰

But, even if the Court’s language in *McMahon* is interpreted as a restriction on the anti-waiver provision’s broad language, the Court should still find that a forum selection bylaw violates the anti-waiver provision based on the Court’s own reasoning in *McMahon*. Specifically, a bylaw that prevents shareholders from bringing derivative suits under the Exchange Act undoubtedly “weaken[s] [the shareholders’] ability to recover under the [Exchange] Act” because these bylaws completely deprive shareholders of an action for recovery.²⁶¹ Dispossession of shareholders of one of the only two actions they can bring under the

253. 15 U.S.C. § 78cc(a) (emphasis added).

254. *Id.*

255. *Id.*

256. See *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218–20 (2008).

257. See *Black*, *supra* note 74, at 824; *Gross*, *supra* note 87, at 389–90.

258. See *Gross*, *supra* note 87, at 389–90 (2016).

Legislative history of the original provision is scant, but it seems apparent that . . . Congress sought to preclude any entity or individual from circumventing the full force of the new federal securities laws by requiring a weaker party to waive the protections that the Act was designed to provide for investors. Congress wanted to ensure that securities firms did not exert their market power on investors by contracting around their new statutory duties and obligations.

259. See *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1140, 1141 (9th Cir. 2023) (en banc).

260. 15 U.S.C. § 78cc(a).

261. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) (quoting *Wilko v. Swan*, 346 U.S. 427, 432 (1953)).

Exchange Act necessarily weakens their prospects of recovery because it seizes one of only two keys to court that the Exchange Act grants to shareholders.²⁶² The dissent in *Lee* went beyond arguing that the bylaw at issue weakened the shareholders’ ability to recover, arguing instead that its “eviscerat[ion]” of derivative suits “eliminate[d] [the substantive right to recover] altogether.”²⁶³

The Ninth Circuit, however, reasoned that the bylaw does not weaken the shareholders’ ability to recover because shareholders can still bring direct suits under the Exchange Act.²⁶⁴ This line of reasoning presumes that direct and derivative suits under the Exchange Act are practically substitutes, to the extent that a shareholder could be deprived of one and, so long as they had the other, the shareholder’s ability to recover would not be weakened.²⁶⁵

The problem, however, is that direct and derivative suits are not interchangeable. There are instances where a shareholder might suffer harm from a company’s actions but only suffers that harm derivatively.²⁶⁶ In these situations, a direct claim would fail because the court would be unable to find relief for the shareholder as an individual.²⁶⁷

For example, Professor Ann Lipton has written about a precise situation where a shareholder would more naturally bring a derivative suit as opposed to a direct suit.²⁶⁸ In this situation, a company is looking to acquire another company and needs a shareholder vote to push the merger over the line.²⁶⁹ To facilitate a vote in favor of the merger, the acquiring company has issued misleading proxy materials to the shareholders.²⁷⁰ While this would pose a harm to the shareholders, who would be deprived of their right to a fully informed vote,²⁷¹ there would be no relief that could be granted to the shareholder through a direct claim because the economic harm is derivative, not direct.²⁷² Put another way, the material misrepresentation would cause direct economic harm to the corporation but only an indirect economic harm to the shareholder.²⁷³ That type of harm is more naturally brought as a derivative claim and is the gap that derivative claims fill.²⁷⁴ In fact, the plaintiffs in *In re Tyson Foods, Inc.* brought a direct claim in Delaware state court based on being denied the right to a fully informed vote, only for the Delaware Court of Chancery to write that the plaintiffs “failed to suggest any form of relief that can be granted to them in a direct claim,” before dismissing the claim.²⁷⁵ Evidently, then, derivative and direct suits are not

262. See discussion *supra* Subsections II.A.1.–A.2.

263. 70 F.4th at 1160–61 (Thomas, J., dissenting).

264. *Id.* at 1141 (majority opinion).

265. *Id.*

266. Lipton, *supra* note 40.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. See *In re Tyson Foods, Inc.*, 919 A.2d 563, 601–02 (Del. Ch. 2007).

272. *Id.*

273. Lipton, *supra* note 40.

274. *Id.*

275. 919 A.2d at 601–02.

interchangeable and there is value in allowing plaintiffs to bring both actions when alleging corporate misdeeds.²⁷⁶ Because there are situations in which a derivative claim can be brought when no direct claim exists, it cannot be said that shareholders would enjoy the same ability to recover if their ability to sue derivatively were preempted.²⁷⁷ Therefore, the Ninth Circuit was incorrect in its reasoning, and the Supreme Court should not be persuaded by this rationale if it decides to hear a case on forum selection bylaws.

Further, the Ninth Circuit's belief that a shareholder's ability to recover is not weakened when they are prevented from suing derivatively is especially concerning because the Ninth Circuit itself ruled that a preemptive contractual waiver to hear certain claims is not permitted, specifically when federal securities laws are at issue.²⁷⁸ In *Petro-Ventures, Inc. v. Takessian*, the majority opinion summarily stated that, "[i]n dealing with federal securities, the general rule is that . . . subsequently maturing causes of action may not be waived."²⁷⁹ Therefore, not only does the bylaw at issue in *Lee* violate the Exchange Act's anti-waiver provision, it also goes against existing Ninth Circuit precedent.²⁸⁰

B. Precedent Cases Support Finding Forum Selection Bylaws to Be Invalid

Aside from the anti-waiver provision's impact on forum selection bylaws, the Seventh and Ninth Circuits were directly opposed in their interpretation of *Mitsubishi* and had different interpretations of *Bremen*.²⁸¹

First, the Seventh Circuit correctly identified that forum selection bylaws are not acceptable under the Court's ruling in *Mitsubishi*.²⁸² The Court in *Mitsubishi* was only willing to allow an antitrust claim to be handled in Japan once it was assured that the Japanese arbitration panel would apply United States antitrust law.²⁸³ That is more than the plaintiff in *Seafarers* was promised, as the bylaw there mandated that United States' securities laws (at least in the form of derivative claims) would not apply to their lawsuit.²⁸⁴ In fact, as the Seventh Circuit pointed out, the Court in *Mitsubishi* specifically warned about using litigation devices to avoid an otherwise-applicable federal statute, "even one without an anti-waiver provision like the 1934 Exchange Act's Section 29(a)."²⁸⁵

The Ninth Circuit's interpretation of *Mitsubishi*, in contrast, is misguided. The majority opinion argues that the Court in *Mitsubishi* was concerned that the forum selection clause at issue "had the potential to 'wholly . . . displace' federal antitrust law," where the forum selection bylaw at issue here would not wholly

276. *See id.*

277. *See id.*

278. *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340–41 (9th Cir. 1992).

279. *Id.*

280. *Id.*

281. *See supra* text accompanying notes 215–29.

282. *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714, 725 (7th Cir. 2022).

283. *See* 473 U.S. 614, 636–38 (1985); *Seafarers*, 23 F.4th at 725.

284. 23 F.4th at 725.

285. *Id.* at 725; *Mitsubishi*, 473 U.S. at 637 n.19.

displace federal securities law because the shareholder would still be able to bring a direct claim under the Exchange Act.²⁸⁶ But framing the Court in *Mitsubishi* as being concerned about antitrust law being “wholly . . . displac[ed]” is misleading, as the Court was merely rephrasing the United States’ argument for why the arbitration clause was impermissible.²⁸⁷ In actuality, the Seventh Circuit rightly identified that the *Mitsubishi* Court’s express warning was about parties waiving their right to remedies, not whether they were contracting out of federal arbitration law applying to their suit.²⁸⁸ Specifically, the Court stated that it “would have little hesitation in condemning the agreement,” if the forum selection clause were to operate as a “waiver of a party’s right to pursue statutory remedies.”²⁸⁹ While the remedies being pursued here are granted by judicial decision, the Court’s real concern is clearly with the interference of remedies, not with whether federal law is “wholly . . . displace[d].”²⁹⁰

Finally, the two circuits pull language from different parts of *Bremen*—the Seventh Circuit asserted that the Court’s presumption in *Bremen* that forum selection clauses are enforceable applies when analyzing a “purely private contractual dispute”²⁹¹ and the Ninth Circuit denied that there is a strong public policy interest in allowing shareholders to bring derivative suits under the Exchange Act.²⁹²

The Ninth Circuit’s assertion that *Borak* was “flawed” and “mistaken[],” and that the Court’s reading of a private cause of action in the form of derivative suits is merely dicta showcases how narrow the Ninth Circuit interprets the Exchange Act as a whole.²⁹³ But *Borak* should not be so readily dismissed. The Exchange Act’s broad language implies that Congress wanted judicial interpretation to fill in the blanks.²⁹⁴

V. CONCLUSION

Upholding the validity of corporate bylaws that deprive shareholders of the ability to bring derivative suits under the Exchange Act violates the Exchange Act’s anti-waiver provision.²⁹⁵ The Seventh Circuit in *Seafarers* inherently

286. *Lee ex rel. The Gap, Inc. v. Fisher*, 70 F.4th 1129, 1150–51 (9th Cir. 2023) (en banc).

287. *Id.*; 473 U.S. at 637 n.19 (“The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply.”).

288. *Seafarers*, 23 F.4th at 725

[T]he Court still went out of its way to warn against that possibility: ‘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.

(quoting *Mitsubishi*, 473 U.S. at 637 n.19).

289. *See Mitsubishi*, 473 U.S. at 637 n.19.

290. *Id.*

291. *Seafarers*, 23 F.4th at 725.

292. *Lee*, 70 F.4th at 1143–46.

293. *Id.* at 1157.

294. *See supra* text accompanying notes 74–79.

295. *See* discussion *supra* Section IV.A.

recognized this and treated the matter as an afterthought, presumably, because the majority found the bylaw to be such a glaring violation of the anti-waiver provision.²⁹⁶ If the Supreme Court chooses to take either *Seafarers* or *Lee* on appeal, it should come to the same conclusion as the Seventh Circuit but must interpret the Exchange Act broadly and explain how these bylaws violate the Exchange Act's anti-waiver provision.²⁹⁷

296. 23 F.4th at 720.

297. See discussion *supra* Part IV.