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

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Over the past decade, a growing number of Delaware corporations have adopted forum selection bylaws. These bylaws often require that all derivative claims against a company's officers or directors be resolved in Delaware state courts. But what happens when a shareholder brings a derivative claim that Delaware courts do not have jurisdiction to adjudicate?

This issue arises when Delaware forum selection bylaws are applied to derivative claims arising under § 14(a) of the Securities and Exchange Act of 1934, because the Exchange Act instructs that only federal *courts may resolve such claims. In this context, Delaware corporations may seek to exploit forum selection bylaws as a jurisdictional loophole to bar shareholders from pursuing derivative Exchange Act claims in* any *court. In effect, the bylaws enable defendant corporations to designate a substitute referee—Delaware courts—that they already know is disqualified from adjudicating Exchange Act claims, which inevitably forfeits the game in their favor.*

Circuits have split on whether to enforce Delaware forum selection bylaws when they are applied to derivative § 14(a) claims. This Comment proposes an alternative approach to resolve the circuit split. The proposed approach revives the historically underutilized "unreasonableness exception" to enforceability, which the Supreme Court established in M/S Bremen v. Zapata Off-Shore Co. *This Comment contends that* Bremen*'s unreasonableness exception must be understood as a context-specific inquiry. It should be applied liberally to forum selection clauses contained in corporate bylaws, and as applied to derivative Exchange Act claims. Under this proposed approach, Delaware forum selection bylaws are unenforceable as applied to derivative § 14(a) claims.*

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INTRODUCTION

Two Boeing 737 MAX airplanes crashed within a six-month period between 2018 and 2019, killing everyone on board. Shortly afterward, Seafarers Pension Plan (a Boeing shareholder) brought a derivative suit[1] on behalf of Boeing (a Delaware

[1] In a derivative suit, a shareholder-plaintiff brings a claim against a corporation's officers, directors, or third parties on behalf of the corporation itself, rather than in her

corporation) against several Boeing officers and directors.[2] Seafarers alleged that the Boeing defendants had violated § 14(a) of the federal Securities and Exchange Act of 1934[3] (Exchange Act) by making materially false and misleading statements about the development and operation of the 737 MAX in Boeing's proxy statements distributed to shareholders.[4]

Seafarers filed suit in federal district court,[5] as the Exchange Act provides federal courts with exclusive jurisdiction over all claims arising under the Act.[6] However, Boeing's corporate bylaws contain a forum selection clause specifying that "any derivative action . . . brought on behalf of the Corporation" must be heard in the Delaware Court of Chancery.[7] This created a conundrum: According to Boeing's bylaw, Seafarers' suit could not be heard in federal court. But according to the Exchange Act, Seafarers' suit could not be heard in Delaware court either. Therefore, enforcing Boeing's forum selection bylaw would effectively bar Seafarers from bringing its derivative § 14(a) claim in *any* court—meaning "checkmate for defendants," in the words of the Seventh Circuit.[8]

Boeing's forum selection bylaw is not an anomaly. A growing number of Delaware corporations have adopted clauses in their charters or bylaws stating that derivative actions—including derivative actions asserting Exchange Act claims—may be brought only in Delaware state courts.[9] Over the past decade, approximately 167 Delaware corporations have adopted such clauses.[10] This is significant growth, considering that prior to

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capacity as an individual shareholder. *See infra* Part I.A; *see also* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95–96 (1991).

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

3 15 U.S.C. § 78n(a)(1).

4 *Seafarers*, 23 F.4th at 717.

5 *Id.*

6 Exchange Act § 27, 15 U.S.C. § 78aa.

7 *Seafarers*, 23 F.4th at 717–18.

8 *Id.* at 720.

9 Brief for Amici Curiae Public Citizen et al. in Support of Plaintiff-Appellant at 6, Lee *ex rel.* The Gap, Inc v. Fisher, 70 F.4th 1129 (9th Cir. 2023) (No. 21-15923) [hereinafter Public Citizen Amicus Brief].

10 *Id.* at 7. This number is based on a search conducted by Public Citizen as amici for filings on the U.S. Securities and Exchange Commission's website containing model language that Delaware corporations commonly use in drafting forum selection bylaws: "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 Corporation." *Id.* at 7–8, n.3. It excludes results showing forty-three corporations that have adopted forum selection

2010, only a handful of publicly traded companies across the United States had adopted any kind of forum selection clause in their governing documents.[11]

This Comment assesses whether Delaware forum selection bylaws are enforceable in the context of derivative Exchange Act claims. Both the Seventh and Ninth Circuits recently addressed this issue in *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*[12] and *Lee ex rel. The Gap, Inc. v. Fisher*,[13] respectively. *Seafarers* and *Lee* involved identical causes of action—derivative claims under Exchange Act § 14(a).[14] And both defendant corporations' bylaws contained nearly identical forum selection clauses, which designated the Delaware Court of Chancery as the exclusive forum for derivative suits.[15] In January 2022, a 2–1 Seventh Circuit panel held that Boeing's bylaw was unenforceable.[16] In May 2022, a unanimous Ninth Circuit panel held that Gap's bylaw was enforceable, creating a circuit split.[17] Shortly thereafter, the Ninth Circuit vacated the panel's decision and granted a petition to rehear the case en banc.[18] In June 2023, a 6–5 Ninth Circuit en banc panel narrowly affirmed, cementing the circuit split.[19]

This Comment argues that neither circuit's reasoning nor holding is wholly correct. It shows that the Ninth Circuit adopted the correct legal framework but reached the wrong outcome, while the Seventh Circuit reached the correct outcome through the wrong approach. With respect to process, the Ninth Circuit en banc majority adopted the proper, three-part framework in *Lee*

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clauses that exclude claims over which the Court of Chancery lacks jurisdiction, or claims under the Exchange Act or the Securities Act of 1933, 15 U.S.C. § 77a. Public Citizen Amicus Brief at 7–8, 7 n.3.

11 Cliff C. Gardner & Lilianna Anh P. Townsend, *Seventh and Ninth Circuits Split over the Scope of Exclusive Forum Provisions*, SKADDEN (May 24, 2022), https://perma.cc/RHG3-82Z5.

12 23 F.4th 714 (7th Cir. 2022).

13 70 F.4th 1129 (9th Cir. 2023) (en banc). This Comment will cite this case as *Lee III*, given its prior history.

14 *See Seafarers*, 23 F.4th at 717; *Lee III*, 70 F.4th at 1130.

15 *See Seafarers*, 23 F.4th at 718; *Lee III*, 70 F.4th at 1138.

16 *Seafarers*, 23 F.4th at 718.

17 Lee *ex rel.* The Gap, Inc v. Fisher (*Lee I*), 34 F.4th 777, 779 (9th Cir. 2022).

18 Lee *ex rel.* The Gap, Inc v. Fisher (*Lee II*), 54 F.4th 608 (9th Cir. 2022).

19 *Lee III*, 70 F.4th 1129. Lee responded by petitioning for yet another rehearing en banc—this time, in front of the full court of twenty-nine active judges, rather than the expanded panel of eleven that typically conducts en banc review in the Ninth Circuit. Appellant's Petition for Rehearing En Banc by Full Court, Lee *ex rel.* The Gap, Inc v. Fisher, 70 F.4th 1129 (9th Cir. 2023) (No. 21-15923). The Ninth Circuit denied that petition. Lee *ex rel.* The Gap, Inc v. Fisher (*Lee IV*), 2023 BL 263944 (9th Cir. Aug. 1, 2023).

for assessing whether a forum selection bylaw is effective. The Ninth Circuit considered whether Gap's bylaw was (1) valid under Delaware law, (2) valid under federal law, and (3) enforceable as-applied.[20] Meanwhile, the Seventh Circuit conflated these distinct inquiries, and improperly viewed Delaware law as dispositive of enforceability.[21] With respect to outcome, the Ninth Circuit was correct on inquiries (1) and (2), but it misapplied (3) and erroneously concluded that Gap's bylaw was enforceable.[22] The Seventh Circuit correctly concluded that Boeing's forum selection bylaw was unenforceable as-applied in *Seafarers*,[23] albeit through a flawed approach.

This Comment proposes a clearer and simpler approach for assessing the third inquiry: enforceability of forum selection clauses. The proposed approach applies an existing Supreme Court framework established in *M/S Bremen v. Zapata Off-Shore Co.*[24] *Bremen* held that, despite the general presumption that forum selection clauses are enforceable, there are several exceptions under which a forum selection clause is not enforceable.[25] One of these exceptions applies when the clause is "unreasonable under the circumstances."[26] *Bremen's* unreasonableness exception has historically played a dormant role in enforceability analysis.[27] Courts have been reluctant to rely on it, and it was not analyzed by either circuit in *Seafarers* or *Lee*. However, the unreasonableness exception provides a commonsense solution to enforceability analysis in the context of derivative Exchange Act claims.

This Comment argues that *Bremen*'s unreasonableness exception should be understood as a context-specific inquiry. Courts should more liberally apply the unreasonableness exception in two circumstances: (1) when the forum selection clause is contained in a non-freely-negotiated contract, such as a corporate bylaw, and (2) when the forum selection clause is applied in a manner unforeseeable to the parties at the time of

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20 *Lee III*, 70 F.4th at 1135.

21 *See infra* Part III.B; *Seafarers*, 23 F.4th at 718.

22 *Lee III*, 70 F.4th at 1135.

23 *Seafarers*, 23 F.4th at 718.

24 407 U.S. 1 (1972).

25 *Id.* at 10, 15.

26 *Id.* at 10 (quotation marks omitted).

27 *See, e.g.*, John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 164 (2022) ("It is . . . uncommon for a federal court to refuse to enforce a clause on grounds that it is unreasonable.").

contracting, such as when the clause is enforced to bar a plaintiff's derivative claim under the federal securities laws from being heard in any court.

Following this approach, this Comment argues that the forum selection bylaws at issue in *Seafarers* and *Lee* are unenforceable as "unreasonable" because the Delaware Court of Chancery lacks subject matter jurisdiction over § 14(a) claims.[28] Enforcing the forum selection bylaws in this context prevents plaintiffs from pursuing their derivative § 14(a) claims in *any* court, by enabling corporations to point to Delaware courts as the proper forum—even though Delaware courts do not have jurisdiction to adjudicate § 14(a) claims. In effect, the bylaws enable defendant corporations to designate a substitute referee that they already know is disqualified, which inevitably forfeits the game in their favor.

This proposed approach makes three contributions. First, it resolves discrepancies between the Seventh and Ninth Circuits' reasoning with respect to the enforceability of forum selection bylaws as applied to derivative § 14(a) claims. This paves a path for resolution of the *Seafarers* and *Lee* circuit split.

Second, the proposed approach mitigates the risk that corporations will exploit forum selection bylaws as a procedural loophole to evade other types of derivative Exchange Act claims. The stakes of this dispute extend far beyond *Seafarers* and *Lee*. Corporations may echo Boeing's and Gap's arguments to dismiss other derivative Exchange Act claims from federal court, such as derivative § 10(b) antifraud claims or derivative § 16(b) claims to recover short-swing profits from a company insider.[29] As long as courts lack a strong, consistent framework for assessing the enforceability of forum selection bylaws, Delaware corporations may seek to exploit these bylaws as a powerful procedural loophole to "contract out" of certain federal securities law claims against them.

By effectively eliminating derivative Exchange Act suits, this loophole would weaken a critical arm of Exchange Act enforcement. Because the U.S. Securities and Exchange Commission (SEC) lacks the resources to identify and prosecute every Exchange Act violation, the Exchange Act empowers

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[28] *See* 15 U.S.C. § 78aa.

[29] Keith F. Higgins, Paul M. Kinsella, Peter L. Welsh & Martin J. Crisp, *A Fresh Look at Exclusive Forum Provisions*, ROPES & GRAY (May 28, 2019), https://perma.cc/R5YE-PJ9U.

individual shareholders to play a role in enforcement of certain provisions through private actions.[30] In contrast to *direct* Exchange Act suits, which typically award the individual shareholder-plaintiff monetary damages,[31] successful *derivative* Exchange Act suits often lead to changes in the corporation's governance and policies to prevent future misconduct by corporate insiders.[32] Therefore, derivative Exchange Act suits are important deterrents to corporate misconduct.

Third, the proposed approach provides a consistent framework for assessing the enforceability of forum selection clauses across contexts. The Seventh and Ninth Circuits' divergent approaches and conflicting conclusions in *Seafarers* and *Lee* illustrate a broader lack of consensus among Courts of Appeals as to the proper legal framework for assessing the enforceability of forum selection clauses. This Comment aims to bring clarity to a muddy area of law.

This Comment proceeds in four parts. Part I provides relevant background on shareholder derivative actions, Delaware forum selection bylaws, enforcement of forum selection clauses, and relevant provisions of the Exchange Act. Part II summarizes the Seventh and Ninth Circuits' divergent approaches to this issue in *Seafarers* and *Lee*, respectively. Part III argues that the Ninth Circuit adopted the correct, three-part framework for assessing whether a forum selection bylaw should be given effect, and evaluates the Seventh and Ninth Circuits' application of this framework. Part IV proposes an alternative approach—a more liberal unreasonableness standard—for assessing whether a forum selection clause is enforceable in the context of derivative § 14(a) claims.

I. BACKGROUND AND RELEVANT LAW

This Part describes the historical and statutory context surrounding the enforceability of forum selection bylaws as

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[30] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) (establishing an implied private right of action under Exchange Act § 14(a)).

[31] *See* Elizabeth J. Thompson, Note, *Direct Harm, Special Injury, or Duty Owed: Which Test Allows for the Most Shareholder Success in Direct Shareholder Litigation?*, 35 J. CORP. L. 215, 219 (2009) ("The purpose of a direct shareholder suit is to compensate a shareholder for suffering a harm . . . .").

[32] *See id.* at 217; *see also Borak*, 377 U.S. at 432 (discussing injunctive relief as a remedy for derivative § 14(a) claims); *Lee III*, 70 F.4th at 1162 (Thomas, J., dissenting) ("[R]emedies available through derivative actions [include] corporate-governance reforms.").

applied to derivative Exchange Act claims. Part I.A introduces shareholder derivative actions. Part I.B provides background on Delaware corporations' use of forum selection bylaws. Part I.C outlines Supreme Court precedent for assessing when a forum selection clause should be enforced. Part I.D introduces relevant Exchange Act provisions.

A. Shareholder Derivative Actions

Shareholders of Delaware corporations may assert two distinct types of claims against the corporation's officers and directors: direct or derivative. In a direct suit, the shareholder, in her individual capacity, sues the officers or directors of the corporation alleging that the defendants' actions harmed the individual shareholder.[33] Typically, the shareholder seeks to recover monetary damages from defendants.[34]

By contrast, in a derivative suit, the shareholder brings suit on behalf of the corporation because the corporation's management is either unwilling or unable to do so.[35] Any monetary damages recovered in a derivative suit are paid to the corporation, not to the individual shareholder-plaintiff.[36] Typically, a shareholder will bring a derivative suit when the shareholder is more interested in injunctive relief, such as a change in corporate governance, rather than an individual monetary award.[37] For example, plaintiffs in *Seafarers* sought a court order requiring Boeing to hold a shareholder vote on various proposed amendments to the company's bylaws.[38] The proposed amendments were designed to improve compliance with safety regulations.[39] The plaintiffs also sought disgorgement of profits earned by defendants as a result of their violations (which would be paid back to Boeing, not to individual shareholder-plaintiffs).[40]

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33 *See* Thompson, *supra* note 31, at 219.

34 *See id.*

35 *See id.* at 218; *see also* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95–96 (1991).

36 *See* Thompson, *supra* note 31, at 217; *see also* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (discussing injunctive relief as a remedy for derivative § 14(a) claims).

37 *See* Thompson, *supra* note 31, at 217; *see also Lee III*, 70 F.4th at 1162 (Thomas, J., dissenting).

38 Complaint at *223–24, Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 2020 WL 3246326 (N.D. Ill. Dec. 11, 2019) (No. 1:19-cv-08095).

39 *Id.*

40 *Id.*

In order to bring a derivative suit on behalf of the corporation, a shareholder must satisfy an extra procedural step. The shareholder must either (1) "make a demand on the company's board of directors," which affords the board the opportunity to take control of the litigation, or (2) "prove that such a demand would be futile" because the allegations raise a reasonable doubt that at least half of the members of the board are disinterested and independent.[41]

Despite these differences between direct and derivative suits, "Delaware courts have often struggled to decipher what constitute[s] a direct or derivative claim."[42] Where the alleged harm involves misleading disclosures by a corporation's officers or directors, as was the case in *Seafarers* and *Lee*,[43] the line between a direct and derivative claim is particularly blurry. For example, a shareholder may assert in a direct suit that she was *individually* harmed by the directors' misleading disclosure, by being deprived of the opportunity to make an informed vote.[44] Alternatively, the shareholder may assert in a derivative suit that the *corporation* itself was harmed by the directors' misleading disclosure, resulting in poor performance or improperly enabling the reelection of inept directors.[45]

Traditionally, plaintiffs have brought derivative suits against officers and directors alleging state law breach of fiduciary duty claims.[46] But in recent years, shareholder-plaintiffs have increasingly asserted derivative claims under the federal securities laws, including the Exchange Act.[47] The Exchange Act is the federal law that regulates the exchanges on which securities are sold.[48] Section 14(a) of the Exchange Act and its

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41 Heather Sultanian, *Delaware Supreme Court Clarifies the Standards for Demand Futility*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 27, 2021), https://perma.cc/4HVJ-9UFJ.

42 Thomas W. Briggs, Jr. & Miranda N. Gilbert, *Direct or Derivative Claims: Is 'Brookfield' the End or Just the Beginning?*, REUTERS (Mar. 22, 2022), https://www.reuters.com/legal/legalindustry/direct-or-derivative-claims-is-brookfield-end-or-just-beginning-2022-03-22/.

43 *Seafarers*, 23 F.4th at 717; *Lee III*, 70 F.4th at 1135.

44 *See, e.g.*, *Lee III*, 70 F.4th at 1140; N.Y.C. Emps.' Ret. Sys. v. Jobs, 593 F.3d 1018, 1022–23 (9th Cir. 2010), *overruled on other grounds by* Lacey v. Maricopa County, 693 F.3d 896 (9th Cir. 2012).

45 *See, e.g.*, Complaint at 193, Seafarers Pension Plan *ex rel.* Boeing Co. v. Bradway, 2020 WL 3246326 (N.D. Ill. Dec. 11, 2019) (No. 1:19-cv-08095).

46 *See* Brian Lutz & Michael Kahn, *Two New Defenses to Federal Shareholder Derivative Claims*, LAW360 (June 15, 2022), https://perma.cc/27L6-QGHS.

47 *Id.*

48 15 U.S.C. §§ 78a–78rr.

implementing regulation, SEC Rule 14a-9, prohibit material misstatements or omissions in proxy statements distributed to shareholders.[49] Section 14(a) is enforced by the federal government via SEC enforcement actions, as well as by shareholders via private enforcement actions.[50] The text of § 14(a) does not expressly provide a private right of action for shareholder litigation, but the Supreme Court established an implied private right of action under § 14(a) in *J.I. Case Co. v. Borak*.[51]

In private enforcement actions, shareholders may sue a corporation's officers and directors for violating § 14(a) either directly or derivatively.[52] The most common federal claim in derivative suits is based in Exchange Act § 14(a), which prohibits material misstatements or omissions in a corporation's proxy statements.[53] Plaintiffs may prefer to bring § 14(a) claims instead of, or in conjunction with, state law breach of fiduciary duty claims because § 14(a) only requires plaintiffs to prove negligence by defendants.[54] In contrast, the state law breach of fiduciary duty claims that cover proxy misstatements—such as breach of duty of loyalty claims—require the plaintiff to prove scienter by defendants. Scienter is a much more demanding, intent-based, bad-faith standard.[55] Section 14(a)'s negligence standard also

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49 *See, e.g.*, *Lee I*, 34 F.4th at 779 (citing 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a)).

50 *Borak*, 377 U.S. at 432.

51 *Id.* (holding that "[w]hile [§ 14(a)] makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result").

In the decades since *Borak*, the Supreme Court has largely abandoned the practice of reading implied private rights of action into statutes where such rights are not expressly granted. *See, e.g.*, *Lee III*, 70 F.4th at 1144–46; *Seafarers*, 23 F.4th at 729–30 (Easterbrook, J., dissenting); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1104 (1991). As a result, *Borak* has drawn modern criticism, especially with respect to its establishment of a private right to bring a *derivative* § 14(a) action. The *Lee* en banc majority described the *Borak* Court's discussion regarding derivative actions as "not well-explained or well-reasoned," and because *Borak*'s shareholder-plaintiff did not himself bring a derivative claim, the en banc majority suggested that this aspect of the *Borak* opinion is merely dicta. *Lee III*, 70 F.4th at 1144–46. Similarly, in his *Seafarers* dissent, Judge Frank Easterbrook described *Borak* as "derelict" and "limited to its facts." *Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting).

Nonetheless, the Supreme Court has never formally overturned *Borak*, and shareholder-plaintiffs continue to bring derivative § 14(a) suits. *See, e.g.*, Reschini v. First Fed. Sav. & Loan Ass'n of Ind., 46 F.3d 246, 255 (3d Cir. 1995) ("*Borak* . . . is still good law as a construction of the 1934 Act and Rule 14a–9.").

52 *Borak*, 377 U.S. at 431.

53 *See* Lutz & Kahn, *supra* note 46; *see also* Exchange Act § 14(a), 15 U.S.C. § 78n.

54 Lutz & Kahn, *supra* note 46.

55 *Id.*

makes § 14(a) a more plaintiff-friendly cause of action than § 10(b), the Exchange Act's catchall antifraud provision, which also requires plaintiffs to prove scienter.[56]

There are also practical reasons why a shareholder-plaintiff may choose to bring a derivative § 14(a) suit. The Private Securities Litigation Reform Act of 1995[57] (PSLRA) requires that direct claims, but not derivative claims, be consolidated into a single case. Professor Ann Lipton has explained that this consolidation requirement may incentivize plaintiffs' firms "who miss out on a class lead counsel appointment [for the direct suit] to file derivative actions instead."[58] This was likely a motivating factor for Seafarers' derivative suit, as other Boeing shareholders had already filed direct suits against Boeing alleging § 14(a) violations related to the 737 MAX crashes.[59]

B. Forum Selection Bylaws for Delaware Corporations

Many Delaware corporations' charters and bylaws contain forum selection clauses designating Delaware courts as the exclusive forum for shareholder derivative suits. These forum selection clauses typically require shareholders to file "any derivative action or proceeding brought on behalf of the Corporation" in the Delaware Court of Chancery.[60] Forum selection clauses have long been commonplace within corporations' material contracts, but they have only become common within Delaware corporations' governing documents over the last several years.[61] In 2010, the Delaware Court of Chancery explained in the dicta of its *In re Revlon, Inc. Shareholders Litigation*[62] opinion that corporations may adopt forum selection clauses in their charters and bylaws as a method for more efficiently adjudicating shareholder disputes and avoiding duplicative litigation in multiple forums.[63] *Revlon* spurred rampant adoption of forum selection clauses among Delaware corporations. Before 2010, only a handful of publicly

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56 Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 319 (2007).

57 15 U.S.C. § 78u-4.

58 Ann M. Lipton, *And the* Salzberg v. Sciabacucchi *Fallout Begins*, BUS. L. PROF BLOG (June 11, 2020), https://perma.cc/PDX5-U26V.

59 *Id.*

60 *See, e.g.*, *Lee I*, 34 F.4th at 779; *Seafarers*, 23 F.4th at 718.

61 Andrew Holt, *Protecting Delaware Corporate Law: Section 115 and Its Underlying Ramifications*, 5 AM. U. BUS. L. REV. 209, 210 (2016).

62 990 A.2d 940 (Del. Ch. 2010).

63 Holt, *supra* note 61, at 212.

traded companies had forum selection clauses in their charters or bylaws; by 2014, more than seven hundred publicly traded companies across the United States had adopted a forum selection clause (though not all of those companies designated Delaware courts as the chosen forum).[64] In addition to helping corporations avoid forum disputes, forum selection clauses also ensure greater stability in shareholder litigation outcomes by limiting variance across jurisdictions.[65]

In 2015, Delaware codified this practice by enacting § 115 of the Delaware General Corporation Law[66] (DGCL).[67] Section 115 provides that a Delaware corporation's charter or bylaws may require *internal corporate claims* to be brought in Delaware courts.[68] Section 115 defines internal corporate claims to include traditional derivative claims involving state law breaches of fiduciary duties.[69] Whether derivative claims arising under the federal securities laws are also considered internal corporate claims is a more complicated question, discussed in detail in Part III.B.

C. Enforcement of Forum Selection Clauses

Forum selection clauses have been rigorously enforced over the past several decades. As a result, Professor John Coyle has explained that forum selection clauses "are today given effect in the overwhelming majority of cases."[70] This trend began with *M/S Bremen v. Zapata Off-Shore Co.*,[71] the Supreme Court's 1972 decision.

In *Bremen*, the Court established a default presumption that forum selection clauses "are prima facie valid and should be enforced" unless one of several exceptions apply.[72] Specifically, *Bremen* established that forum selection clauses are

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64 Gardner & Townsend, *supra* note 11.

65 *See, e.g.*, Anna Fiscella, Article, *An Exclusive Solution to the Multitude of Problems in Multi-Forum Shareholder Litigation*, 42 DEL. J. CORP. L. 687, 690, 696 (2018).

66 DEL. CODE ANN. TIT. 8 § 115.

67 Holt, *supra* note 61, at 209–10.

68 DEL. CODE ANN. TIT. 8 § 115; *see also* James G. McMillan, *Delaware Corporations Can Keep Federal Securities Law Claims Out of State Courts: Delaware Supreme Court Overrules* Sciabacucchi, AM. BAR ASS'N (May 20, 2020), https://perma.cc/B4GF-UVPE.

69 DEL. CODE ANN. TIT. 8 § 115 (defining "internal corporate claims" to include "claims, including claims in the right of the corporation, [ ] that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity").

70 Coyle, *supra* note 27, at 132.

71 *Id.* at 143.

72 *Bremen*, 407 U.S. at 10.

unenforceable when (1) the forum selection clause is induced by "fraud or overreaching"; (2) enforcement of the clause "would contravene a strong public policy of the forum in which suit is brought"; or (3) when enforcing the bylaw would be "'unreasonable' under the circumstances."[73]

Bremen also suggests that in order for a forum selection clause to have effect, it must be both valid and enforceable, and that validity and enforceability are distinct legal concepts.[74] However, the Supreme Court never defined these concepts with precision. In subsequent decisions, the Court has referenced validity as a prerequisite to a forum selection clause's presumed enforceability. Justice Anthony Kennedy's 1988 concurrence in *Stewart Organization, Inc. v. Ricoh Corp.*[75] reiterated that "a *valid* forum-selection clause is [to be] given controlling weight in all but the most exceptional cases."[76] Most recently, in 2013, the Court held in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*[77] that "[w]hen [ ] parties have agreed to a *valid* forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause," absent "extraordinary circumstances."[78] In each of these decisions, the Court referenced the *validity* of the forum selection clause as a prerequisite to the presumption of enforceability. However, as Professor Coyle has observed, the Supreme Court has largely avoided "the most complex and vexing issue relating to forum selection clauses: the issue of when a forum selection clause is valid in the first place."[79] In *Atlantic Marine*, the Court dodged this question by simply noting in a footnote that its "analysis presupposes a contractually valid forum-selection clause."[80]

Perhaps unsurprisingly, then, lower courts do not always use these terms with precision, and often discuss validity and enforceability interchangeably.[81] As discussed in Part II, the Ninth Circuit en banc majority's analysis in *Lee* is exceptionally precise and distinguishes the validity and enforceability

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73 *Id.* at 10, 15.
74 *Id.*
75 487 U.S. 22 (1988).
76 *Id.* at 33 (Kennedy, J., concurring) (emphasis added).
77 571 U.S. 49 (2013).
78 *Id.* at 62 (emphasis added).
79 Coyle, *supra* note 27, at 129.
80 *Atlantic Marine*, 571 U.S. at 62 n.5.
81 Coyle, *supra* note 27, at 129 & nn.7–8.

inquiries. In contrast, the Seventh Circuit majority in *Seafarers* seems to conflate validity and enforceability analysis.

D. Federal Jurisdiction and Antiwaiver Provisions of the Exchange Act

Two other Exchange Act sections are relevant to assessing the validity and enforceability of Delaware forum selection clauses with respect to derivative § 14(a) claims: § 27(a)[82] and § 29(a).[83] First, § 27(a) of the Exchange Act provides that federal courts have exclusive jurisdiction over claims that arise under the Act.[84] This means that Delaware state courts do not have authority to adjudicate Exchange Act claims. Section 27(a) stands in stark contrast to the Securities Act of 1933[85] (Securities Act) and four other major federal securities laws, all of which provide for concurrent jurisdiction of federal and state courts.[86]

Congress's rationale for providing exclusive federal jurisdiction in the Exchange Act alone remains a matter of speculation.[87] In a study comparing the jurisdictional provisions of the Securities Act and the Exchange Act, the American Law Institute concluded that "[s]o far as the legislative history shows, th[e] difference in these two related statutes is pure happenstance."[88] Despite its seeming peculiarity, Congress has not amended the Exchange Act's federal exclusivity provision, and courts continue to enforce it.

Second, § 29(a) of the Exchange Act provides that corporations may not waive compliance with the provisions of the Act by contract.[89] Any provision that *does* waive compliance with the Exchange Act "shall be void."[90] Plaintiffs in *Seafarers* and *Lee* relied on § 29(a) to argue that corporations may not waive federal

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82 15 U.S.C. § 78aa.

83 Securities Exchange Act of 1934 § 29(a), 15 U.S.C. § 78cc.

84 15 U.S.C. § 78aa.

85 15 U.S.C. § 77a.

86 Margaret V. Sachs, *Exclusive Federal Jurisdiction for Implied Rule 10b-5 Actions: The Emperor Has No Clothes*, 49 OHIO ST. L.J. 559, 561–62 (1988); *see also* Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (1982); Public Utility Holding Company Act of 1935 § 25, 15 U.S.C. § 79y (1982); Trust Indenture Act of 1939 § 322(b), 15 U.S.C. § 77vvv(b) (1982); Investment Company Act of 1940 § 44, 15 U.S.C. § 80a-43 (1982); Investment Advisers Act of 1940 § 214, 15 U.S.C. § 80b-14 (1982).

87 *See* Sachs, *supra* note 86, at 561–62.

88 *Id.* at 579 (alteration in original) (quoting AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 183 (1969)).

89 15 U.S.C. § 78cc(a); *see also Seafarers*, 23 F.4th at 720.

90 15 U.S.C. § 78cc(a).

courts' exclusive jurisdiction over Exchange Act claims by writing a Delaware forum selection clause into their bylaws.[91]

Critically, however, § 29(a)'s antiwaiver provision is not absolute. The Supreme Court has interpreted § 29(a) to "only prohibit[ ] waiver of the *substantive* obligations imposed by the Exchange Act"—that is, "any duty with which persons trading in securities must 'comply.'"[92] The dispositive question thus becomes whether a forum selection clause requiring all derivative claims to be brought in Delaware court constitutes a waiver of *substantive* compliance of the Exchange Act. At least once before, the Supreme Court has answered that it does not. In *Shearson/American Express, Inc. v. McMahon*,[93] the McMahons filed suit against their brokerage firm, Shearson/American Express Inc. (Shearson), alleging that Shearson violated Exchange Act § 10(b) by fraudulently trading on the McMahons' accounts.[94] Shearson moved to enforce an arbitration clause in the McMahons' brokerage agreement to transfer the case to arbitration.[95] The McMahons argued that the arbitration clause was unenforceable because it violated Exchange Act §§ 27 and 29(a).[96] The Supreme Court rejected this argument, and held that the federal exclusivity provision, § 27(a), *was* waivable in this context. The Court reasoned that "[b]ecause § 27 does not impose any statutory duties, its waiver does *not* constitute a waiver" of substantive compliance with the Exchange Act under § 29(a).[97] Instead, the *Shearson* Court viewed § 27(a) as a merely procedural provision, which could be waived without violating § 29(a). The Court allowed *Shearson* to transfer the case to an alternative, arbitral forum.[98]

Boeing's and Gap's forum selection bylaws go a step further than the arbitration clause at issue in *Shearson*. Their bylaws do not provide an alternative forum in which the plaintiffs may bring their derivative § 14(a) claims. Instead, the bylaws operate to prevent plaintiffs from bringing their claims—at least derivatively—in *any* court. As discussed in greater detail below,

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91 *Seafarers*, 23 F.4th at 720; *Lee III,* 70 F.4th at 1138; Appellant's Reply Brief at 5, Lee *ex rel.* The Gap, Inc v. Fisher, 34 F.4th 777 (9th Cir. 2022) (No. 21-15923).

92 Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 228 (1987) (emphasis added).

93 482 U.S. 220 (1987).

94 *Id.* at 222–23.

95 *Id.* at 223.

96 *Id.* at 228.

97 *Id.* (emphasis added).

98 *Shearson*, 482 U.S. at 229–30.

it is unclear whether *Shearson* extends to tolerate waiver of § 27(a) under these circumstances.

II. DIVERGENT APPROACHES AT THE CIRCUIT LEVEL

In 2022 and 2023, both the Seventh and Ninth Circuits grappled with determining whether forum selection bylaws are enforceable against derivative § 14(a) claims in *Seafarers* and *Lee*, respectively. Despite very similar facts and identical causes of action in the two cases before the courts, the Seventh and Ninth Circuits adopted vastly different frameworks to assess the validity and enforceability of the bylaws at issue and reached opposite conclusions.

This Part proceeds in two sections. Part II.A summarizes the Seventh Circuit's decision in *Seafarers*, which held that the forum selection bylaw at issue was unenforceable. Part II.B summarizes the Ninth Circuit en banc decision in *Lee*, which held that the forum selection bylaw at issue was valid and enforceable.

A. The Seventh Circuit's Decision in *Seafarers*

As summarized in the Introduction, after two fatal crashes occurred involving Boeing 737 MAX airplanes, plaintiff Seafarers Pension Plan (a Boeing shareholder) brought a derivative suit in federal court on behalf of Boeing (a Delaware corporation) alleging that Boeing's officers and directors violated § 14(a) of the Exchange Act.[99] Specifically, Seafarers alleged that the Boeing defendants made materially false and misleading public statements about the development and operation of the 737 MAX in Boeing's proxy statements.[100] The Northern District of Illinois dismissed the suit by applying Boeing's bylaw that designated the Delaware Court of Chancery as the forum for all derivative suits.[101]

On appeal, a divided Seventh Circuit panel held that Boeing's bylaw was unenforceable as applied to Seafarers' derivative § 14(a) claim.[102] The majority held:

> Because the federal Exchange Act gives federal courts exclusive jurisdiction over actions under it, applying the bylaw to this case would mean that plaintiff's derivative

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99 *Seafarers*, 23 F.4th at 717.

100 *Id.*

101 *Id.* at 717–18.

102 *Id.* at 718.

> Section 14(a) action may not be heard in any forum. That result would be contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal
> Exchange Act.[103]

The Seventh Circuit did not apply the Supreme Court's *Bremen* precedent. As described in Part I.C, *Bremen* established a default presumption that forum selection clauses are enforceable unless certain exceptions apply.[104] The majority distinguished *Bremen* as inapplicable to *Seafarers* because *Bremen* "involved a purely private contractual dispute," rather than a claim arising under a federal statute like the Exchange Act.[105] Instead, the majority focused primarily on Delaware law, specifically DGCL § 115, which provides that a Delaware corporation's "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."[106] The majority highlighted the statute's qualifier that bylaws must be "consistent with applicable jurisdictional requirements."[107] According to the majority, the Exchange Act's "applicable jurisdictional requirements" grant federal courts exclusive jurisdiction (§ 27(a)), and prohibit contractual waivers of compliance with the Act (§ 29(a)).[108]

Judge Frank Easterbrook dissented. Judge Easterbrook emphasized the Supreme Court's *Shearson* precedent. He stressed that the *Shearson* Court held that the Exchange Act's antiwaiver provision does not apply to § 27(a); rather, "the anti-waiver clause in § 29(a) . . . is limited to the Act's *substantive* standards."[109] Judge Easterbrook also argued that enforcing Boeing's forum selection bylaw and dismissing the derivative § 14(a) claim would not actually "deprive[ ] [Seafarers] of a right to enforce § 14(a)," since a plaintiff could theoretically still bring

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103 *Id.* at 717.
104 *Bremen*, 407 U.S. at 10.
105 *Seafarers*, 23 F.4th at 725.
106 DEL. CODE ANN. TIT. 8 § 115 (emphasis added).
107 *Seafarers*, 23 F.4th at 720.
108 *Id.* at 717.
109 *Id.* at 730 (Easterbrook, J., dissenting) (emphasis added).

a direct § 14(a) claim, which would not be subject to the forum selection bylaw.[110]

B. The Ninth Circuit's Decision in *Lee*

Just a few months after the Seventh Circuit decided to enforce Boeing's forum selection bylaw in *Seafarers*, the Ninth Circuit confronted a very similar case. In the wake of heightened racial tensions and widespread protests across the United States in 2020, plaintiff Noelle Lee (a Gap shareholder) brought a derivative suit in federal court on behalf of The Gap, Inc. (a Delaware corporation) alleging that Gap officers and directors had violated § 14(a) of the Exchange Act.[111] Specifically, Lee argued that Gap's officers and directors made materially false and misleading statements about the level of diversity they had achieved within the company in Gap's proxy statements.[112] The Northern District of California dismissed the suit by applying Gap's bylaw that designated the Delaware Court of Chancery as the forum for all derivative suits.[113]

Lee appealed to the Ninth Circuit. A unanimous three-judge panel held that Gap's bylaw was enforceable and dismissed Lee's case from federal court in May 2022.[114] In October 2022, the Ninth Circuit vacated the panel's decision and granted a petition to rehear *Lee* en banc before an expanded panel of eleven judges.[115] In June 2023, a 6–5 divided en banc panel narrowly affirmed the decision to enforce Gap's bylaw.[116]

In contrast to the Seventh Circuit in *Seafarers*, which viewed its analysis of Boeing's forum selection bylaw as involving the singular question of enforceability, the *Lee* en banc majority viewed its analysis of Gap's nearly identical forum selection bylaw as involving three, distinct questions: whether (1) Gap's forum selection bylaw is invalid because it violates Delaware law; (2) Gap's forum selection bylaw is invalid because it violates the Exchange Act's antiwaiver provision, § 29(a); and (3) Gap's forum

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110 *Id.* at 729.
111 *Lee I*, 34 F.4th at 779.
112 *Id.*
113 *Id.* at 780.
114 *Id.* at 779.
115 *Lee II*, 54 F.4th at 608.
116 *Lee III*, 70 F.4th at 1135.

selection bylaw is unenforceable under *Bremen*, because enforcement would violate a strong federal public policy.[117]

The *Lee* en banc majority answered "no" to all three questions and affirmed the panel's decision to enforce Gap's forum selection bylaw.[118] The en banc majority disagreed with the *Seafarers* majority's interpretation of DGCL § 115 and instead concluded that Gap's bylaw was valid under Delaware law.[119] The en banc majority also agreed with Judge Easterbrook's interpretation of *Shearson* from his *Seafarers* dissent.[120] The en banc majority held that Gap's bylaw was valid under federal law and did not violate the Exchange Act's antiwaiver provision, § 29(a), because merely waiving § 27(a)'s exclusive federal jurisdiction provision "does not waive Gap's compliance with the substantive obligations" of the Exchange Act.[121] Finally, the en banc majority disagreed with the *Seafarers* majority's conclusion that *Bremen* is inapplicable to a claim arising under a federal statute such as § 14(a).[122] Instead, the en banc majority held that Gap's forum selection bylaw was enforceable because *Bremen*'s public policy exception was not satisfied.[123] Importantly, the appellant Lee only argued that the second *Bremen* exception applied—enforcing Gap's bylaw would "contravene a strong public policy" of the federal forum in which the suit was brought.[124] Therefore, the Ninth Circuit did not address whether Gap's bylaw satisfied the other *Bremen* exceptions.

However, this analysis was far from unanimous. Five members of the eleven-judge en banc panel dissented. The dissenting judges argued that Gap's forum selection bylaw is invalid under federal law because it violates the text of the Exchange Act's antiwaiver provision, § 29(a), and "deprives [Lee] of the ability to bring her derivative claim under § 14(a) . . . in any forum—thereby resulting in complete waiver of the claim."[125] Because the dissent found Gap's bylaw invalid under federal law,

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117 *Id*. Note that the *Lee* en banc majority listed these three inquiries in a different order in its opinion; this Comment reorders the inquiries for clarity.

118 *Id*.

119 *Id*.

120 *Id*. at 1158.

121 *Lee III*, 70 F.4th at 1143.

122 *Id*.

123 *Id*. at 1151.

124 *Lee I*, 34 F.4th at 780–81 (quoting *Bremen*, 407 U.S. at 15).

125 *Lee III*, 70 F.4th at 1160 (Thomas, J., dissenting).

it did not reach the question of validity under Delaware law.[126] The dissent also diverged on the issue of enforceability and found that Gap's bylaw *did* indeed satisfy *Bremen*'s public policy exception, meaning the bylaw was unenforceable.[127] The dissent argued that enforcing Gap's bylaw would violate two federal public policies, as articulated by (1) the Exchange Act's antiwaiver provision, § 29(a), and (2) the Exchange Act's exclusive federal jurisdiction provision, § 27(a).[128]

III. LEGAL FRAMEWORK

Given that *Seafarers* and *Lee* involved nearly identical legal claims and procedural postures, one might reasonably expect that the Seventh and Ninth Circuits' opinions would have followed similar analytical approaches. However, not only did the courts reach opposite conclusions, they adopted completely different frameworks to reach those conclusions. This divergence reflects a lack of consensus among Courts of Appeals as to the proper framework for assessing the validity and enforceability of a forum selection clause.

This Part argues that the Ninth Circuit en banc majority adopted the correct, three-part legal framework for determining whether a Delaware forum selection bylaw is enforceable with respect to a claim arising under the Exchange Act. The Ninth Circuit appropriately identified that determining whether a forum selection bylaw has effect requires answering three underlying legal questions: (1) whether the forum selection clause is valid as a matter of state law contract principles; (2) whether the forum selection clause is valid under federal law, as articulated by the Exchange Act's antiwaiver provision § 29(a); and (3) whether the forum selection clause is enforceable as-applied under federal law.

Part III.A provides an overview of this three-part framework. Parts III.B and III.C demonstrate that the Ninth Circuit analyzed the validity inquiries (1) and (2) correctly, while the Seventh Circuit misinterpreted relevant Delaware Supreme Court precedent and neglected to consider the federal law question. With respect to (3) enforceability, Part III.D

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126 *Id.* at 1159–65 (Thomas, J., dissenting).

127 *Id.* at 1167.

128 *Id.* at 1165–67.

demonstrates that the Ninth Circuit appropriately identified *Bremen* as controlling but misapplied *Bremen*'s public policy exception, while the Seventh Circuit erroneously distinguished *Bremen* as inapplicable.

A. Overview of Three-Part Framework

Determining whether a forum selection bylaw should be given effect with respect to a claim arising under the Exchange Act requires answering three underlying questions. In order for the bylaw to be effective, all three questions must be answered affirmatively.[129]

First, validity must be the threshold inquiry, as "any analysis of a forum-selection clause's enforceability 'presupposes a contractually valid forum-selection clause.'"[130] State law principles of contract interpretation generally govern a forum selection clause's validity—that is, whether the language of the forum selection clause represents a binding agreement between the parties to resolve their disputes in a particular forum.[131] Thus, when the forum selection clause at issue is contained in a Delaware corporation's bylaws, the threshold question is whether the forum selection clause is valid as a matter of Delaware law. If the forum selection clause is void under Delaware law, the analysis need not reach the next two questions.

Second, in the context of the Exchange Act, the validity inquiry also has a federal law prong. Section 29(a) provides that any contract clause that allows parties to waive compliance with the Exchange Act "shall be void."[132] Thus, the second requisite question is whether the forum selection clause is valid under federal law—specifically, the Exchange Act.[133] If the forum selection clause is void as violating Exchange Act § 29(a), the analysis need not reach the final, enforceability question.

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[129] Professor Coyle proposed a substantively similar framework in an article published prior to the Ninth Circuit's *Lee III* en banc decision. Coyle, *supra* note 27, at 138 ("The first step in determining whether a forum selection clause is contractually valid is to ascertain whether that clause is valid as a matter of contract law."); *id.* at 142 ("The second step . . . is to interpret the clause. A clause is only 'contractually valid' when it is exclusive and broad enough to cover the claims asserted."); *id.* at 131 ("Third, the court must determine whether the clause is *enforceable*." (emphasis in original)).

[130] *Lee III*, 70 F.4th at 1160 (Thomas, J., dissenting) (quoting *Atlantic Marine*, 571 U.S. at 62 n.5).

[131] Coyle, *supra* note 27, at 130, 145 n.116.

[132] 15 U.S.C. § 78cc(a).

[133] *See Lee III*, 70 F.4th at 1135.

Third, only after a forum selection clause is deemed valid does it become necessary to assess whether the clause is enforceable as-applied—that is, whether the bylaw shall be given effect in a particular case.[134] The Supreme Court has held that federal law governs enforceability when the suit is brought in federal court.[135]

B. Validity Under Delaware Law

Because the forum selection clauses at issue in *Seafarers* and *Lee* are contained in Delaware corporations' bylaws, the first inquiry is whether the forum selection clauses are valid under Delaware state law. This Section argues that they are. First, it shows that the Ninth Circuit got this inquiry right, while the Seventh Circuit's analysis of Delaware law failed to account for relevant state supreme court precedent. Second, this Section explains that the Seventh Circuit actually analyzed validity under Delaware law but mislabeled its analysis as a discussion of enforceability.

The Ninth Circuit appropriately concluded that Gap's forum selection bylaw is valid under Delaware law. The Ninth Circuit's analysis of Delaware law in *Lee* relied on the Delaware Supreme Court's *Salzberg v. Sciabacucchi*[136] precedent. The Seventh Circuit, on the other hand, misconstrued *Salzberg* in *Seafarers* and erroneously held that Boeing's bylaw was unenforceable as-applied because it violates DGCL § 115.[137] Section 115 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*."[138] The *Seafarers* majority reasoned that Boeing's bylaw violates § 115 as applied because it is inconsistent

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134 *See* Coyle, *supra* note 27, at 142–44.

135 *See generally Stewart*, 487 U.S. at 32 (holding that federal law applies in determining if a forum selection clause is enforceable). *See also* Coyle, *supra* note 27, at 165–66.

In *Stewart*, the Court grappled with complicated choice-of-law questions when an Alabama corporation sought to enforce a forum selection clause in order to transfer a contract dispute from a federal district court in Alabama to a federal district court in New York. *Stewart*, 487 U.S. at 24. Alabama law strongly disfavored enforcing forum selection clauses, but the Court held that "federal law . . . governs the . . . decision whether to give effect to the parties' forum-selection clause," *id.* at 32, "notwithstanding any contrary Alabama policy," *id.* at 30 n.9.

136 227 A.3d 102 (Del. 2020).

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

138 DEL. CODE ANN. TIT. 8 § 115 (emphasis added).

with the exclusive federal jurisdictional requirements of the Exchange Act.[139]

Boeing countered that § 115 is irrelevant because the bylaw is governed by a separate provision of the DGCL, § 109(b), which broadly provides that a corporation's "bylaws may contain any provision, not inconsistent with law . . . relating to the business of the corporation."[140] The majority dismissed Boeing's argument by employing a standard canon of statutory interpretation that the specific governs the general.[141] The majority reasoned that § 115's narrower scope limits § 109(b), so § 115 controls.[142]

However, the Ninth Circuit rightly recognized that this reasoning flies in the face of the Delaware Supreme Court's own reading of § 115 as articulated in *Salzberg*.[143] In *Salzberg*, the Delaware Supreme Court described a continuum of corporate affairs. Purely internal affairs claims "brought by stockholders *qua* stockholders," sit on one end of the continuum, and are governed by § 115.[144] "[P]urely 'external' claims," such as tort and commercial contract claims, sit on the other end of the continuum, and fall outside the scope of Delaware law.[145] However, the court described a third category of claims that fall within the "Outer Band" of what is "traditionally defined as 'internal affairs' . . . but are, nevertheless, 'internal' or 'intracorporate.'"[146]

Salzberg involved a different kind of forum selection clause contained in a Delaware corporation's charter, which designated *federal* courts as the exclusive forum for claims arising under the Securities Act. The Delaware Supreme Court classified the claims covered by this forum selection clause as falling within the third, "Outer Band" category. The court noted that "Section 115, read fairly, *does not address* the propriety of forum-selection provisions applicable to [this third category] of claims."[147] Although the claims fell outside the scope of § 115, the court held that they

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

140 *Id.* at 721 (quoting DEL. CODE ANN. TIT. 8 § 109(b)).

141 *Id.*

142 *Id.* ("We start with the general principle . . . that more specific statutory provisions, like Section 115 for bylaws with forum-selection clauses, ordinarily take precedence over more general provisions like Section 109.").

143 *Lee III*, 70 F.4th at 1153–56.

144 *Salzberg*, 227 A.3d at 124 (quotation marks omitted) (quoting Sciabacucchi v. Salzberg, 2018 WL 6719718, at *1 (Del. Ch. Dec. 19, 2018)).

145 *Id.* at 131.

146 *Id.*

147 *Id.* at 119 (emphasis added).

remained "within the scope of Section 102(b)(1),"[148] a broader provision of the DGCL that governs the contents of a corporation's charter. Critically, the court clarified that § 115 does "[n]ot [a]lter Section 102(b)(1)'s [b]road [s]cope."[149] Thus, *Salzberg* expressly rejects the application of the specific governs the general canon in the context of § 115. Although § 115 is more specific than § 102(b)(1), it does not limit § 102(b)(1)'s scope.

As applied to Seafarers's derivative Exchange Act claim, Boeing's forum selection bylaw falls into the same "Outer Band" category as the forum selection clause at issue in *Salzberg*. Much like a Securities Act claim, an Exchange Act claim is distinct from internal affairs claims brought by "stockholders *qua* stockholders."[150] Therefore, its permissibility is not governed by § 115; rather, the court must "look elsewhere . . . to determine whether the provision is permissible."[151]

In *Salzberg*, the proper alternative provision that the Delaware Supreme Court looked to was § 102(b)(1), which governs matters that may be contained in a corporation's *charter*.[152] In *Seafarers* and *Lee*, the forum selection provisions at issue were contained in the corporations' *bylaws*. Section 109(b) is the analogous provision governing matters that may be contained in a corporation's bylaws.[153] Just as the Delaware Supreme Court instructed that § 115 should not be read as narrowing the scope of § 102(b)(1), § 115 should not be read as narrowing the scope of analogous § 109(b) either. The Ninth Circuit en banc majority embraced this argument in *Lee*, ultimately concluding that "Section 115, as interpreted by *Salzberg* . . . does not implicitly forbid [forum selection] clauses unless they prevent a plaintiff from bringing state-law claims in Delaware courts."[154]

Although there are practical differences between corporate charters and bylaws, *Salzberg* still applies when analyzing

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148 *Id.* at 131.

149 *Salzberg*, 227 A.3d at 116.

150 *See id.* at 124.

151 *Id.* at 119.

152 *Id.* at 113.

153 DEL. CODE ANN. TIT. 8 § 109(b).

154 *Lee III*, 70 F.4th at 1153; *see also id.* at 1156 ("[*Salzberg*] held that '[f]orum provisions were valid [under Section 109(b)] prior to Section 115's enactment," and Section 115 'did not establish the outer limit of what is permissible under . . . Section 109(b).'" (quoting *Salzberg*, 227 A.3d at 120, 123) (alterations in original) (citations omitted)).

Boeing's forum selection bylaw under Delaware law. For instance, corporate bylaws may typically be unilaterally amended by directors, while charter amendments typically require a shareholder vote.[155] However, the Delaware laws regulating the contents of these documents are substantively the same, as reflected by their nearly identical language. Section 102(b)(1) instructs that a charter may contain "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation,"[156] and § 109(b) instructs that bylaws may contain "any provision . . . relating to the business of the corporation [and] the conduct of its affairs."[157]

Second, although the Seventh Circuit *Seafarers* majority focused almost exclusively on Delaware law,[158] the court did not actually address *validity* under Delaware law. Instead, the majority conflated the validity and enforceability analyses and erroneously couched its holding in terms of enforceability. The Seventh Circuit held that Boeing's "bylaw is *unenforceable* as applied to this case because its application would violate § 115 of the Delaware General Corporation Law."[159] But as explained in Part III.A, the Supreme Court has instructed that *federal* law governs the enforceability inquiry when the case is brought in federal court.[160] Thus, the Seventh Circuit's holding that Boeing's bylaw is "*unenforceable*"[161] is difficult to square with its reasoning that such bylaw would violate *Delaware* law. Instead, the Seventh Circuit's analysis of Delaware law goes to the question of the bylaw's *validity* as a matter of state law.

The preceding analysis demonstrates that the Ninth Circuit got the first step of its analysis—validity under Delaware law—right, while the Seventh Circuit got it wrong. The Seventh Circuit incorrectly interpreted DGCL § 115 as rendering Boeing's bylaw unenforceable. But the discussion of § 115 goes to validity, not enforceability. And even more critically, § 115 does not render Boeing's bylaw invalid at all; the bylaw is valid under DGCL

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155 Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 353–54, 361 (2023) [hereinafter Lipton, *Inside Out*].

156 DEL. CODE ANN. TIT. 8 § 102(b)(1).

157 DEL. CODE ANN. TIT. 8 § 109(b).

158 *Seafarers*, 23 F.4th at 724.

159 *Id.* at 718 (emphasis added).

160 *See* Coyle, *supra* note 27, at 165–66.

161 *Seafarers*, 23 F.4th at 718 (emphasis added).

§ 109(b). The forum selection bylaws at issue in *Seafarers* and *Lee* are valid under Delaware law.

C. Validity Under Federal Law

After determining that the forum selection bylaws at issue in *Seafarers* and *Lee* are valid under Delaware law, the next inquiry is whether the bylaws are valid under federal law, as articulated by the Exchange Act. This Section argues that Boeing's and Gap's bylaws are valid under federal law. Part III.C.1 shows that the Ninth Circuit en banc majority got this inquiry right in *Lee*, while Part III.C.2 shows that the Seventh Circuit majority neglected to consider this question in *Seafarers*.

1. The Ninth Circuit appropriately concluded that the forum selection bylaw is valid under Exchange Act § 29(a).

Section 27(a) of the Exchange Act expressly designates *federal* courts as the exclusive forum for all claims arising under the Act, and § 29(a) instructs that any contract provision attempting to "waive compliance with any provision" of the Act "shall be void."[162] Therefore, based on statutory text alone, plaintiffs in *Seafarers* and *Lee* have a strong argument that a forum selection clause designating the Delaware Court of Chancery as the exclusive forum to hear a derivative § 14(a) claim is void and invalid under federal law, as articulated by Exchange Act § 29(a).

However, the statutory text is not the only applicable authority governing validity of a forum selection clause under the federal Exchange Act. As discussed in Part I.D, the Supreme Court held in *Shearson* that § 27(a)'s exclusive federal jurisdiction provision *was* waivable in a dispute over the enforceability of an arbitration clause.[163] The Supreme Court has separately opined that "[a]n agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause."[164] Because *Shearson* held that enforcing an arbitration clause does not violate Exchange Act § 27(a) or § 29(a), and because an arbitration clause is a "specialized kind of forum-selection

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[162] 15 U.S.C. § 78cc(a).

[163] *Shearson*, 482 U.S. at 227; *see also Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting).

[164] Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

clause," it follows that enforcing a forum selection clause does not violate § 27(a) or § 29(a) either. The Ninth Circuit en banc majority summarized:

> Like the arbitration clause in [*Shearson*], Gap's forum-selection clause does not waive Gap's compliance with any substantive obligation . . . imposed by the Exchange Act. A shareholder can enforce Gap's statutory duty to comply with § 14(a) by means of a direct action in federal court, just as the investors in [*Shearson*] could enforce compliance with Exchange Act duties in an arbitral forum.[165]

Judge Easterbrook echoed this argument in his *Seafarers* dissent. He noted that *Shearson* "treats [federal courts'] exclusivity under § 27(a) as a right that people *may* waive."[166] Based on the Supreme Court's interpretation of Exchange Act §§ 27(a) and 29(a) in *Shearson*, the forum selection bylaws at issue in *Seafarers* and *Lee* are valid under federal law.

2. The Seventh Circuit majority dodged the question of validity under federal law.

The Seventh Circuit majority did not even cite *Shearson* in its *Seafarers* opinion. Instead, the majority's assessment of validity under federal law began and ended with a single sentence. The court quickly noted that enforcing Boeing's bylaw "would be difficult to reconcile with Section 29(a) of the Exchange Act, which deems void contractual waivers of compliance with the requirements of the Act."[167] Thus, the Seventh Circuit's analysis of validity under federal law is insufficient, as it fails to address relevant Supreme Court caselaw.

The Seventh Circuit did not explain *why* it viewed Delaware law as dispositive. The court merely noted that Delaware corporation law provided "the most straightforward resolution of this appeal."[168] Professor Lipton has commented that the *Seafarers* majority opinion's discussion of federal law is "almost an afterthought."[169] Instead, the court's "primary focus . . . is what *Delaware* thinks of such bylaws—and whether, amazingly, a

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165 *Lee III*, 70 F.4th at 1141.

166 *Seafarers*, 23 F.4th at 730 (Easterbrook, J., dissenting) (emphasis added).

167 *Id.* at 720.

168 *Id.* at 719.

169 Ann M. Lipton, *The Battle's Done, and We Kinda Won*, BUS. L. PROF BLOG (Jan. 14, 2022), https://perma.cc/S7TM-D97W.

Delaware Chancery [C]ourt thinks they violate the Exchange Act."[170] Lipton suggests that the *Seafarers* majority opinion is a "startling example of [ ] deference to Delaware,"[171] continuing a "broader trend of courts expanding the internal affairs doctrine . . . [and] ced[ing] an enormous amount of additional regulatory power to the state of Delaware."[172] By failing to cite or consider *Shearson* and instead focusing entirely on Delaware law, the Seventh Circuit did not properly assess the validity of Boeing's forum selection bylaw under federal law.

D. Enforceability under Federal Law

After determining that the forum selection bylaws at issue in *Seafarers* and *Lee* are valid under both Delaware and federal law, this Comment turns to the final inquiry: whether the bylaws are enforceable. This Section argues that neither circuit got this inquiry right. Part III.D.1 shows that the Ninth Circuit identified the correct legal test for assessing enforceability, based on the Supreme Court's *Bremen* framework, while the Seventh Circuit failed to apply *Bremen* at all. However, Part III.D.2 explains how the Ninth Circuit misapplied *Bremen*'s public policy exception.

1. The Ninth Circuit appropriately identified *Bremen* as the controlling test for enforceability, while the Seventh Circuit distinguished *Bremen* as inapplicable.

With respect to enforceability analysis, the Ninth Circuit rested on a straightforward application of *Bremen*. The *Lee* en banc majority held that Gap's bylaw was enforceable because it did not satisfy the *Bremen* exceptions.[173] Appellant Lee failed to show that Gap's bylaw satisfied *Bremen*'s public policy exception, and she did not argue that either of the other two exceptions applied.[174] In contrast, the Seventh Circuit did not apply any of the *Bremen* exceptions. The Seventh Circuit distinguished *Bremen* as inapplicable to *Seafarers*, because *Bremen* "did not involve any claim under a federal statute, let alone a federal statute with a nonwaiver provision like § 29(a) of the Exchange Act."[175] This Section argues that the Ninth Circuit's reliance on

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[170] *Id.*
[171] Lipton, *Inside Out*, *supra* note 155, at 363.
[172] *Id.* at 366.
[173] *Lee III*, 70 F.4th at 1151.
[174] *Lee I*, 34 F.4th at 780–81.
[175] *Seafarers*, 23 F.4th at 725.

Bremen was appropriate.

First, *Bremen* remains controlling in the context of claims arising under federal statutes. It is true that the facts of *Bremen* differ starkly from the facts at hand in *Seafarers* and *Lee*. *Bremen* involved a forum selection clause contained in an international agreement and was heard before a federal district court sitting in admiralty.[176] However, the Supreme Court did not limit its rule to admiralty or international cases.[177] The Supreme Court has also expressly extended *Bremen*'s reach to other contexts. For instance, *Stewart Organization, Inc. v. Ricoh Corp.* involved a purely domestic forum selection clause before a federal court sitting in diversity.[178] Justice Anthony Kennedy noted in his concurring opinion that, "[a]lthough our opinion in [*Bremen*] involved a Federal District Court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity."[179] Other Courts of Appeals have followed suit. For instance, the Second Circuit has applied *Bremen* in cases involving claims arising under several federal statutes including the Exchange Act,[180] as well as the Securities Act and Racketeer Influenced and Corrupt Organizations Act[181] (RICO Act), the Sherman Act,[182] and the Copyright Act.[183]

Second, *Bremen* remains controlling despite the fact that corporate bylaws differ from traditional, freely negotiated contracts. Some scholars have argued that "[t]he basic lack of meaningful shareholder consent to corporate bylaws makes those instruments a poor fit with the Supreme Court's forum-selection cases [which] emphasize consent at every turn."[184] By purchasing

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176 *Bremen*, 407 U.S. at 2–4.

177 *Id.* at 10–11 (citing Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964)).

178 *Stewart*, 487 U.S. at 24.

179 *Id.* at 33 (Kennedy, J., concurring).

180 *See* AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 156 (2d Cir. 1984) (citing 15 U.S.C. § 78j).

181 18 U.S.C. §§ 1961–1968; *see* Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1356, 1362–63 (2d Cir.1993) (citing 18 U.S.C. §§ 1961–1968).

182 15 U.S.C. §§ 1–38; *see* Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718, 719, 720–22 (2d Cir. 1982) (citing 15 U.S.C. §§ 1, 12, 13, 22).

183 17 U.S.C. §§ 101–122; *see* Phillips v. Audio Active Ltd., 494 F.3d 378, 381, 383–84 (2d Cir. 2007).

184 Brief of Amici Curiae Law Professors in Support of Plaintiff-Appellant Noelle Lee at 13, Lee *ex rel.* The Gap, Inc. v. Fisher, 70 F.4th 1129 (9th Cir. 2022) (No. 21-15923).

a share of a public corporation's stock—the argument goes—a shareholder does not enter into the kind of freely negotiated contract to which the parties in *Bremen* agreed. The *Lee* en banc dissent echoed this argument, noting that "[p]urchasers of Gap stock may or may not be sophisticated parties, but they have no opportunity to negotiate the content of the bylaws or alter terms not to their liking."[185] This is particularly true with respect to corporate bylaws, which can usually be unilaterally amended by directors without a shareholder vote.[186] In this way, forum selection clauses in corporate bylaws more closely resemble contracts of adhesion than freely negotiated contracts. Contracts of adhesion are contracts unilaterally drafted by the party with stronger bargaining power and offered to the counterparty with weaker bargaining power "on a take-or-leave basis."[187]

However, the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*[188] suggests that *Bremen* applies to contracts of adhesion.[189] The Shutes, residents of Washington, purchased tickets for a Carnival Cruise. A forum selection clause designating courts in Florida as the forum for dispute resolution was printed on the bottom of the tickets.[190] Mrs. Shute was injured on the cruise, and the Shutes filed suit in federal district court in Washington.[191] Carnival moved for summary judgment citing the forum selection clause.[192] The Ninth Circuit held the forum selection clause unenforceable under *Bremen* because it was not "freely bargained for."[193]

The Supreme Court reversed, expressly rejecting the Ninth Circuit's conclusion "that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[194] The Court noted three reasons why a nonnegotiated forum selection clause may be permissible in this context. First, because a cruise line operates across many locales, it "has a special interest in limiting the fora in which it [ ]

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185 *Lee III*, 70 F.4th at 1164 (Thomas, J., dissenting).

186 Lipton, *Inside Out*, *supra* note 155, at 353.

187 Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991) (Stevens, J., dissenting).

188 499 U.S. 585 (1991).

189 *Id.* at 593.

190 *Id.* at 587–88.

191 *Id.* at 588.

192 *Id.*

193 *Carnival Cruise Lines, Inc.*, 499 U.S. at 589 (quoting Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 389 (9th Cir. 1990)).

194 *Id.* at 593.

could be subject to suit."[195] Second, a forum selection clause "spar[es] litigants the time and expense of pretrial motions to determine the correct forum."[196] Third, purchasers of tickets containing a forum selection clause may "benefit [from] reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[197]

Each of these three factors applies equally to shareholders of public corporations like Boeing and Gap as to guests of Carnival Cruise Lines. First, Boeing and Gap operate worldwide. Second, the forum selection clauses in their bylaws ordinarily operate to streamline litigation and minimize transaction costs. And third, shareholders may indirectly benefit from cost savings that the corporations enjoy as a result of the forum selection clause. Therefore, *Carnival Cruise Lines* suggests that despite the fact that corporate bylaws are not freely negotiated contracts, and instead more closely resemble contracts of adhesion, *Bremen* remains instructive. The preceding analysis demonstrates that the Seventh Circuit was wrong to distinguish *Bremen* as inapplicable, as *Bremen*'s holding is not limited to international cases, maritime cases, or cases involving freely negotiated contracts. Instead, as the Ninth Circuit correctly identified, *Bremen* remains the controlling Supreme Court test for assessing the enforceability of forum selection clauses.

2. The Ninth Circuit's application of *Bremen*'s public policy exception is flawed.

In *Lee*, the plaintiff argued that Gap's bylaw was unenforceable because it satisfied *Bremen*'s second exception: enforcing the forum selection clause would "contravene a strong public policy of the forum in which suit is brought."[198] In order to satisfy this exception, Lee needed to identify at least one "statute or [ ] judicial decision" articulating the strong, federal public policy that would be violated if Gap's bylaw were enforced.[199] The Ninth Circuit en banc majority focused on two articulations of federal public policy that Lee identified: (1) the Supreme Court's

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195 *Id.*
196 *Id.* at 594.
197 *Id.*
198 *Bremen*, 407 U.S. at 15.
199 *Id.*

Borak decision, and (2) the Exchange Act's exclusive federal jurisdiction provision, § 27(a).[200]

This Section argues that the Ninth Circuit en banc majority's analysis of each of these arguments is, at the very least, fallible. Applying *Bremen*'s public policy exception to the forum selection clauses at issue in *Seafarers* and *Lee* requires resolving unsettled issues of law that exceed the scope of this circuit split. Therefore, this Section does not decide whether the forum selection bylaws at issue in *Seafarers* and *Lee* actually satisfy *Bremen*'s public policy exception. Rather, it suggests that the Ninth Circuit misapplied *Bremen*'s public policy exception by failing to capture these nuances and concluding too quickly that Gap's bylaw did not satisfy the exception.

a) The Ninth Circuit's analysis of Borak *is imprecise, and risks improperly defying Supreme Court precedent.* The en banc majority rejected Lee's argument that enforcing Gap's forum selection bylaw would contravene federal public policy as articulated by the Supreme Court's holding in *Borak*. *Borak* recognized an implied private right of action under § 14(a) for shareholders like Lee, and explicitly noted that such private right of action "exists as to both derivative and direct" claims.[201] Indeed, the Supreme Court went so far as to emphasize that "[t]o hold that derivative actions are not within the sweep of [§ 14(a)] would [ ] be tantamount to a denial of private relief."[202] Lee argued that enforcing Gap's bylaw would violate *Borak* by causing her derivative § 14(a) claim to be dismissed from federal court—the only court authorized to hear such a claim.[203] In other words, *Borak* established a federal public policy granting Lee the right to bring a derivative § 14(a) action, and enforcing Gap's forum selection bylaw would extinguish that right.[204] The en banc majority attempted to circumvent this binding Supreme Court precedent by distinguishing *Borak*'s discussion of derivative suits as mere dicta.[205] The majority reasoned that because the plaintiff in *Borak* "brought only a direct action," "the Court's discussion regarding derivative actions was 'unnecessary to the

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200 *Lee III*, 70 F.4th at 1143–44.

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

202 *Id.* at 432.

203 *Lee III*, 70 F.4th at 1143–44.

204 *Id.*

205 *Id.* at 1146.

announcement or application of the rule [*Borak*] established,' and therefore dicta."[206]

But accepting this conclusion means extinguishing an entire class of shareholder claims. The majority reasoned that enforcing Gap's bylaw to dismiss Lee's derivative § 14(a) claim doesn't violate *Borak*, because *Borak* doesn't actually establish a private right to bring a derivative § 14(a) action in the first place.[207] This argument is not unprecedented. Professors Mohsen Manesh and Joseph Grundfest have argued that the Supreme Court's post-*Borak* decisions—which disfavor implying private rights of action where such rights are not expressly granted in the statute—suggest that "*Borak* creates no implied right to bring derivative Section 14(a) claims, and the only right that it implies is to bring direct Section 14(a) claims."[208] Judge Easterbrook took a similar stance in his *Seafarers* dissent, arguing that *Borak* does not authorize a private plaintiff to bring a derivative § 14(a) claim, at least when that plaintiff can bring a direct § 14(a) claim instead.[209]

It is unclear, however, whether *Borak*'s holding is limited to authorizing direct claims under § 14(a). The en banc majority relies on the premise that the *Borak* plaintiff "brought only a direct action,"[210] but the Supreme Court expressly declined to accept that premise. Instead, the *Borak* court stated, "While the respondent contends that his . . . claim is not a derivative one, *we need not embrace that view*, for we believe that a right of action exists as to both derivative and direct causes."[211] Because the Supreme Court did not reach the question of whether the *Borak* plaintiff's claim was direct or derivative, the Ninth Circuit may not presume that its holding is limited to direct claims. Thus, it is at least plausible that the *Lee* en banc majority misconstrued the scope of *Borak*'s holding, and in doing so, improperly contravened Supreme Court precedent. The *Lee* en banc dissent suggests as much, noting that "[c]riticisms of a Supreme Court

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206 *Id.* (alterations in original) (quoting Murr v. Wisconsin, 582 U.S. 383, 400 (2017)).

207 *Id.* at 1149.

208 Mohsen Manesh & Joseph A. Grundfest, *Abandoned and Split but Never Reversed:* Borak *and Federal Court Derivative Litigation*, 78 BUS. LAW. 1047, 1094 (2023).

209 *Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting) ("The Supreme Court has never held or even intimated that there is a federal right to pursue a derivative claim under § 14(a) when the investor can pursue a direct claim.").

210 *Lee III*, 70 F.4th at 1146.

211 *Borak*, 377 U.S. at 431 (emphasis added).

decision do not mean that the decision is not binding on us. . . . *Borak* has not been overruled by the Supreme Court."[212]

b) The Ninth Circuit's analysis of § 27(a) rests on a shaky, formalist distinction. The en banc majority also rejected Lee's argument that enforcing Gap's bylaw contravenes the strong federal public policy articulated by § 27(a), the Exchange Act's exclusive federal jurisdiction provision. But the majority's reasoning stands on a shaky, formalist distinction between Delaware courts' lack of subject matter jurisdiction over Exchange Act claims, and Delaware courts' actual adjudication of such claims. The majority reasoned that enforcing Gap's bylaw would not contravene § 27(a) because enforcement would not *force* the Delaware Court of Chancery to adjudicate Lee's derivative Exchange Act claim, over which it lacks subject matter jurisdiction.[213] Rather, enforcing Gap's bylaw would merely dismiss Lee's case from federal court.[214] This formalist reasoning might be technically sound, but surely it contravenes the spirit of the statute's exclusive federal jurisdiction provision.

Moreover, the majority hastily presumed that Congress was motivated to enact § 27(a) out of concern for judicial incompetence in state courts, without any proof that such concern actually existed. The majority reasoned that because enforcing Gap's bylaw would not actually force a Delaware judge to decide the case, "[t]here is no danger that state court judges who are not fully expert in federal securities law will . . . adjudicate the Exchange Act claims."[215] By granting federal courts exclusive jurisdiction in § 27(a), Congress instructed that private enforcement of the Exchange Act shall be adjudicated by federal courts.[216] Certainly, concern for judicial incompetence is one possible motivation for this instruction. Congress may have sought to prevent state court judges from adjudicating federal securities claims over which they lack expertise.[217] But conversely, this same motivation also implies a concern for plaintiff protection. It is equally plausible that Congress sought to provide Exchange Act plaintiffs with the

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212 *Lee III*, 70 F.4th at 1166 (Thomas, J., dissenting).

213 *Id.* at 1149–50.

214 *Id.* at 1150.

215 *Id.* (quoting Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367, 383 (1996)).

216 *See* 15 U.S.C. § 78aa.

217 *See, e.g.*, Louis Loss, *The SEC Proxy Rules and State Law*, 73 HARV. L. REV. 1249, 1275 (1960) (arguing that the Exchange Act's exclusive federal jurisdiction provision was motivated by Congress's desire to "achieve a greater uniformity of construction" given that the "[A]ct is considerably more technical" than the Securities Law of 1933).

benefit of presenting their case before a federal judge with Exchange Act expertise—not to prevent plaintiffs from bringing their claims altogether by dismissing them from federal court.[218] The majority neglected to consider this alternative motivation for § 27(a).

Instead, the majority hedged, noting that "the Supreme Court has indicated that there was 'no specific purpose on the part of Congress in enacting § 27.'"[219] Historical uncertainty over Congress's actual motivation for granting federal courts exclusive jurisdiction over Exchange Act claims is not a license for courts to choose their preferred narrative. In concluding that Gap's forum selection bylaw does not contravene § 27(a), the Ninth Circuit relied on overly formalist reasoning and failed to consider an equally plausible counterargument.

This Section has demonstrated that applying *Bremen*'s public policy exception to assess the enforceability of forum selection bylaws in the context of derivative Exchange Act claims is complex, and does not produce clear answers. A narrow Ninth Circuit en banc majority ultimately found that Gap's bylaw did not satisfy the public policy exception, but five judges dissented. Moreover, the en banc majority's analysis of *Borak* and § 27(a) are, at the very least, imprecise. Part IV proposes a stronger approach for assessing the enforceability of forum selection clauses.

IV. PROPOSED APPROACH TO ENFORCEABILITY ANALYSIS

To argue that the forum selection bylaws at issue were not enforceable, the plaintiffs in *Seafarers* and *Lee* relied exclusively on *Bremen*'s public policy exception. The preceding Section illustrated that applying the public policy exception in the context of derivative § 14(a) claims raises thorny, unsettled issues with stakes extending far beyond this circuit split. Properly assessing whether Gap's forum selection bylaw satisfies *Bremen*'s public policy exception required the Ninth Circuit to determine whether the Supreme Court ever established an implied right to bring derivative § 14(a) actions at all, and to identify Congress's true motive for granting federal courts exclusive jurisdiction over

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[218] *See, e.g.*, *Lee III*, 70 F.4th at 1167 (Thomas, J., dissenting) ("[P]rohibiting Lee's properly asserted derivative claim from being adjudicated in any forum [ ] was not the intent of Congress.").

[219] *Id.* at 1150 (quoting *Matsushita Elec. Indus. Co.*, 516 U.S. at 383).

Exchange Act claims. This Part argues that the *Seafarers* and *Lee* plaintiffs could have avoided courts' scrutiny of these complicated issues by simply relying on a different *Bremen* exception: the unreasonableness exception.

The plaintiff in *Lee* did not raise either of *Bremen*'s other two exceptions. She did not argue that the forum selection bylaws at issue were unenforceable under *Bremen*'s "fraud or overreaching" exception or the unreasonableness exception.[220] Therefore, the Ninth Circuit did not consider these exceptions in its enforceability analysis.[221] The plaintiff in *Seafarers* quoted *Bremen*'s "unreasonable and unjust" language in its brief,[222] but only to bolster its description of why Boeing's bylaw satisfied *Bremen*'s public policy exception.[223] Seafarers' brief did not raise the unreasonableness exception as an independent basis for declining to enforce Boeing's bylaw. Seafarers did not raise the fraud or overreaching exception either.[224]

Because shareholders voluntarily accept a company's bylaws by purchasing the company's stock, the fraud or overreaching exception is unlikely to provide a solution to enforceability analysis in cases involving claims arising under the federal securities laws. *Bremen*'s "fraud or overreaching" exception is not applicable to the forum selection bylaws at issue in *Seafarers* and *Lee*, because there is no indication in either case that the bylaws were induced by fraudulent means.

However, *Bremen*'s unreasonableness exception—while historically underutilized—provides a simple, commonsense solution to enforceability analysis in the context of derivative Exchange Act claims. Applying the unreasonableness exception to *Seafarers* and *Lee* reconciles the discrepancies between the Seventh and Ninth Circuits' reasoning, and provides a path to the conclusion that the forum selection bylaws at issue are valid, but *unenforceable* as-applied to derivative § 14(a) claims.

This Part proposes a framework for determining when a forum selection bylaw is unenforceable. Part IV.A provides an overview of the proposed framework, which recommends a

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220 *Lee I*, 34 F.4th at 780–81.

221 *Id.*

222 *See* Brief of Appellant and Short Appendix at 12–13, Seafarers Pension Plan *ex rel.* The Boeing Co. v. Bradway, 23 F.4th 714 (7th Cir. 2022) (No. 20-2244).

223 *Id.* at 12 ("Seafarers can[ ] 'clearly show that enforcement would be unreasonable and unjust' because 'enforcement would contravene a strong public policy of the forum in which suit is brought.'" (quoting *Bremen*, 407 U.S. at 15)).

224 *Id.* at 12–15, 12 n.8.

context-specific application of *Bremen*'s unreasonableness exception, to be applied leniently to derivative Exchange Act claims. Part IV.B applies this proposed framework to the forum selection bylaws at issue in *Seafarers* and *Lee* to conclude that the bylaws are unenforceable under *Bremen*'s unreasonableness exception as it is currently articulated, as well as under the proposed context-specific application.

A. The Courts of Appeals Do Not Consistently Articulate *Bremen*'s Unreasonableness Exception and Rarely Rely upon It

As discussed in Part I.C, *Bremen* established a starting presumption that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[225] *Bremen* remains controlling in the context of claims arising under federal statutes such as the Exchange Act,[226] and when the forum selection clause is contained in a contract of adhesion that is not freely negotiated,[227] such as a corporate bylaw. *Bremen* also establishes exceptions where a forum selection clause should not be enforced. The Supreme Court did not explicitly enumerate these exceptions in its *Bremen* opinion. Rather, the Courts of Appeals have derived these exceptions from the Supreme Court's reasoning in *Bremen*. As a result, the exceptions are not articulated in precisely the same way by each circuit. For instance, the First, Second, Fifth, and Eleventh Circuits articulate four *Bremen* exceptions,[228] while the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits articulate three *Bremen* exceptions.[229]

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[225] *Bremen*, 407 U.S. at 10.

[226] *See supra* Section III.D.1; AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 156 (2d Cir. 1984).

[227] *See supra* Section III.D.1; *Carnival Cruise Lines*, 499 U.S. at 592–95.

[228] *See, e.g.*, Carter's of New Bedford, Inc. v. Nike, Inc., 790 F.3d 289, 292 (1st Cir. 2015); Martinez v. Bloomberg LP, 740 F.3d 211, 228 (2d Cir. 2014) (quoting Phillips v. Audio Active Ltd., 494 F.3d 378, 392 (2d Cir. 2007)); Calix-Chacon v. Glob. Int'l Marine, Inc., 493 F.3d 507, 514 (5th Cir. 2007); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1292 (11th Cir. 1998).

[229] *See, e.g.*, Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983); Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp., 696 F.2d 315, 317 (4th Cir. 1982); Lakeside Surfaces, Inc. v. Cambria Co., 16 F.4th 209, 217 (6th Cir. 2021) (citing Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 375 (6th Cir. 1999)); Jackson v. Payday Fin., LLC, 764 F.3d 765, 776 (7th Cir. 2014); Union Elec. Co. v. Energy Ins. Mut. Ltd., 689 F.3d 968, 973–74 (8th Cir. 2012); *Lee I*, 34 F.4th at 780; Nauert v. Nava

Two of these exceptions are common across circuits. First, each circuit enumerates one exception that deems a forum selection clause unenforceable if it is induced by "fraud or overreaching" (the "fraud or overreaching exception").[230] Second, most circuits also recognize one exception that deems a forum selection clause unenforceable if it "would contravene a strong public policy of the forum in which the suit is brought" (the "public policy
exception").[231]

The circuits vary in their articulation of the remaining exception. A forum selection clause is unenforceable when it is "unreasonable under the circumstances" (the "unreasonableness exception").[232] Some circuits, such as the Third Circuit, express unreasonableness in a single third exception: a forum selection clause is unenforceable where "enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable."[233] Others, such as the First Circuit, split unreasonableness into discrete third *and* fourth exceptions: a forum selection clause is unenforceable where "[(3)] enforcement is unreasonable and unjust; [or] [(4)] its enforcement would render the proceedings gravely difficult and inconvenient to the point of practical

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Leisure USA, Inc., 2000 WL 381509, at *2–4 (10th Cir. Apr. 14, 2000); Milanovich v. Costa Crociere, S.P.A., 954 F.2d 763, 768 (D.C. Cir. 1992).

The Federal Circuit has not articulated all of *Bremen*'s exceptions in a single opinion, but it has cumulatively referred to three distinct exceptions across two cases. *See* Monsanto Co. v. McFarling, 302 F.3d 1291, 1295 (Fed. Cir. 2002) ("[A] forum selection clause . . . should be enforced unless . . . enforcement would be [(1)] unreasonable and unjust, or [(2)] that the clause was invalid for such reasons as fraud or overreaching.'" (quoting *Bremen*, 407 U.S. at 15)); Minesen Co. v. McHugh, 671 F.3d 1332, 1345–46 (Fed. Cir. 2012) (Bryson, J., dissenting) ("[(3)] [A] choice-of-forum clause [is] unenforceable 'if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.'" (quoting *Bremen*, 407 U.S. at 15)).

230 *See, e.g.*, *Carter's*, 790 F.3d at 292; *Martinez*, 740 F.3d at 228; *Coastal Steel Corp.*, 709 F.2d at 202; *Mercury Coal*, 696 F.2d at 317; *Calix-Chacon*, 493 F.3d at 514; *Lakeside Surfaces, Inc.*, 16 F.4th at 217; *Jackson*, 764 F.3d at 776; *Union Elec. Co.*, 689 F.3d at 973; *Lee I*, 34 F.4th at 780; *Nauert*, 2000 WL 381509, at *3; *Milanovich*, 954 F.2d at 768; *Monsanto*, 302 F.3d at 1295.

231 *See, e.g.*, *Carter's*, 790 F.3d at 292; *Martinez*, 740 F.3d at 228; *Coastal Steel Corp.*, 709 F.2d at 202; *Mercury Coal*, 696 F.2d at 317; *Calix-Chacon*, 493 F.3d at 514; *Lakeside Surfaces, Inc.*, 16 F.4th at 214, 218; *Jackson*, 764 F.3d at 776; *Union Elec. Co.*, 689 F.3d at 973–74; *Lee I*, 34 F.4th at 780; *Nauert*, 2000 WL 381509, at *3; *Milanovich*, 954 F.2d at 768; *Minesen*, 671 F.3d at 1345–46 (Bryson, J., dissenting).

232 *Bremen*, 407 U.S. at 10 (quotation marks omitted).

233 *Coastal Steel Corp.*, 709 F.2d at 202.

impossibility."[234] These differing articulations of the unreasonableness exception are perhaps unsurprising, since the Supreme Court repeated the term "unreasonable" four times in the body of the *Bremen* opinion and defined it slightly differently each time.[235]

Both the Seventh and Ninth Circuits articulate unreasonableness as a single third exception.[236] Both circuits' articulations also reflect a very narrow conception of the exception—relying on just one of the four times the Court attempted to define "unreasonable" in *Bremen*. The Ninth Circuit in *Lee* articulated the unreasonableness exception as requiring a showing that "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical

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[234] *Carter's*, 790 F.3d at 292.

[235] *Bremen*, 407 U.S. at 10, 15, 16, 18. First, the Court stated, "[Forum selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be '*unreasonable*' under the circumstances." *Id.* at 10 (emphasis added). Second, the Court continued "The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be *unreasonable* and unjust." *Id.* at 15 (emphasis added). Third, the Court continued, "[A] forum clause . . . may [ ] be '*unreasonable*' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action." *Id.* at 16 (emphasis added). Fourth, the court explained:

> In [these] circumstances it should be incumbent on the [challenging] party . . . to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or *unreasonable* to hold that party to his bargain.

Id. at 18 (emphasis added).

[236] For example, in *Bonny v. Soc'y of Lloyd*'s, 3 F.3d 156 (7th Cir. 1993), the Seventh Circuit cited *Bremen* as establishing three exceptions to enforceability: (1) if the forum selection clause "was the result of fraud, undue influence or overweening bargaining power"; (2) "if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision"; and (3) "if the selected forum is so 'gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court[ ].'" *Id.* at 160 (internal citations omitted) (quoting *Bremen*, 407 U.S. at 12–13, 15, 18) (numbering reordered from original).

The Ninth Circuit articulates *Bremen*'s exceptions very similarly. For example, in *Yei A. Sun v. Advanced China Healthcare*, 901 F.3d 1081 (9th Cir. 2018), the court explained that a forum selection clause should not be enforced when:

> (1) the clause is invalid due to "fraud or overreaching," (2) "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision," or (3) "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court."

Id. at 1088 (alterations in original) (quoting *Bremen*, 407 U.S. at 15, 18); *see also, e.g.*, *Lee I*, 34 F.4th at 780–81 (quoting *Bremen*, 407 U.S. at 15, 18).

purposes be deprived of his day in court."[237] The Seventh Circuit did not apply the *Bremen* exceptions in *Seafarers*, but it has relied on a similarly narrow definition of unreasonableness when applying *Bremen* in other cases.[238] Perhaps the Seventh and Ninth Circuits grasped onto this narrow language because it is the lengthiest of the Supreme Court's four descriptions of unreasonableness in the *Bremen* opinion, and the Court never adopted a clear, single definition of the term in subsequent cases.

Federal courts have historically been reluctant to employ the unreasonableness exception. This is likely due in part to the fact that many courts, including the Seventh and Ninth Circuits, have articulated the unreasonableness exception in its narrowest form, which creates a difficult standard to satisfy. Ironically, the Supreme Court's 1991 holding in *Carnival Cruise Lines, Inc. v. Shute*—the same case that established *Bremen*'s applicability to forum selection clauses contained in contracts of adhesion—may also have deterred litigants from relying on the unreasonableness exception.[239] In *Carnival Cruise Lines*, the Court held that a forum selection clause printed on the Shutes' cruise tickets was reasonable and enforceable, even though it required the Shutes to travel several thousand miles—from Washington state to Florida—to bring their lawsuit in the designated forum.[240] This precedent left litigants with little hope of relying on the unreasonableness exception, given that the Supreme Court seemed to interpret the exception as requiring something more inconvenient than forcing the plaintiff to travel to the opposite corner of the country.

According to Professor Coyle, over the last decade, there have been a "mere handful of cases where the federal courts declined to enforce a clause on the grounds that it was unreasonable."[241] It is perhaps unsurprising, then, that neither the Seventh Circuit nor the Ninth Circuit addressed this argument in *Seafarers* or *Lee*. As discussed above, the Seventh Circuit failed to apply *Bremen* at all in *Seafarers*. And the Ninth Circuit only applied

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[237] *Lee III*, 70 F.4th at 1143 n.11 (alteration in original) (quotation marks omitted) (quoting *Bremen*, 407 U.S. at 18).

[238] *See, e.g.*, *Jackson*, 764 F.3d at 776 (finding a forum selection clause is unenforceable "if the selected forum is so 'gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court[ ]'" (alteration in original) (quoting *Bonny*, 3 F.3d at 160)).

[239] Coyle, *supra* note 27, at 156.

[240] *Carnival Cruise Lines*, 499 U.S. at 596.

[241] Coyle, *supra* note 27, at 156.

Bremen's public policy exception, because Lee failed to argue that the unreasonableness exception applied.[242] The remainder of this Part demonstrates that had *Seafarers* and *Lee* applied the unreasonableness exception, both courts could have reached a consistent conclusion that the forum selection bylaws at issue were
unenforceable.

B. *Bremen*'s Unreasonableness Exception Should Be Understood as a Context-Specific Inquiry

The Seventh and Ninth Circuits' narrow articulations of *Bremen*'s unreasonableness exception fail to capture the nuance of the Supreme Court's reasoning. Both courts articulate this factor as requiring the party challenging the forum selection clause to show that enforcing the clause will be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[243] Viewed holistically, however, the Court's discussion of what constitutes "unreasonable under the circumstances" throughout the *Bremen* opinion suggests that the inquiry is context specific, and should be applied more liberally to forum selection clauses contained in corporate bylaws.[244] This Section argues that a more lenient standard of unreasonableness applies when the forum selection clause (1) is contained in a non-freely-negotiated contract, or (2) is being applied in a manner unforeseeable to the parties at the time of contracting.

The Court defined the term "unreasonable" four different ways in the *Bremen* opinion. First, the Court established that "[forum selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' *under the circumstances*."[245] The Court's "under the circumstances" qualifier here suggests that the standard required to satisfy the unreasonableness exception to *Bremen*'s presumption of enforceability is not absolute, but rather, context specific.

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[242] *Lee I*, 34 F.4th at 781 ("Lee does not contend that the forum-selection clause is invalid due to fraud, nor that litigating her derivative claim in the Delaware forum would be gravely difficult. Therefore, we consider only the second *Bremen* factor.").

[243] *Bremen*, 407 U.S. at 18.

[244] *Id.* at 10 (quotation marks omitted).

[245] *Id.* (emphasis added).

Second, the Court reiterated that "[t]he correct approach" is "to enforce the forum clause specifically unless [the challenging party] could clearly show that enforcement would be unreasonable or unjust."[246] This language associates unreasonableness with injustice, which also suggests that the standard is context specific. Determining what constitutes unreasonableness, as with injustice, involves a level of discretion and consideration of the projected outcome.

Third, the Court explained that "a forum clause . . . may [ ] be 'unreasonable' and unenforceable if the chosen forum is *seriously inconvenient* for the trial of the action."[247] The Court limited this standard to particular circumstances, noting that a claim of inconvenience should not render a forum selection clause unenforceable "where it can be said with reasonable assurance that . . . the parties to a freely negotiated . . . agreement contemplated the claimed inconvenience."[248] Rather, a claim of serious inconvenience is sufficient when the circumstances suggest that the agreement "was an adhesive one, or that the parties did not have th[is] particular controversy in mind when they made their agreement."[249]

Finally, the Court reasoned that in the circumstances of *Bremen*, which involved a freely negotiated contract, "[w]hatever 'inconvenience' [the challenging party] would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting."[250] Under these circumstances where the inconvenience was "foreseeable," the Court articulated a heightened standard of unreasonableness:

> In [these] circumstances it should be incumbent on the [challenging] party . . . to show that trial in the contractual forum will be *so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court*. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable.[251]

The Seventh and Ninth Circuits do not currently distinguish between these different contexts contemplated by the *Bremen*

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[246] *Id.* at 15.
[247] *Id.* at 16 (emphasis added).
[248] *Bremen*, 407 U.S. at 16.
[249] *Id.* at 17.
[250] *Id.* at 17–18.
[251] *Id.* at 18 (emphasis added).

Court. Instead, they apply the narrowest articulation of the unreasonableness exception—requiring a showing of "grave[ ] difficult[y] and inconvenien[ce]"[252]—in all circumstances.

This Comment proposes a context-specific approach to *Bremen*'s unreasonableness exception, which more accurately captures the *Bremen* Court's nuanced understanding of enforceability. When the forum selection clause at issue is contained in a freely negotiated contract between two sophisticated parties, as was the case in *Bremen*, the challenging party must show that the forum selection clause is being applied in a manner that makes litigation "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court" in order to satisfy the unreasonableness exception.[253] In contrast, if the forum selection clause at issue is contained in a contract of adhesion, or is being applied in a manner not reasonably foreseeable to the parties, the challenging party may satisfy the unreasonableness exception by merely showing a lower threshold of "serious inconvenience."[254]

Critics of the proposed context-specific approach to *Bremen*'s unreasonableness exception may argue that the "foreseeability" threshold is an imprecise and difficult line to draw. Yet unreasonableness itself is an imprecise and context-specific concept. A context-specific approach functions better than a rigid rule in applying an inherently fluid exception.

C. The Forum Selection Bylaws at Issue in *Seafarers* and *Lee* Are Unenforceable Because They Satisfy *Bremen*'s Unreasonableness Exception

Part IV.B proposed a context-specific approach to *Bremen*'s unreasonableness exception, which tolerates a lower threshold of unreasonableness in circumstances where the forum selection clause at issue was not freely negotiated or is being applied in a manner unforeseeable to the challenging party at the time of contracting. This Section argues that the forum selection bylaws at issue in *Seafarers* and *Lee* satisfy the unreasonableness exception both in the narrow formulation of the exception as

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[252] *Id.*
[253] *Bremen*, 407 U.S. at 18.
[254] *Id.* at 17.

currently articulated, and under the proposed context-specific approach.

1. The bylaws are unenforceable under the Seventh and Ninth Circuits' narrow articulations of the unreasonableness exception.

To begin, the forum-selection bylaws at issue in *Seafarers* and *Lee* satisfy *Bremen*'s unreasonableness exception even when that exception is articulated in its narrowest form, as the Seventh and Ninth Circuit currently articulate it. Enforcing Boeing's and Gap's bylaws would make litigation of plaintiffs' derivative § 14(a) claims so "gravely difficult and inconvenient that [plaintiffs] will for all practical purposes be deprived of [their] day in court."[255] If the bylaw is enforced, plaintiffs' derivative § 14(a) claims will be dismissed from federal court and directed to the Delaware Court of Chancery. But because the Delaware Court of Chancery does not have subject matter jurisdiction to adjudicate Exchange Act claims, enforcing the forum selection bylaw bars plaintiffs from bringing their derivative § 14(a) claims in *any* court.

While applying the unreasonableness exception in this way is still relatively novel, it is not entirely unprecedented. Coyle has suggested that federal district courts have occasionally deemed a clause unenforceable as unreasonable when "the chosen court lacks subject matter jurisdiction to hear a case."[256] Coyle identified several cases in which federal district courts deemed forum selection clauses designating state courts unenforceable as applied to claims arising under federal statutes with exclusive federal jurisdiction. First, in *Hare v. YJ Sales, Inc.*,[257] a federal district court refused to enforce a forum selection clause requiring a copyright claim to be brought in Rhode Island state court because state courts do not have subject matter jurisdiction over copyright claims.[258] Second, in *BH Services v. FCE Benefit Administrators Inc.*,[259] a federal district court refused to enforce a forum selection clause requiring a suit under the Employee Retirement Income Security Act of 1974[260] (ERISA) to be brought

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255 *Id.* at 18.

256 Coyle, *supra* note 27, at 156.

257 2017 WL 7163926 (C.D. Cal. June 15, 2017).

258 Coyle, *supra* note 27, at 157 (citing *Hare*, 2017 WL 7163926, at *4–5).

259 2017 WL 3635186 (D.S.D. Aug. 23, 2017).

260 Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461).

in San Mateo County, California, because there was no federal court located in that county and state courts lack subject matter jurisdiction to hear ERISA claims.[261] Third, in *Alamo Masonry & Construction Contractors, LLC v. Air Ideal, Inc.*,[262] a federal district court refused to enforce a forum selection clause calling for disputes to be resolved in Seminole County, Florida, because there was no federal court located in that county and state courts lack subject matter jurisdiction to hear claims arising under the Miller Act.[263]

These cases illustrate that the proposed approach is not unprecedented. Federal courts have previously applied *Bremen*'s unreasonableness exception to deem forum selection clauses designating state courts unenforceable when applied to claims arising under statutes with exclusive federal jurisdiction provisions. The same reasoning applies to the forum selection clauses at issue in *Seafarers* and *Lee*. Boeing's and Gap's forum selection bylaws call for derivative claims to be resolved in the Delaware Court of Chancery, but federal courts should deem these bylaws unenforceable as unreasonable when they are applied to derivative claims arising under the Exchange Act, because Delaware lacks subject matter jurisdiction over such claims.

2. The bylaws are unenforceable as unreasonable despite the availability of alternative, *direct* § 14(a) claims.

The strongest counterargument to this straightforward application of *Bremen*'s unreasonableness exception echoes the Ninth Circuit's *Lee* en banc majority and Judge Easterbrook's *Seafarers* dissent. Critics may counter that plaintiffs are not so "gravely" inconvenienced as to "be deprived of [their] day in court," because to stay in court, plaintiffs may simply bring their § 14(a) claim as a direct action, rather than a derivative one.[264] Judge Easterbrook argued that a plaintiff like Seafarers may still bring a *direct* 14(a) claim in federal court, because Boeing's forum selection bylaw only applies to derivative claims.[265] Similarly, in deciding to enforce Gap's forum selection bylaw, the *Lee* en banc

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261 Coyle, *supra* note 27, at 157 (citing *BH Servs. Inc*, 2017 WL 3635186, at *4–7).

262 2014 WL 1391024 (S.D. Tex. Apr. 8, 2014).

263 40 U.S.C. §§ 3131–3134; Coyle, *supra* note 27, at 157 (citing *Alamo Masonry*, 2014 WL 1391024, at *2–3).

264 *Bremen*, 407 U.S. at 18.

265 *Seafarers*, 23 F.4th at 729 (Easterbrook, J., dissenting).

majority emphasized that "Lee can [still] enforce Gap's compliance with the substantive obligations of § 14(a) by bringing a direct action in federal court."[266]

However, this argument incorrectly presumes that direct and derivative § 14(a) claims are perfect substitutes. It is true that direct and derivative claims are not mutually exclusive in the context of harms resulting from misleading proxy disclosures. Some shareholder-plaintiffs who choose to bring a derivative § 14(a) claim might have had the option and standing to bring a direct § 14(a) claim instead, but some will not. In order to have standing to bring a direct action, the shareholder must demonstrate that "she has suffered an injury that is not dependent on an injury to the corporation."[267] For instance, the *Lee* en banc majority explained that the plaintiff could bring a direct action based on her allegation that Gap's misleading proxy statements deprived her of the opportunity to make an informed vote at two annual shareholder meetings.[268] This alleged harm impacted Lee directly, in her capacity as a shareholder. In contrast, a hypothetical plaintiff who merely alleges that the corporation was harmed by the misleading proxy statements—but cannot show that she, individually, would have voted differently at certain shareholder meetings given full information—would be unlikely to have standing for a direct suit.

Moreover, the remedies afforded by direct and derivative § 14(a) suits are different. A shareholder-plaintiff seeking equitable or injunctive relief leading to corporate governance changes is less likely to receive that relief in a direct action. At best, if successful in a direct § 14(a) action, the shareholder-plaintiff will likely receive individual monetary damages.[269] As Judge Sidney Thomas explained in his *Lee* en banc dissent:

> [D]irect and derivative shareholder actions are distinct, with different purposes and different remedies. In a direct action, the plaintiff shareholder . . . seeks damages, usually as compensation for loss in stock value . . . . By contrast, . . . the remedies available through derivative actions, such as

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266 *Lee III*, 70 F.4th at 1139–41.

267 *Id.* at 1140 (quotation marks omitted) (quoting Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004)).

268 *Id.*

269 *See, e.g.*, *id.* at 1161–62 (Thomas, J., dissenting) ("Direct and derivative suits are not interchangeable.").

> corporate governance reforms and [ ] payment[ ] "flow[ ] only to the corporation."[270]

More fundamentally, though, an assessment of whether a forum selection bylaw is enforceable in a given context should not turn on a judicial determination of whether there is a "better" alternative claim that the plaintiff could have brought. The *Bremen* Court instructed that a forum selection clause is unenforceable when the plaintiff shows that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court";[271] it did not ask whether the plaintiff might have come to court with a different claim. As Judge Thomas explained plainly in his *Lee* en banc rehearing dissent, the Exchange Act's antiwaiver provision "does not include the qualification 'unless there are alternate remedies available.'"[272]

3. The bylaws are unenforceable under the proposed context-specific understanding of the unreasonableness exception.

Even if one is not persuaded that enforcement of the bylaws at issue in *Seafarers* and *Lee* satisfies *Bremen*'s unreasonableness exception in its narrowest form, as it is currently articulated, enforcement certainly satisfies the unreasonableness exception set forth in the proposed context-specific approach.[273] As described in Part IV.B, a lower threshold of unreasonableness applies when the forum selection clause (1) is contained in a non-freely-negotiated contract or (2) is being applied in a manner unforeseeable to the parties at the time of contracting.

In *Seafarers* and *Lee*, both conditions are satisfied. The forum selection clauses at issue are contained in corporate bylaws, which are not freely negotiated contracts. And it is at least plausible that the parties did not foresee the forum selection bylaws being applied in this manner at the time of drafting. Both Boeing's and Gap's forum selection bylaws govern all derivative actions, of which derivative § 14(a) claims are a relatively novel type.[274] Moreover, because most corporate bylaws are enacted

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[270] *Id.* (quoting *Tooley*, 845 A.2d at 1036).
[271] *Bremen*, 407 U.S. at 18.
[272] *Lee III*, 70 F.4th at 1161 (Thomas, J., dissenting).
[273] *See supra* Part IV.B.
[274] *Seafarers*, 23 F.4th at 718; *Lee I*, 34 F.4th at 779.

unilaterally by the board of directors without a shareholder vote,[275] it is possible for forum selection clauses to be added to the bylaws *after* contracting, when shareholder-plaintiffs already own the stock (though there is no indication that this was the case in *Seafarers* or *Lee*, specifically).

The preceding analysis demonstrates that under the proposed context-specific approach, Boeing's and Gap's forum selection bylaws are subject to the more lenient version of *Bremen*'s unreasonableness exception. To meet this lower threshold of unreasonableness, the plaintiffs need only show that litigating in Delaware would pose a "serious inconvenience."[276] Enforcing the forum selection bylaws to dismiss *Seafarers*' and *Lee*'s derivative § 14(a) claims from federal court clearly poses a "serious inconvenience" to plaintiffs, by forcing them to start over with an entirely separate, direct cause of action.

CONCLUSION

Over the past decade, Delaware has embraced forum selection bylaws as a useful procedural mechanism to streamline adjudication of shareholder disputes and avoid duplicative litigation in multiple forums. However, Boeing's and Gap's recent attempts to enforce these bylaws to dismiss shareholders' derivative § 14(a) claims from federal court demonstrate how corporations may exploit forum selection bylaws to fend off certain federal securities law claims. In addition to derivative § 14(a) claims, the same bylaws at issue in *Seafarers* and *Lee* could be exploited in the future to try to dismiss other derivative Exchange Act claims, such as derivative § 10(b) antifraud claims, or § 16(b) claims to recover short-swing profits from a company insider. Therefore, the enforceability of Delaware forum selection bylaws must be limited to avoid creating a jurisdictional loophole that effectively bars shareholders from bringing derivative Exchange Act claims in any court. The Seventh and Ninth Circuits' divergent approaches and conflicting conclusions in *Seafarers* and *Lee* illustrate a broader lack of consensus among

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[275] *See* Richard A. Rosen, Stephen P. Lamb & Daniel Mason, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws*, PAUL, WEISS (Jan. 8, 2015), https://perma.cc/BZH4-8XHH ("Of the 122 companies that adopted forum selection provisions between June 1 and November 30, 2014, 104 did so by unilateral bylaw amendment."); *see also* Lipton, *Inside Out*, *supra* note 155, at 361.

[276] *Bremen*, 407 U.S. at 17; *see supra* Part IV.B.

Courts of Appeals as to the proper framework for assessing the enforceability of forum selection clauses.

This Comment proposes a clearer and simpler solution. It proposes that *Bremen* is controlling, and *Bremen*'s unreasonableness exception must be taken seriously—particularly when the forum selection clauses at issue are contained in corporate bylaws, which are not freely negotiated contracts. Courts should begin with a presumption of enforceability, which may be rebutted if any of the *Bremen* exceptions apply. In the context of forum selection clauses contained in corporate bylaws, *Bremen*'s unreasonableness exception should be applied liberally, and only require a showing of "serious inconvenience." A litigant may easily satisfy this standard by demonstrating that the chosen forum lacks subject matter jurisdiction over her claim. Following this approach, the forum selection bylaws at issue in *Seafarers* and *Lee* would be unenforceable under *Bremen*'s unreasonableness exception because the Delaware Court of Chancery lacks subject matter jurisdiction over § 14(a) claims.