IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE DORIS BEHR 2012 IRREVOCABLE TRUST,
Plaintiff,

v.

JOHNSON & JOHNSON,
Defendant,

and

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION,
Proposed Intervenors-Defendants.

Civil Action No. 19-08828 (MAS)(LHG)

Oral Argument Requested

Memorandum in Support of Motion to Dismiss of Proposed Intervenors California Public Employees' Retirement System and Colorado Public Employees' Retirement Association

MARC I. GROSS
JEREMY A. LIEBERMAN
JENNIFER PAFITI
MICHAEL GRUNFELD
Pomerantz LLP
600 Third Avenue
New York, NY 10016
(212) 661-1100

SALVATORE J. GRAZIANO
JAI K. CHANDRASEKHAR
Bernstein Litowitz Berger
& Grossmann LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

DEEPAK GUPTA (*pro hac vice*)
MATTHEW WESSLER
ALEXANDRIA TWINEM
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

JAMES E. CECCHI
LINDSEY H. TAYLOR
Carella, Byrne, Cecchi, Olstein,
Brody & Agnello, P.C.
5 Becker Farm Road
Roseland, NJ 07068
(973) 994-1700

Counsel for Proposed Intervenors California Public Employees' Retirement System and The Colorado Public Employees' Retirement Association

May 31, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Legislative History

Books and Articles

Other Authorities

INTRODUCTION

A trust controlled by Hal Scott—a retired law professor and vocal opponent of class actions—has proposed an amendment to Johnson & Johnson's bylaws. If adopted, the proposal would ban shareholders from bringing any securities class actions against Johnson & Johnson and instead force all securities claims against the company into individual arbitration. Scott's trust is suing for an injunction to require the company to include the proposal in its proxy materials.

Two of Johnson & Johnson's largest shareholders—the Colorado Public Employees' Retirement Association and the California Public Employees' Retirement System—have sought to intervene in this action to protect shareholders' rights. In contrast to the trust's one thousand shares, Colorado PERA and CalPERS together hold over ten million shares of the company's stock. They are also class members in a securities-fraud case against Johnson & Johnson. They are thus well positioned to ensure that shareholders' rights are vigorously protected in this case.

As intervenors, Colorado PERA and CalPERS move to dismiss this action because the trust has failed to state a claim upon which relief may be granted.[1] As a matter of law, Johnson & Johnson properly excluded the trust's proposal under SEC Rule 14a-8 because it "would, if implemented, cause the company to violate [a] state . . . law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). As a recent opinion of the New Jersey Attorney General explains, a corporation's bylaws may relate only to matters of "internal concern"—*i.e.*, internal corporate governance. *Lambert v. Fishermen's Dock Co-op., Inc.*, 61 N.J. 597, 600 (1972). The trust's proposal—

[1] CalPERS and Colorado PERA seek to file this motion to dismiss as intervenors, for the reasons given in their pending motion to intervene. If the Court denies their motion to intervene for any reason, the proposed intervenors respectfully request that the Court treat them as amici curiae and accept this brief for filing on that basis; the plaintiff trust does not oppose that request.

which seeks to govern the external legal relationship between shareholders and the corporation under federal law—therefore runs afoul of New Jersey law and was properly excluded.

Undaunted, Professor Scott and his trust insist that Johnson & Johnson must take up the proposal—even if both state corporate law and federal securities regulations preclude it—because the Federal Arbitration Act (FAA) demands that result. But the trust's reliance on the FAA is a category error. The FAA "establishes an equal-treatment principle"—courts may not refuse to enforce arbitration agreements based on "discrimination against arbitration." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426, 1428 (2017). Even assuming the FAA applied, it would not preempt "generally applicable" state law like the rule of corporate law at issue here. *Id.* New Jersey prohibits *any* proposed bylaw that falls outside the corporation's internal affairs.

More fundamentally, the FAA does not even apply in this context, for two reasons: *First*, it applies only to "controvers[ies]" that "aris[e] out of" a "contract." 9 U.S.C. § 2. But securities-fraud claims cannot "arise out of" bylaws. *Second*, it applies only to true contracts formed under the "law of contracts," under which a "mutual manifestation of intent to be bound" and "explicit agreement" are "essential to the formation of an enforceable arbitration contract." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 163 (3d Cir. 2009). It is therefore insufficient to resort to "corporate law principles" that "impute to members of the corporation knowledge and acceptance of corporate bylaws." *Id.* at 163-64. This is the "first principle" of the FAA: "Arbitration is strictly a matter of consent." *Lamps Plus v. Varela*, 139 S. Ct. 1407, 1415 (2019).

While the FAA thus has no bearing here, later enactments of Congress do. Congress has consistently encouraged securities class actions and discouraged waivers of shareholder rights, and the SEC has never allowed companies to mandate arbitration of shareholder securities claims. This Court should not lightly depart from that long-settled approach.

BACKGROUND

A. For over half a century, shareholders have been able to bring securities class actions and, for decades, the SEC has consistently rejected attempts to force shareholders into arbitration.

For over half a century, shareholders in the United States have been able to police securities fraud through class actions. *See, e.g.*, *List v. Fashion Park, Inc.*, 340 F.2d 457, 462–63 (2d Cir. 1965). As the Supreme Court has recognized, "meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). And both Congress and the Supreme Court have repeatedly emphasized that the class-action mechanism is integral to this private enforcement of the securities laws. *See* Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 Wash. U. L. Rev. 453, 464–69 (2015).

Class actions provide an important tool to compensate investors and deter fraud. Because the SEC has the resources to prosecute only a fraction of all securities fraud, private investors will rarely be compensated for the deflated price of their shares caused by fraud unless they initiate a suit. *Securities Investor Protection Act of 1991: Hearing on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong. 15–16 (1991) (statement of Richard C. Breeden, Chair, SEC). But because litigation is expensive, investors—particularly small investors whose individual losses would be too small to justify the costs of litigation—must share those costs through a class action. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. Corp. L. 637, 667 (2006). Class actions also provide significant deterrence for managerial misconduct by aggregating shareholders' losses. *Id.*; Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 Colum. Bus. L. Rev. 802, 808 & n.21.

And class actions create an incentive for shareholders to actively monitor corporate managers to avoid judgments against the corporation that may affect stock prices. *See* Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 243, 287–91.

For decades, the SEC has refused to permit companies with publicly traded securities to mandate shareholder arbitration in their bylaws or other organizational documents. *See generally* Barbara Roper & Micah Hauptman, Consumer Federation of America, *A Settled Matter: Mandatory Shareholder Arbitration Is Against the Law and the Public Interest* (2018), https://bit.ly/2UQNkx9.

In 1988, for example, Franklin First Financial declared its intention to include a shareholder arbitration clause in its bylaws in advance of a planned initial public offering. The SEC firmly and unequivocally rejected this attempt. Carl Schneider, *Change, the SEC and . . . me* (1998), at 3, https://bit.ly/2Xf0ncy (describing as a "complete defeat" an "effort to include an arbitration provision in a corporate-governance document"). As the company's lawyer later recalled, "the commission itself, as well as the staff, expressed horror at the concept of a mandatory arbitration provision in our company's articles." *Id.* at 14. In response, Franklin withdrew the provision and went ahead with its IPO. Similarly, in 2012, The Carlyle Group filed a registration statement that would have mandated arbitration of all shareholder securities claims. S-1/A, The Carlyle Group, Jan. 10, 2012, https://bit.ly/2Kb4liJ. After institutional investors and their advocates complained—and several members of Congress expressed their opposition—the SEC informed Carlyle that it would not accelerate the registration statement if Carlyle included the shareholder-arbitration provision. Carlyle relented. Miles Weiss, et al., *Carlyle Drops Class-Action Lawsuit Ban as Opposition Mounts*, Bloomberg (Feb. 3, 2012), https://bloom.bg/2TmnuQn.

In addition to these failed attempts to include forced arbitration through IPO filings, there have been at least three unsuccessful attempts to force shareholder arbitration through corporate bylaws. In 2008, for example, some Alaska Air shareholders requested a proxy proposal in favor of forced arbitration of securities disputes. Alaska Air announced that it would exclude the proposal and sought a no-action letter, which the SEC issued. Letter from Carmen Moncada-Terry, SEC, to Alaska Air Group, Inc., Mar. 5, 2009, https://bit.ly/30ULbDF. A few years later, shareholders at Gannett and Pfizer sought to change the bylaws of these already-public companies to provide for mandatory shareholder arbitration. As with Alaska Air, the companies resisted the proposals.[2] In both cases, the SEC staff granted no-action letters.[3]

B. Professor Hal Scott—a longtime opponent of securities class actions—proposes to ban class-action litigation via corporate bylaws.

One leading proponent of forced arbitration is undeterred by this consistent history. Hal Scott, a Harvard law professor emeritus, is a long-time opponent of securities class actions and the controlling trustee of the plaintiff in this case, the Doris Behr 2012 Irrevocable Trust. *See, e.g.*, Susan Antilla, *A Harvard Professor Filed a Shareholder Lawsuit to Restrict Shareholder Rights*, The Intercept, Apr. 9, 2019, https://bit.ly/2Io5tOU (Gupta Decl., Ex. A); Hal Scott, Opinion, *The SEC's Misguided Attack on Shareholder Arbitration*, Wall St. J., Feb. 21, 2019, https://on.wsj.com/2Ww1sw8 (Gupta Decl., Ex. B).[4] On behalf of his trust, which owns 1,050

---

[2] Letter from Kevin L. Vold, Counsel for Gannett, to SEC, at 2, Dec. 27, 2011, https://bit.ly/2XcfjrH (explaining that adopting the bylaw change "would be contrary to the public policy interests underlying the federal securities laws"); Letter from Matthew Lepore, Counsel for Pfizer, to SEC, Dec. 20, 2011, https://bit.ly/2HJYZJK; Letter from Matthew Lepore, Counsel for Pfizer, to SEC, Jan. 12, 2012, https://bit.ly/2HJYZJK.

[3] Letter from Mark Vilardo, SEC, to Gannett, Feb. 22, 2012, https://bit.ly/2XcfjrH; Letter from Sirimal R. Mukerjee, SEC, to Pfizer, Feb. 22, 2012, https://bit.ly/2HJYZJK.

[4] All declarations cited in this brief—with the exception of the Second Gupta Declaration filed today—were filed in support of CalPERS' and Colorado PERA's motion to intervene.

shares of Johnson & Johnson's stock, Scott proposed an amendment to Johnson & Johnson's bylaws in late 2018 that would run counter to state and federal law and put an end to shareholder class actions against Johnson & Johnson.

C. Johnson & Johnson seeks a no-action letter from the Securities and Exchange Commission to exclude the proposed bylaw amendment.

After reviewing Scott's proposal, Johnson & Johnson decided that it could not implement the proposed amendment without violating the law. Compl. Ex. 2. So it asked the SEC to issue a "no action" letter indicating that the SEC would take no action against the company if it omitted the proposal from its proxy materials. The company explained that shareholders who did not vote to approve the bylaw "would not have provided the mutual assent required to enforce an arbitration agreement, as determined under customary principles of contract law." Compl. Ex. 4., at 3. It further explained that a federal securities-law claim "does not implicate the internal affairs of the corporation," and thus New Jersey corporations "may not lawfully mandate arbitration" of such claims "in their constitutive documents." *Id.* at 11. Thus, requiring arbitration for all shareholders would be illegal under New Jersey law, and hence the bylaw proposal is excludable under SEC regulations. *See* 17 C.F.R. § 240.14a-8(i)(1)–(2).

D. The New Jersey Attorney General's office weighs in, and the SEC's no-action letter defers to the Attorney General's view that the proposal would violate state law.

Meanwhile, the New Jersey Attorney General's office filed its own letter with the SEC stating that Scott's proposal would violate New Jersey law. The Attorney General explained that corporate bylaws are generally limited to matters of the corporation's "'internal concern.'" Compl. Ex. 6, at 3 (quoting *Lambert*, 61 N.J. at 600). Relying principally on the New Jersey Attorney General's opinion, the SEC issued a no-action letter. It concluded that the New Jersey Attorney General's interpretation of state law was "legally authoritative" and that the agency was "not in a position to question" it. Compl. Ex. 8, at 2. As the SEC explained, "[t]o conclude otherwise would put the Company in a position of taking actions that the chief legal officer of its state of incorporation has determined to be illegal." *Id.* Johnson & Johnson then excluded the proposal from its 2019 proxy materials.

E. Hal Scott's trust sues Johnson & Johnson, seeking to force the company to include his proposal in its proxy materials.

On March 21, 2019—nearly six weeks after the SEC issued its no-action letter—Hal Scott's trust filed a complaint seeking a declaratory judgment that its proposal is legal and an order compelling Johnson & Johnson to issue supplemental proxy materials including the proposal. Compl. ¶ 44. After this Court denied Scott's request for a temporary restraining order, Johnson & Johnson indicated that it would move to dismiss the complaint by May 31, 2019.

F. Colorado PERA and CalPERS seek to intervene to safeguard shareholders' ability to sue Johnson & Johnson in class actions.

To ensure that Johnson & Johnson would not be the only party defending shareholders' right to sue Johnson & Johnson, two major shareholders sought to intervene at the earliest opportunity—before Johnson & Johnson even responded to the complaint. They filed their motion to intervene on May 23, 2019 and are now seeking to have the complaint dismissed.

CalPERS. The California Public Employees' Retirement System is the nation's largest state public pension fund, serving more than 1.9 million members. *See* Bienvenue Decl. ¶ 2. Among its many holdings, CalPERS owns 8,368,519 shares of Johnson & Johnson stock as of March 31, 2019. Bienvenue Decl. ¶ 2 & Ex. A.

Because CalPERS is such a large stockholder of many corporations, it has participated in numerous securities-fraud class-action lawsuits and is regularly appointed as class representative in such suits to defend its and other stockholders' interests. Bienvenue Decl. ¶ 4; *see also In re*

Cendant Corp. Litig., 264 F.3d 201, 268–70 (3d Cir. 2001) (affirming district court's conclusion that CalPERS would adequately represent a class of shareholders as lead plaintiff). CalPERS has also advocated against forcing shareholders to arbitrate securities claims, most recently by filing a letter with the SEC in 2018 cautioning the agency against adopting a favorable view of such arbitration clauses. Bienvenue Decl. ¶ 5 & Ex. B. The organization's interest in protecting class-action litigation is a central part of its mission: One of its Governance and Sustainability Principles is that companies should not "attempt to bar shareowners from the courts through the introduction of forced arbitration clauses." Bienvenue Decl. ¶ 7 & Ex. E at 11.

Colorado PERA. The Colorado Public Employees' Retirement Association is the twenty-fourth largest public pension plan in the nation with approximately $48 billion in assets and over 600,000 plan participants and beneficiaries—including teachers, state troopers, and other public employees. Franklin Decl. ¶¶ 2, 4. Colorado PERA has fulfilled its fiduciary duty to protect the retirement security of its plan participants and beneficiaries by serving as lead plaintiff in several security-fraud class-action suits. Franklin Decl. ¶ 7. Colorado PERA is one of the largest shareholders of Johnson & Johnson, currently possessing 1,906,754 shares of its stock. Franklin Decl. ¶ 3.

Colorado PERA "has long recognized the importance of securities litigation, and specifically securities class actions, due to the role it plays in creating a culture of accountability and deterring corporate fraud." Franklin Decl. Ex. D. Colorado PERA has publicly opposed the use of arbitration in corporate bylaws, including sending a letter in June 2018 to SEC Chair Jay Clayton explaining why arbitration does not adequately protect shareholder rights and encouraging the Chair to undertake notice-and-comment rulemaking before the SEC changes its long-held position against forced arbitration in initial public offerings. *See id.*

Because they purchased Johnson & Johnson stock within the class period, both Colorado PERA and CalPERS are members of the putative class in an ongoing case against Johnson & Johnson in this District. Bienvenue Decl. ¶ 3. In *Hall v. Johnson & Johnson*, the plaintiff asserts that Johnson & Johnson engaged in a decades-long fraud by knowingly issuing false and misleading statements about its talc and baby-powder products, which contain cancer-causing asbestos. *See* Compl. at 1–2, *Hall v. Johnson & Johnson*, No. 18-cv-1833-FLW-TJB (D.N.J. Feb. 28, 2019), ECF No. 33. Johnson & Johnson disputes these claims.

ARGUMENT

I. Because the proposed bylaw amendment would cause Johnson & Johnson to violate New Jersey state law, it may be excluded as a matter of federal law.

Johnson & Johnson was allowed to exclude the trust's proposed bylaw amendment under the SEC's Rule 14a-8. That rule allows a corporation to exclude a proposal from its proxy materials if it "would, if implemented, cause the company to violate any state . . . law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). Johnson & Johnson properly excluded the proposal on this basis. Under New Jersey law, as explained in the New Jersey Attorney General's opinion, the founding documents of a corporation may contain provisions relating only to matters of "'internal concern'" to the corporation, *i.e.*, matters of internal corporate governance. Compl. Ex. 6, at 3 (citation omitted). The proposed bylaw—which relates to the external legal relationship between a shareholder and the corporation under federal law—therefore runs afoul of New Jersey law. *Id.*; *see generally* Jacob Hale Russell et al., *Mandatory Securities Arbitration's Impermissibility Under State Corporate Law: An Analysis of the Johnson & Johnson Shareholder Proposal* (Stanford Rock Ctr. For Corp. Governance Working Paper No. 237, 2019) (white paper signed by 25 leading law professors arguing that the proposed bylaw violates New Jersey law because it does not regulate a matter of corporate internal affairs) (Second Gupta Decl., Ex. A).

It is well settled that New Jersey limits the subject matter of corporate bylaws to a corporation's internal affairs. For over forty years, the New Jersey Supreme Court has recognized that under New Jersey law, shareholders' right to amend corporate bylaws "should be confined to matters touching the administrative policies and affairs of the corporation, the relations of members and officers with the corporation and among themselves, and like matters of internal concern." *Lambert*, 61 N.J. at 600.

But the distinction between matters internal to the corporation and external to the corporation, known as the "internal affairs doctrine," is far older. In 1765, Blackstone described the right of corporations "[t]o make by-laws . . . for the better government of the corporation" as firmly established in English law, with origins in ancient Rome. 1 William Blackstone, *Commentaries on the Laws of England* *463–64 ("And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome."). These bylaws, he explained, "were binding upon themselves, unless contrary to the laws of the land, and then they are void." *Id.*; *see generally* Adam Winkler, *We the Corporations* 46–52 (2018) (discussing the influence of Blackstone's *Commentaries* on American corporate law). Beginning in mid-nineteenth century America, corporations were created "one-by-one, through special acts of state legislatures," with each state act being "specifically tailored to the particular project proposed, with powers and privileges specifically defined." Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. Corp. L. 33, 47 (2006). Under this model, corporations were "'creatures' of the state" that were given powers by the state and were "viewed as agencies of the state." *Id.* Because of this quasi-sovereign status enjoyed by corporations, it was understood that only the state of incorporation, which had created the corporation and defined its powers and responsibilities, could regulate the corporation's "internal affairs," or the matters that dealt with the corporation's powers and responsibilities. *Id.*; *see also* 1 James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 2:13 (3d ed. 2018) (noting that "the corporation's capacity to act does not exist unless provided both by the law of the state of incorporation and the law that governs the act."). These internal matters generally include "the duties and obligations of the officers and directors, election and appointment of directors, issuance of shares, meetings, inspection rights, acquisition procedures, dividend regulation, and dissolution." *Id.* In contrast, other actions that were not internal to the corporation but instead affected third parties or matters external to corporate governance—such as torts or commercial contracts—would be governed by the law of the jurisdiction where the tort or contract arose, under traditional choice-of-law principles. *See id.*

Although corporations are no longer quasi-sovereign, the internal affairs doctrine continues to apply. As the Supreme Court has explained, it "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Under this doctrine, questions about the division of power in a corporation and the rights of its directors, officers, and shareholders are controlled by the documents of incorporation as governed by state corporate law. *See Burks v. Lasker*, 441 U.S. 471, 478 (1979). Conversely, documents of incorporation must be limited *only* to matters of internal affairs because that is the scope of the state of incorporation's authority over a corporation. *See ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (concluding that a fee-shifting bylaw could govern only suits arising from the internal affairs of a corporation rather than all types of lawsuits); *Boilermakers Local 154 Ret. Fund v. Chevron*

Corp., 73 A.3d 934, 952 (Del. Ch. 2013) (explaining that bylaws could not regulate the manner in which a stockholder brought a tort or commercial-contract claim because those bylaws "would not deal with the rights and powers of the plaintiff-stockholder *as a stockholder*"); *see also* Joseph Grundfest & Kristen Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis,* 68 Bus. Law. 325, 330 (2013) (explaining that corporate bylaws cannot restrict the forum for external claims because those claims are not matters of state corporate law and thus do not deal with rights over which the state has jurisdiction). New Jersey courts have regulated the content of corporate bylaws in the state with an understanding of this long-recognized principle. *See*, *e.g.*, *Lambert*, 61 N.J. at 600.

In 2018, New Jersey's legislature reaffirmed this longstanding principle by amending the New Jersey Business Corporation Act to expressly limit the subject matter of bylaws—allowing only provisions "not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees." N.J.S.A. § 14A:2-9(4). And, further reflecting its intent to limit corporate bylaws to matters of internal corporate governance, the legislature added a provision allowing corporations to add a bylaw making New Jersey the "sole and exclusive forum" for certain types of suits—all of which relate to the internal governance of the corporation. *Id.* § 14A:2-9(5) (applying to derivative actions, breach-of-fiduciary-duty claims, violations of the certificate of incorporation, state-law claims including breach of duty to disclose, and "any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine").

Delaware, too, has interpreted its parallel law to apply only to matters of internal concern to the corporation. New Jersey's law governing the contents of bylaws is nearly identical to

Delaware's law governing the contents of a corporation's founding documents. *See* 8 Del. C. § 102(b)(1). And the Delaware Court of Chancery has recently interpreted Section 102(b)(1) to invalidate a forum-selection clause that would have required shareholders to bring federal securities cases only in federal court. *See Sciabacucchi v. Salzberg*, 2018 WL 6719718, *1–2 (Del. Ch. Dec. 19, 2018). In *Sciabacucchi*, the court reasoned that "Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships." *Id.* at *2. It recognized that a Delaware corporation that operates in other states "must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions," and that when a lawsuit is related to those legal regimes, "the DGCL cannot provide the necessary authority to regulate the claims." *Id.* The same reasoning applies for federal securities-fraud claims: a corporation's fraudulent representations "do[] not arise out of the corporate contract" and are thus "beyond the power of state corporate law to regulate." *Id.* As courts and scholars have reasoned, a "Rule 10b-5 claim under the federal securities laws is a personal claim akin to a tort claim for fraud" based on a specific action in the sale of stock, and it is therefore external to matters of corporate governance. Lucian A. Bebchuk et al., *Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims* 2 (2018), https://bit.ly/2Rn4G1C (quoting *In re Activision Blizzard Inc. Stockholder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015)) (Second Gupta Decl., Ex. B).

And this requirement that foundational corporate documents be limited to internal affairs applies to more than just forum-selection provisions. In *ATP Tour*, the Delaware Supreme Court concluded that a corporation could adopt a fee-shifting provision that required unsuccessful plaintiffs to pay the corporation's attorneys fees—crucially, as long as the provision was limited to suits arising from the internal affairs of the corporation. 91 A.3d at 554. It reasoned that "[a] bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must 'relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.'" *Id.* at 558 (second alteration in original) (quoting 8 Del. C. § 109(b)).

New Jersey follows Delaware's lead and, through its Attorney General, has recently explained precisely what New Jersey law allows in this very case. The Attorney General's letter to the SEC outlines in detail the above-stated points and explains that under these "[l]ongstanding principles of New Jersey law [that] limit the subject matter of corporate bylaws to matters of internal concern to the corporation," a forum-selection clause related to federal claims is void. Compl. Ex. 6, at 2. And as the SEC recognized in its no-action letter to Johnson & Johnson, the Attorney General of New Jersey has legal authority to interpret the law of the state. *See, e.g.*, *Paff v. Div. of Law*, 412 N.J. Super. 140, 145 (App. Div. 2010) (recognizing legal authority of Attorney General to interpret statutes and legal documents on behalf of state). As the SEC correctly concluded, New Jersey Attorney General's interpretation of state law is "legally authoritative." Compl. Ex. 8, at 2.

Because the officer tasked with authoritatively interpreting and enforcing New Jersey state law unequivocally concluded that Johnson & Johnson would violate state law if it adopted the proposed bylaw amendment, the corporation must be allowed to exclude the proposal under Rule 14a-8. "To conclude otherwise would put the Company in a position of taking actions that the chief legal officer of its state of incorporation has determined to be illegal." *Id.*

II. Even assuming that the Federal Arbitration Act applied, it would not preempt New Jersey's generally applicable corporate law.

The trust contends that, even if state corporate law and federal securities law preclude its proposed bylaw amendment, Johnson & Johnson is nevertheless required to include the amendment in its proxy statement because the Federal Arbitration Act demands that result. Not so. Enacted in 1925, the FAA requires only that written contracts to settle controversies by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act was passed to overturn the traditional judicial hostility to arbitration agreements. Its purpose is "to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 n.6 (2011). It ensures that the expectations of contracting parties "who desired arbitration" would not be "undermined by federal judges" or "by state courts or legislatures" that would discriminate against arbitration. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984). At the same time, the Act "does not confer a right to compel arbitration of any dispute at any time" or "require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–78 (1989).

Setting aside whether corporate bylaws are contracts subject to the FAA in the first place (a question discussed in Part III below), New Jersey's generally applicable corporate law is not preempted by the Federal Arbitration Act. *Kindred Nursing Centers*, 137 S. Ct. at 1428. That is because New Jersey's corporate law does not address the enforceability of arbitration agreements at all. It neither prohibits nor discourages voluntary arbitration. Nor does it preclude the enforcement of any arbitration agreement; the corporation remains free to include an arbitration clause in any contract it chooses, subject of course to the consent of the counterparty.

Just as importantly, the FAA's text expressly saves generally applicable state law from preemption. *See* 9 U.S.C. § 2 (creating an exception for state law that applies to "any contract"). Because New Jersey law generally prohibits *any* proposed bylaw that would fall outside of "the administrative policies and affairs of the corporation, the relations of members and officers with the corporation and among themselves, and like matters of internal concern," *Lambert*, 61 N.J. at 600—regardless of whether the bylaw happens to concern arbitration—the trust is wrong to assert that New Jersey's law "would be preempted by the Federal Arbitration Act," Compl. ¶ 40.

The Supreme Court's settled FAA preemption jurisprudence makes this clear. Section 2 of the FAA establishes what is, in essence, "an equal-treatment principle." *Kindred Nursing Centers*, 137 S. Ct. at 1426. Under that principle, the FAA preempts "any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'" *Id.* (quoting *AT&T Mobility,* 563 U.S. at 339); *see, e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 687 (1996) (holding the FAA preempted a Montana law that invalidated arbitration agreements unless "[n]otice that a contract is subject to arbitration" was "typed in underlined capital letters on the first page of the contract" because courts may not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions"). And the FAA also preempts any state law that disfavors contracts based on the "defining features of arbitration"—like a law declaring unenforceable any contract that waives a consumer's right to a seek a jury trial in court. *Kindred Nursing Centers*, 137 S. Ct. at 1426. But it does not preempt those state laws that are arbitration-neutral—"generally applicable" rules or laws that do not have an "arbitration-specific character." *Id.* at 1428. And that remains true even where such a rule may be applied "in an arbitration case." *Id.* So long as the rule "in fact appl[ies] generally" and does not "single out arbitration," it will not run afoul of the FAA. *Id.* at 1428 n.2.

There can be no doubt that New Jersey's corporate law governing the process of bylaw amendment is "generally applicable"—that is, it does not discriminate "on its face against arbitration." *Id.* at 1426, 1428. In *Lambert*, the New Jersey Supreme Court described its state's corporate-governance law as a "general" rule that "a reserved power to amend by-laws may not affect basic rights" and "should be confined to matters touching the administrative policies and affairs of the corporation, the relations of members and officers with the corporation and among themselves, and like matters of internal concern." 61 N.J. at 600. And the New Jersey statute codifying the rule is likewise "generally applicable": It simply specifies that the nature of any corporate bylaw must "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees." N.J.S.A. § 14A:2-9(4). Given that nothing in the statute or New Jersey case law discussing this basic rule of corporate governance even references arbitration, it certainly cannot be said that the rule explicitly "single[s] out arbitration" from any other matter. *Kindred*, 137 S. Ct. at 1428 n.2.

Nor does New Jersey law "disfavor[] contracts that . . . have the defining features of arbitration agreements." *Id.* at 1426. The law restricting the subject-matter of bylaws has been applied for over a century across a range of varying circumstances to bar bylaw amendments that have nothing to do with arbitration yet attempt to cover matters outside a corporation's internal affairs. For instance, the law has been applied to invalidate a corporation's bylaw amendment reducing death benefits paid to shareholders. *See O'Neill v. Supreme Council Am. Legion of Honor*, 70 N.J.L. 410, 420–21 (Sup. Ct. 1904); *Sautter v. Supreme Conclave Improved Order of Heptasophs*, 72 N.J.L. 325, 326–27 (Sup. Ct. 1906). It has foreclosed bylaw amendments eliminating delegate representation at national conventions. *See St. John's Baptist Soc'y, Subordinate Assembly 270 v. Ukrainian Nat'l Ass'n, Inc.*, 105 N.J. Eq. 69 (Ch. 1929). And it has barred bylaw amendments designed to divest stockholders of the right to redeem shares at fair book value. *See Lambert*, 61 N.J. at 604.

The law, in short, is as arbitration-neutral as they come. It does not "target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration," and so simply does not meet the prerequisites for FAA preemption. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018). To the contrary, just as for bylaws addressing other matters of internal corporate affairs, New Jersey's law does not prohibit corporations from including bylaws that require arbitration for disputes arising out of internal governance matters. *See, e.g.*, *Teamsters Local Union No. 469 v. Teamsters Joint Council No. 73 Pension Fund*, 2015 WL 5603656, at *5–6 (D.N.J. Sept. 22, 2015) (holding, under *Lambert*, that a bylaw amendment "to include a standing arbitrator" to resolve *internal* disputes was valid); *cf.* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 Geo. L.J. 583, 599 (2016) (explaining that such a bylaw would be "a far cry from the corporation dictating the terms on which its securities are resold in interstate markets merely by amending its charter or bylaws under the laws of the state of incorporation"). All the law does, then, is establish a boundary line for those matters that may be addressed through bylaws. Nothing about this state-law rule comes close to being "tailor-made to arbitration agreements" or "subjecting them" to "uncommon barriers." *Kindred Nursing Centers*, 137 S. Ct. at 1427. Instead, New Jersey's rule "appl[ies] generally," *id.*, to the full range of issues that fall outside the scope of internal corporate governance. The FAA, therefore, leaves New Jersey's rule alone.

III. In any event, the Federal Arbitration Act is inapplicable.

A. Securities-fraud claims are not "controvers[ies]" that "aris[e] out of" a corporation's bylaws.

The Federal Arbitration Act does not apply to a corporate bylaw that purports to limit federal securities claims because federal securities claims do not "arise out of" a corporation's bylaws. The FAA applies only when (1) a "contract evidencing a transaction involving commerce" includes a written arbitration agreement and (2) the "controversy" to be arbitrated "aris[es] out of such contract." 9 U.S.C. § 2. To be sure, some courts have described corporate bylaws as contractual or quasi-contractual and have applied contract-law principles by way of analogy—even though (as we discuss below) bylaws obviously would not satisfy the traditional Anglo-American requirements for the formation of a contract. But even if corporate bylaws *were* contracts in any relevant sense, the FAA would still not apply here because securities-fraud claims do not "aris[e] out of" a corporation's bylaws. Instead, they arise out of an actual *purchase* of shares by an investor and out of the federal securities law that governs that transaction. Neither the transaction that gives rise to a federal securities claim nor the source of law that governs it relates in any way to the corporation's bylaws: "[T]o the extent corporate constitutive documents are a contract, that contract only extends as far as the realm of internal affairs." Lipton, *Manufactured Consent*, at 600.

The bylaws cannot govern litigation over federal securities claims, "which are not brought under [state] law, do not concern [state]-imposed duties, and usually have no territorial nexus to [the state of incorporation]." *Id.* This makes sense: a corporation cannot, through amending its bylaws, dictate how shareholders resell its securities to other purchasers on the interstate markets or prohibit shareholders from owning stock in a competing corporation. Such provisions do not touch on any matter of internal concern to the corporation such as the corporation's organization, and thus have no place in a corporation's founding documents.

The same is true of a forum-selection clause related to federal securities claims. These claims do not arise because of a corporation's administrative policies, relations between the corporation and officers, or other matters of corporate organization. Instead, federal securities claims arise from the actual purchase of the securities and concern whether federal law is followed in connection with that transaction. *Id.* Controversies concerning federal securities claims do not "arise" out of a corporation's bylaws just because a forum-selection bylaw to that effect is adopted. The same is true of other matters external to a corporation's internal affairs—including labor law, antitrust law, environmental regulations, and common-law torts: A corporation cannot adopt a forum-selection bylaw that applies to such claims and argue that, by virtue of the bylaw, those claims now "arise out of" the bylaws themselves. *See Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1515–16 (10th Cir. 1995) (holding that an antitrust claim does not arise out of a contract containing an arbitration clause where claims did not turn on interpreting the contract or performance of the contract). If corporations could do so, they would be able to run roughshod over the sovereignty of other states and the federal government to enforce their laws against a corporation, and corporate law would swallow other areas of law whole. No court has suggested that the law should be interpreted in this way.

Thus, based on the FAA's plain text, the Act does not apply. Because there is no circumstance in which a securities-fraud claim will "arise out of" Johnson & Johnson's bylaws, the FAA cannot preempt the application of New Jersey's general corporate law.

B. Corporate bylaws are not "contract[s] evidencing a transaction" within the meaning of the Federal Arbitration Act.

The FAA also does not apply here for an even more fundamental reason: because the FAA applies only to private bilateral "contract[s] evidencing a transaction involving commerce," 9 U.S.C. § 2, and a corporation's bylaws, absent a manifestation of assent, do not constitute such a contract. As a review by more than two dozen of the top securities and corporate law professors in the country has explained:

> [T]he FAA has never been interpreted to require the enforcement of bylaws or similar provisions unilaterally adopted to remove judicial oversight of investor disputes. . . . [C]orporate bylaws—particularly in public corporations that form the basis of the nation's financial markets—are vastly dissimilar to the kind of contractual agreements that have been enforced by courts, including the Supreme Court, under the FAA.[5]

This settled understanding is rooted in the Act's text, purpose, and history. By its terms, the FAA applies only to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2. Thus, the FAA applies only to contracts as traditionally understood: "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981). And as the Supreme Court has recently made clear, "[w]hile a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) (noting that the FAA's reach "doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration"). Instead, before invoking the FAA, a court must first determine "whether the contract itself falls within or beyond

[5] Letter from James D. Cox, et al., to Mary Jo White, Oct. 30, 2013, available at https://bit.ly/2Bb7Na7 (signed by 29 of the leading securities and corporate law professors in the United States) (Second Gupta Decl., Ex. C).

[its] boundaries." *Id.* And simply because a contract "may be crystal clear and require arbitration of every question under the sun," that "does not necessarily mean" the FAA will apply. *Id.*

Consistent with this understanding, federal courts have held that the FAA does not apply outside of "private agreements between contracting parties," even if the documents in question are treated as contractual or quasi-contractual for other purposes and interpreted by courts according to contract-law principles. *Breazeale v. Victim Services, Inc.*, 878 F.3d 759, 769 (9th Cir. 2017). Thus, in *Kirleis*, the Third Circuit rejected an attempt to enforce an arbitration clause in a corporation's bylaws against a shareholder because, under the FAA and traditional contract law, there must be a "mutual manifestation of assent"—it is insufficient to rely on "corporate law principles" that "generally impute to members of the corporation knowledge and acceptance of corporate bylaws." 560 F.3d at 160. And in *Breazeale*, the Ninth Circuit held that the FAA does not apply to plea agreements between a criminal defendant and a prosecutor, even though such agreements are generally treated as binding contracts. 878 F.3d at 768–69. Even if such documents resemble contracts in some way (or many ways), that is insufficient for the FAA to apply. *See id.* ("Contract law doctrines operate in the realm of criminal plea bargains by analogy only—and even then, '[t]he contract analogy is imperfect.'" (quoting *United States v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988)). Instead, the relevant question is whether the document to be analyzed satisfies the FAA-imposed prerequisites that govern whether the Act applies—including whether the document can be considered an agreement that meets the traditional contractual requirements under Anglo-American contract law. *See id.*

Consider the "first principle" of the FAA—that "'[a]rbitration is strictly a matter of consent.'" *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)). For a contract to meet this bedrock requirement (and thus be properly subject to the

FAA), it must be the product of consent between the parties. That, as the Supreme Court has repeatedly emphasized, is a matter "of fundamental importance." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (observing that "arbitration 'is a matter of consent, not coercion'" (quoting *Volt Info. Scis.,* 489 U.S. at 479)).

But consent for FAA purposes requires actual manifestation of mutual assent as established by state-law rules of contract law. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate," courts generally apply "ordinary state-law principles that govern the formation of contracts."). And, under New Jersey law, "[a]n agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law." *James v. Global TelLink Corp*, 852 F.3d 262, 265 (3d Cir. 2017) (quoting *Atalese v. U.S. Legal Servs. Grp.*, 219 N.J. 430, 442 (2014)); *see also Kirleis*, 560 F.3d at 160. Among those customary contract-law principles are the principles that "[s]ilence does not ordinarily manifest assent" unless there is reason for the offeror to expect a reply and that "the offeror must 'give[ ] the offeree reason to understand that assent may be manifested by silence or inaction.'" *James*, 852 F.3d at 266 (quoting *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436 (1992) and Restatement (Second) of Contracts § 69 (1981)). Mutual assent "requires that the parties have an understanding of the terms to which they have agreed," and courts must "take particular care in assuring the knowing assent of both parties" *Id.* (quoting *Atalese*, 219 N.J. at 442). Because mutual assent is critical to contract formation generally and the adoption of an arbitration agreement in particular, the Third Circuit has struck down purported arbitration agreements that did not require consumers to "demonstrate acceptance of the terms of use through any affirmative act" and in which consumers were not notified "that their use of [a] service would constitute assent to the terms of use." *Id.*

This prerequisite is absent when it comes to corporate bylaws. Shareholders do not manifest assent to a bylaw amendment that requires securities claims to be individually arbitrated. In fact, corporate law does not even require that shareholders be notified when the bylaws are amended. New Jersey grants a corporation's board the right to amend the corporate bylaws without the approval of shareholders unless that right has been specifically rescinded in the certificate of incorporation. *See* N.J.S.A. § 14A:2-9(1). As a result, changes to the bylaws can be made without shareholders' authorization or agreement. And a corporation is not required to provide amended bylaws to its shareholders or even file its bylaws with the Secretary of State—it need only keep a copy of the bylaws at its principal place of business. *Compare id.* § 14A:2-7 (requiring certificate of incorporation be filed with secretary of state), *with id.* § 14A:2-9 (imposing no filing requirement for bylaws).[6] As a result, a shareholder's decision to purchase and keep shares of stock does not manifest the shareholder's assent to these changes in terms, which the shareholder has no reason to know occurred. In his explanation of the SEC's objection to mandatory shareholder arbitration in 1990, the then-Assistant General Counsel explicitly explored whether there could be such a contractual relationship and concluded that there could not because "shareholders typically do not affirmatively agree to the provisions in a corporate charter and generally have little knowledge of those provisions." Thomas Riesenberg, *Arbitration and Corporate Governance: A Reply to Carly Schneider*, 4 Insights, no. 8, Aug. 1990, at 30 (Second Gupta Decl., Ex. D). This falls well short of the consent required to manifest agreement to an arbitration agreement. *James*, 852 F.3d at 266–67.

[6] Under federal securities law, publicly traded corporations are required to publicly file any bylaw amendment with the SEC. 17 C.F.R. § 240.13a-11. But such a public filing is plainly insufficient to give notice of a change in contract terms under the common law governing ordinary contracts.

Nor do corporations voluntarily assent to bylaws as self-interested parties to a contract. Directors, who may adopt bylaws on the corporation's behalf, cannot bargain solely for the corporation's interests. Instead, the directors owe fiduciary duties to the shareholders, including the duties of care and loyalty. *See* 2 James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* §§ 10:1–19 (3d 2018). If the corporation proposed a bylaw in its own self-interest without regard for the shareholders, that otherwise-valid bylaw amendment would nevertheless be invalid under corporate law. *ATP Tour,* 91 A.3d at 558–59; *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) ("[T]here is a vast difference between expending corporate funds to inform the electorate and exercising power for the primary purpose of foreclosing effective shareholder action."). As a result, it is simply a fallacy to suggest that "the parties come before the court as autonomous equals," as contract law and FAA jurisprudence assume. *See* Lipton, *Manufactured Consent*, at 627. And because corporations can't give voluntary consent to a bylaw in the same manner as a party who negotiates a contract, the FAA's central premise—that arbitration is a "matter of consent not coercion," *Stolt-Nielsen S.A.*, 559 U.S. at 681—cannot be satisfied.

Courts considering whether shareholders have assented to a bylaw amendment have relied on the fact that when a shareholder buys stock in a company, he or she has constructive notice that state law and a company's "certificate[] of incorporation gave the boards the power to adopt and amend bylaws unilaterally" and that such bylaws "are binding on the stockholders." *Boilermakers*, 73 A.3d at 939–40. Therefore, courts reason, "an essential part of the contract stockholders assent to when they buy stock . . . is one that presupposes the board's authority to adopt binding bylaws consistent with" state law. *Id.* at 940.

That logic may be sufficient to bind shareholders *as a matter of corporate law*, but it is insufficient as a matter of contract law—and it is plainly insufficient under the FAA. As the Third Circuit has recognized, there is "tension between corporate law principles—which generally impute to members of the corporation knowledge and acceptance of corporate bylaws—and the law of contracts, which requires consent to be bound." *Kirleis*, 560 F.3d at 163. In a case involving an attempt to enforce a mandatory arbitration clause found in corporate bylaws against a shareholder who sought to bring a civil-rights claim, the Third Circuit resolved that tension by holding that contract law applies. *Id.* ("[E]xplicit agreement is essential to the formation of an enforceable arbitration contract.").[7]

That fundamental distinction between *corporate law* and *contract law* is dispositive here. It is undoubtedly true that as a matter of corporate law, courts often treat a corporation's bylaws, by analogy, as if they were a contract between the corporation and its shareholders. *See, e.g.*, *Boilermakers*, 73 A.3d at 939–40. But the fact that courts have found it useful to analogize bylaws to contracts for purposes of corporate law is not enough to make these bylaws subject to the FAA.

[7] Even under contract principles governing a party's unilateral change of contract terms, a shareholder does not manifest assent to the adoption of a forced-arbitration bylaw. Courts have approved contracts that give one party the right to modify a contract but have held that the modifying party does not have "carte blanche to make any kind of change whatsoever as long as a specified procedure is followed." *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 790 (1998); *Discover Bank v. Shea*, 362 N.J. Super. 200, 204–07 (2001) (adopting entire reasoning of *Badie*). A modification is appropriate only if the other party to the contract receives notice of the change and the change is "in accordance with" the contract—that is, it pertains to a subject addressed in the original contract. *Badie*, 67 Cal. App. 4th at 791; *Discover Bank*, 362 N.J. Super. at 205–06. Those requirements are not met when an arbitration clause related to securities claims is added to a corporation's bylaws. Not only do shareholders not necessarily receive notice of bylaw amendments, but an arbitration-related bylaw—and particularly a bylaw amendment requiring arbitration of federal securities claims—does not pertain to any subject in the bylaws as they already exist. As a result, a shareholder cannot be deemed to have assented to this new, unrelated bylaw merely because she knew the bylaws could be amended when she purchased stock.

IV. Allowing the proposed bylaw amendment would reverse settled and longstanding federal policies embodied in the securities laws.

Although nothing in the Federal Arbitration Act of 1925 bears on the propriety of the trust's proposal, later enactments of Congress do have some bearing here—namely, those in which Congress has continuously expressed a policy of permitting private securities class actions. That policy deserves respect. When it enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress included strong anti-waiver provisions designed to prevent investors' statutory rights from being waived via contract. These nearly identical provisions (under the headings "contrary stipulations void" and "validity of contracts") provide that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Acts or related rules or regulations "shall be void." 15 U.S.C. § 77n; *see also id.* § 78cc. Congress reaffirmed its protection of shareholders' ability to bring securities claims through class actions in the 1990s, when it passed the Private Securities Litigation Reform Act, which dictates how lead plaintiffs and counsel will be appointed in securities class actions, and the Securities Litigation Uniform Standards Act, which requires that securities-fraud class-action suits involving more than 50 plaintiffs be brought in federal court. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Securities Litigation Uniform Standards Act, Pub. L. No. 105-353, 112 Stat. 3227 (1998).[8] Together, all of these enactments reflect a strong congressional policy in favor of permitting private enforcement of the securities laws through class actions.

---

[8] The history of the Private Securities Litigation Reform Act confirms this principle. Even as it imposed limits, Congress repeatedly acknowledged the importance of private securities actions, describing them as "an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). And one of the sponsors emphasized that the Act's lead-plaintiff provisions

The Supreme Court has indicated that the anti-waiver language in the 1934 Act would bar any provision that "weakens [investors'] ability to recover under the Exchange Act." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987). While simultaneously upholding arbitration provisions in contracts with broker-dealers, the Court indicated that a provision waiving a shareholder's right to sue in court would run afoul of the anti-waiver provision "where arbitration is inadequate to protect the substantive rights at issue." *Id.* at 229. And the SEC and its staff have repeatedly concluded that individual shareholder arbitration is "inadequate" to protect investors' substantive rights. Indeed, in the more than eight decades of the federal securities laws, the SEC has never permitted a public company to mandate shareholder arbitration.

After the Supreme Court upheld arbitration in customer disputes involving broker-dealers in *McMahon* and the SEC rebuffed Franklin First Financial's attempt to go public with mandatory shareholder arbitration embedded in its organizational documents, the SEC's then-Assistant General Counsel explained the Commission's position.[9] That explanation distinguished arbitration of broker-customer disputes (which the SEC supported) from mandatory shareholder arbitration (which the SEC opposed) by noting that the SEC has extensive oversight of the former, but would not over the latter.[10] In its amicus brief urging the Supreme Court to uphold

---

were intended to "empower[] investors so that they . . . have the greater control over the class action cases by allowing plaintiffs with the greatest claim to be named plaintiff and allowing that plaintiff to select their counsel." 141 Cong. Rec. S17956 (daily ed. Dec. 5, 1995) (statement of Sen. Dodd).

[9] Riesenberg, *Arbitration and Corporate Governance: A Reply to Carly Schneider*, at 2 (Second Gupta Decl., Ex. D).

[10] *Id.* at 30 ("Because Commission oversight authority is lacking as to shareholder/issuer disputes, corporations may impose arbitration procedures that could be unfavorable to investors.").

an arbitration agreement between a broker and its customer, the SEC reinforced this point, stating that its argument "would not apply" where the arbitration procedure was not subject to the Commission's oversight of self-regulatory organizations. Br. of SEC at 20, *McMahon,* 482 U.S. 220 (No. 86-44). In the broker-customer context, following the decision in *McMahon* and as a result of encouragement by the SEC, self-regulatory organizations adopted rules ensuring that arbitration was unavailable for claims *brought as class actions*. Organizations including the New York Stock Exchange and the Financial Industry Regulatory Authority disallowed class waivers for decades under such rules. *See* NYSE Rule 600(d) (adopted in 1992); FINRA Code of Arbitration Procedure § 12204(d).

The Supreme Court agreed that the SEC's oversight of the dispute-resolution process between brokers and customers was essential to ensure that the rights of investors were protected. *See McMahon*, 482 U.S. at 234 (emphasizing the SEC's "power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights"). Here, arbitration of federal securities claims against Johnson & Johnson under the trust's proposal would not be subject to SEC oversight and would hence be "inadequate to protect" investors' rights. *Id.* at 229.

Because it would overturn the settled approach taken by Congress, the Supreme Court, and the SEC for decades—and because it runs afoul of both state corporate law and federal securities regulations—this Court should reject the trust's impermissible attempt to limit shareholders' federal statutory protections through corporate bylaws.

CONCLUSION

The proposed intervenors' motion to dismiss should be granted.

Respectfully submitted,

/s/ James E. Cecchi
JAMES E. CECCHI
LINDSEY H. TAYLOR
Carella, Byrne, Cecchi, Olstein,
Brody & Agnello, P.C.
5 Becker Farm Road
Roseland, NJ 07068
(973) 994-1700

DEEPAK GUPTA (*pro hac vice*)
MATTHEW WESSLER
ALEXANDRIA TWINEM *
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741

**Admitted in New York only; practicing under supervision of members of the D.C. Bar.*

Counsel for Proposed Intervenors/Defendants The California Public Employees' Retirement System and The Colorado Public Employees' Retirement Association

MARC I. GROSS
JEREMY A. LIEBERMAN
JENNIFER PAFITI
MICHAEL GRUNFELD
Pomerantz LLP
600 Third Avenue
New York, NY 10016
(212) 661-1100

SALVATORE J. GRAZIANO
JAI K. CHANDRASEKHAR
Bernstein Litowitz Berger
& Grossmann LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

May 31, 2019

CERTIFICATE OF SERVICE

I certify that on May 31, 2019, I served this document via CM/ECF upon:

Walter Stephen Zimolong
Zimolong LLC
PO Box 552
Suite 1210
Villanova, PA 19085
215-665-0842 (phone)
215-689-3404 (fax)
wally@zimolonglaw.com

Counsel for the Plaintiff

Justin Taylor Quinn
Robinson Miller LLC
One Newark Center
19th Floor
Newark, NJ 07102
973-690-5400 (phone)
jquinn@rwmlegal.com

Andrew Muscato
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, New York 10036
(212) 735-3000 (phone)
(212) 735-2000 (fax)
andrew.muscato@skadden.com

Counsel for the Defendant

/s/ James E. Cecchi
James E. Cecchi
Counsel for Proposed Intervenors/Defendants The California Public Employees' Retirement System and The Colorado Public Employees' Retirement Association