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

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| **The Doris Behr 2012 Irrevocable Trust,**<br><br>Plaintiff,<br><br>v.<br><br>**Johnson & Johnson,**<br><br>Defendant. | Case No. 3:19-cv-8828-MAS-LHG |

# BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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The Doris Behr 2012 Irrevocable Trust ("the Trust") is one of many shareholders in Johnson & Johnson. The Trust wants Johnson & Johnson to amend its bylaws to require the company's shareholders to submit their federal securities law claims to arbitration. And it recently submitted a proposal for its fellow shareholders to consider and vote upon at the company's annual shareholder meeting, which is scheduled for April 25, 2019.

Johnson & Johnson, however, refused to include the Trust's shareholder arbitration proposal in the proxy materials that it issued to its shareholders on March 13, 2019. The Trust sued Johnson & Johnson over this exclusion on March 20, 2019. Because the annual shareholder meeting is fast approaching, the Trust is seeking a preliminary injunction that requires Johnson & Johnson to issue supplementary proxy materials that include the Trust's shareholder arbitration proposal. The Trust also asks for an injunction that prevents Johnson & Johnson from excluding the Trust's proposal from future proxy materials. Finally, the Trust asks that the Court order Johnson & Johnson to announce in its proxy materials that the Trust's proposal is legal under the law of New Jersey and under the law of the United States, to remove the taint caused by the baseless accusations of illegality that Johnson & Johnson and the New Jersey Attorney General have made against the Trust's proposal.

## FACTS AND STATUTORY BACKGROUND

Johnson & Johnson holds annual shareholder meetings, where the company's shareholders vote on decisions relevant to the company's business. Because Johnson & Johnson is a large and publicly traded company, it is infeasible for each shareholder to attend this meeting. To deal with this problem, Johnson & Johnson sends "proxy solicitation materials" to each of its shareholders before the annual meeting. These proxy materials include: (1) a "proxy statement," which explains the issues to be voted on at the meeting and requests authority to vote on behalf of the shareholder in accordance with the shareholder's instructions; and (2) a "proxy card," which shareholders use to instruct those who will vote on the shareholder's behalf.

Section 14(a) of the Securities Exchange Act of 1934 requires proxy solicitation materials to comply with the SEC's rules and regulations. *See* 15 U.S.C. § 78n(a)).[1] Under these rules, a shareholder may submit proposals for consideration at the company's annual shareholder meetings, so long as the shareholder has: (1) continuously held at least $2,000 (or 1%) of the company's stock for at least one year before submitting its proposal; and (2) continues to hold this required stock through the date of the annual shareholder meeting. *See* 17 C.F.R. § 240.14a-8(b)(1). A shareholder proposal and its accompanying supporting statement are limited to 500 words,[2] and the proposal must be "received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting." *See* 17 C.F.R. § 240.14a-8(e)(2). If an eligible shareholder submits a proposal that meets these requirements, then the company *must* include that proposal in its proxy solicitation

1. The SEC rules governing proxy solicitations are codified at 17 C.F.R. § 240.14a-1 *et seq.* The text of Rule 14a-8, which governs shareholder proposals, is attached as Exhibit 9 to this brief.
2. *See* 17 C.F.R. § 240.14a-8(b)(1).

materials, unless the company shows that the proposal falls within one of the 13 exceptions listed in Rule 14a-8(i) (codified at 17 C.F.R. § 240.14a-8(i)). The company bears the burden of demonstrating that an exception in Rule 14a-8(i) applies. *See Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 334 (3d Cir. 2015) ("[The company] bears the burden of establishing as a matter of law that it properly excluded the proposal under an exception to Rule 14a-8.").

One of these exceptions is Rule 14a-8(i)(2), which allows a company to exclude proposals that "would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2).

## I. The Trust's Shareholder Arbitration Proposal

On November 9, 2018, the Trust submitted its proposal to Johnson & Johnson's management. *See* Exhibit 1. The Trust's proposal, if adopted, would instruct the company's Board of Directors to "take all practicable steps to adopt a mandatory arbitration bylaw" that provides:

- for disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation to be exclusively and finally settled by arbitration under the Commercial Rules of the American Arbitration Association (AAA), as supplemented by the Securities Arbitration Supplementary Procedures;

- that any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined;

- an express submission to arbitration (which shall be treated as a written arbitration agreement) by each stockholder, the Corporation and its directors, officers, controlling persons and third parties consenting to be bound;

- unless the claim is determined by the arbitrator(s) to be frivolous, the Corporation shall pay the fees of the AAA and the arbitrator(s), and if the stockholder party is successful, the fees of its counsel;

- a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s);

- that governing law is federal law; and

- for a five-year sunset provision, unless holders of a majority of Corporation shares vote for an extension and the duration of any extension.

*See* Exhibit 1. The Trust submitted this proposal within the time window provided in Rule 14a-8(e)(2), and the Trust is eligible to submit this shareholder proposal under the requirements of Rule 14a-8(b)(1).[3]

## II. Johnson & Johnson's Opposition To The Trust's Proposal

On December 11, 2018, Johnson & Johnson informed the SEC Division of Corporation Finance ("the Division") that it intended to exclude the Trust's proposal from its proxy solicitation materials. *See* Exhibit 2. Johnson & Johnson claimed that

3. The Trust owns 1,050 shares of Johnson & Johnson (with a market value well in excess of $2,000), and it had held these shares for at least one year when it submitted its proposal on November 9, 2018. *See* Exhibit 1. The Trust will continue to hold these shares through the company's 2019 shareholder meeting. *See* 17 C.F.R. § 240.14a-8(b)(1).

the Trust's proposal was excludable under Rule 14a-8(i)(2) because it would cause the company to violate federal law. *See id.* Specifically, Johnson & Johnson asserted that the Trust's proposal would cause the company to violate Section 29(a) of the Securities Exchange Act, which states that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." 15 U.S.C. § 78cc(a).

On December 24, 2018, the Trust wrote to the Division and explained that Johnson & Johnson's argument was irreconcilable with the Federal Arbitration Act and a series of Supreme Court decisions, including *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *See* Exhibit 3.

In response to the Trust's letter, Johnson & Johnson sent a supplementary letter to the Division arguing for the first time that the Trust's shareholder arbitration proposal would cause the company to violate New Jersey *state* law. *See* Exhibit 4. Johnson & Johnson admitted that no court in New Jersey has ever ruled on whether a corporation's bylaws may require arbitration of shareholder claims. *See id.* at 3. And Johnson & Johnson could not point to any statutory language that precludes New Jersey corporations from establishing an arbitration regime of this sort. Instead, Johnson & Johnson attached an opinion letter from Lowenstein Sandler, which cited cases interpreting Delaware and Pennsylvania law and predicted that the New Jersey courts would follow the rationale in those cases. *See* Exhibit 4, Ex. A at 4–8 (citing *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19. 2018), and *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 163 (3d Cir. 2009)).

On January 23, 2019, the Trust wrote to the Division to refute the arguments in Johnson & Johnson's supplementary letter. *See* Exhibit 5. The Trust protested that New Jersey law was *at most* "unclear or unsettled" on the legality of shareholder arbitration, and that the company therefore could not carry its burden of showing that the Trust's proposal "*would*, if implemented, cause the company to violate any state, federal, or foreign law to which it *is subject*," as required by the text of Rule 14a-8(i)(2). *See* Exhibit 5 at page 8 (quoting 17 C.F.R. § 240.14a-8(i)(2) (emphasis added)). The Trust also argued that the opinion letter from Lowenstein Sandler had misinterpreted the requirements of Delaware, Pennsylvania, and New Jersey law. *See id.* at 3–10. Finally, the Trust noted that *even if* Johnson & Johnson were correct to assert that New Jersey law forbids the company to adopt shareholder arbitration, the Federal Arbitration Act would preempt state law and allow Johnson & Johnson to implement the Trust's proposal. *See id.* at 10–12.

On January 29, 2019, the Attorney General of New Jersey sent a letter to the Division opining that the Trust's proposal, if adopted, would cause Johnson & Johnson to violate New Jersey law. *See* Exhibit 6. The Attorney General, like Johnson & Johnson, was unable to identify any statutory language or any New Jersey court decision that prohibits a corporation from requiring its shareholders to arbitrate their federal securities law claims. *See id.* at 3 (acknowledging the "absence of controlling New Jersey authority"). The Trust responded to the New Jersey Attorney General's letter on February 1, 2019. *See* Exhibit 7. The Trust reiterated its claim that the Federal Arbitration Act preempts any provision of New Jersey law that purports to prevent Johnson & Johnson from requiring shareholder arbitration, and it noted that the

Attorney General's letter did not even attempt to address the issue of FAA preemption. *See id.* at 3.

After considering all of these submissions, the SEC Division of Corporation Finance issued a "no-action letter" on February 11, 2019, announcing that it would *not* recommend enforcement action if Johnson & Johnson excluded the Trust's proposal from its 2019 proxy materials. *See* Exhibit 8. The no-action letter concluded that Johnson & Johnson could exclude the Trust's proposal under Rule 14a-8(i)(2), but only on the ground that the proposal would cause Johnson & Johnson to violate state law. *See id.* In reaching this conclusion, the Division put decisive weight on the letter submitted by the Attorney General of New Jersey.[4] The Division, however, emphasized that it was "not expressing its own view on the correct interpretation of New Jersey law," and that it was not "'approving' or 'disapproving' the substance of the Proposal or opining on the legality of it." *Id.* The Division also invited the parties to "seek a more definitive determination from a court of competent jurisdiction." *Id.* The Division refused to express a view on whether the Trust's proposal would cause Johnson & Johnson to violate federal law.[5]

4. *See* Exhibit 8 ("When parties in a rule 14a-8(i)(2) matter have differing views about the application of state law, we consider authoritative views expressed by state officials. Here, the Attorney General of the State of New Jersey, the state's chief legal officer, wrote a letter to the Division stating that 'the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law.' We view this submission as a legally authoritative statement that we are not in a position to question.").

5. *See id.* ("We are also not expressing a view as to whether the Proposal, if implemented, would cause the Company to violate federal law.").

In reliance on the Division's no-action letter, Johnson & Johnson excluded the Trust's proposal from the proxy materials that it mailed to its shareholders on March 13, 2019. The company's annual shareholder meeting is scheduled for April 25, 2019, so there is time for Johnson & Johnson to issue supplementary proxy materials that include the Trust's proposal before the 2019 shareholder meeting.

## THE TRUST IS ENTITLED TO A PRELIMINARY INJUNCTION

A court must consider four factors when deciding whether to issue a preliminary injunction: (1) Whether the plaintiff is likely to succeed on the merits; (2) Whether the plaintiff will suffer irreparable injury absent a preliminary injunction; (3) The possibility of harm to other interested parties; and (4) The public interest. *See Eli Lilly & Co. v. Premo Pharm. Labs., Inc.*, 630 F.2d 120, 136 (3d Cir. 1980); *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 815 (3d Cir. 1978). All four factors support preliminary relief.

### I. The Trust Is Likely To Succeed On The Merits

The Trust is not only likely but certain to succeed on its claim that Johnson & Johnson violated the federal securities laws, because Johnson & Johnson cannot show that the Trust's proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). Johnson & Johnson bears the burden of establishing that this exception to Rule 14a-8 applies, *see Trinity Wall Street*, 792 F.3d at 334, and its arguments do not come close to carrying this burden.

### A. The Trust's Proposal Will Not Cause Johnson & Johnson To Violate Federal Law

Johnson & Johnson's initial letter to the SEC claimed that the Trust's proposal would cause the company to violate Section 29(a) of the Securities Exchange Act. *See* Exhibit 2. But the SEC's no-action letter did not even attempt to argue that the Trust's proposal would violate Section 29(a). *See* Exhibit 8. And for good reason: the Federal Arbitration Act and the Supreme Court's ruling in *Epic Systems* squelch any possibility that a company would "violate" federal law by amending its bylaws to require arbitration of federal securities law claims. The corporate bylaws are a contract between the corporation and its shareholders,[6] and arbitration provisions in contracts *must* be enforced in accordance with the FAA.

#### 1. An agreement to arbitrate does not "waive compliance with" the governing law

Section 29(a) of the Securities Exchange Act provides:

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

6. *See Vergopia v. Shaker*, 922 A.2d 1238, 1249 (N.J. 2007) ("[T]he certificate of incorporation, constitution and bylaws of the corporation constitute *a contract* between the corporation and its stockholders and the stockholders *inter sese*" (quoting *Faunce v. Boost Co.,* 15 N.J. Super. 534, 538, 83 A.2d 649 (Ch. Div. 1951) (emphasis added in the *Vergopia* opinion)); *Rosenberg v. AT&T Employees Federal Credit Union*, 726 F. Supp. 573, 578 (D.N.J. 1989) ("It is well settled under common law that bylaws generally act as a contract between a corporation and its shareholders."); *see also Airgas, Inc. v. Air Prods. and Chems., Inc.,* 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among the corporation's shareholders").

15 U.S.C. § 78cc(a) (emphasis added). Johnson & Johnson asserts that the Trust's proposal would "cause" Johnson & Johnson to "violate" this statutory provision.

The first problem with Johnson & Johnson's argument is apparent from the text of Section 29(a): An *agreement to arbitrate* federal securities law claims does not *waive compliance with* the federal securities laws. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). Far from "waiving compliance with" the securities laws, the Trust's proposal *preserves* a shareholder's right to enforce those laws in arbitration proceedings. This is no different from parties to a contract agreeing to arbitrate their disputes. A contract of that sort does not waive the parties' obligations to comply with the governing law; it simply channels the parties' disputes into a low-cost arbitral forum that enforces the same laws that the courts would apply.

Johnson & Johnson never attempts to explain how an agreement to arbitrate is a waiver of compliance with the law. Instead, the company asserts that the Trust's proposal "would weaken the ability of investors" to enforce the securities laws because it eliminates the possibility of class litigation.[7] But the Supreme Court enforces class-action waivers in arbitration agreements, and it has emphatically rejected the

7. *See* Exhibit 2 at 4 ("[T]he Proposal seeks to prevent any shareholder who has a claim subject to arbitration from bringing the claim on behalf of a class of Johnson & Johnson shareholders or by consolidation or joinder in order to resolve the dispute.").

argument that class-action waivers prevent the effective vindication of statutory rights. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."); *id.* ("The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." (citations omitted)). Johnson & Johnson never so much as mentions *Italian Colors Restaurant*, but that ruling puts the kibosh on any efforts to equate a waiver of class-action remedies with a waiver of compliance with the law.

Johnson & Johnson's next move is to claim that the Trust's Proposal "effectively waives" a shareholder's ability to bring securities law claims because it prohibits judicial review of the arbitrator's decision.[8] That is nonsense. Shareholders will retain their ability to "bring claims" under the Securities Exchange Act, but their claims will be resolved through arbitration rather than litigation. An agreement to submit claims to binding arbitration does not waive compliance with the law—and it does not waive a shareholder's prerogative to enforce the law through private rights of action.

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8. *See* Exhibit 2 at 4 ("[T]he Proposal provides a waiver of any right under the laws of any jurisdiction to apply to any court of law or other judicial authority to determine any matter or to appeal or otherwise challenge the award, ruling or decision of the arbitrator(s), thus effectively waiving shareholders' abilities to bring claims under Exchange Act Section 10(b) and Rule 10b-5.").

Finally, Johnson & Johnson contends that shareholder agreements to arbitrate securities law claims may be enforced only when the arbitration procedures are subject to SEC oversight. *See* Exhibit 2 at 3–4, 4–5. Johnson & Johnson relies on *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), which enforced an agreement to arbitrate securities law claims, but limited its holding to arbitration procedures established by entities within the SEC's regulatory jurisdiction.[9] *McMahon* limited its holding in this manner because an earlier ruling of the Supreme Court, *Wilko v. Swan*, 346 U.S. 427 (1953), had refused to enforce an agreement to arbitrate claims arising under the federal securities laws. Rather than overruling *Wilko*, the *McMahon* Court chose to distinguish it on the ground that the arbitration procedures in *McMahon* had been specifically approved by the SEC,[10] while the arbitration procedures in *Wilko* were not subject to SEC oversight.[11] Johnson & Johnson suggests that this dooms any agreement to arbitrate securities law claims *unless* the arbitration procedures are subject to SEC oversight, as they were in *McMahon*.

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9. *See Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 234 (1987) ("We conclude that where, as in this case, the prescribed [arbitration] procedures are subject to the [SEC's] § 19 authority, an arbitration agreement does not effect a waiver of the protections of the Act.").
10. *See McMahon*, 482 U.S. at 234 ("[T]he SEC has specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the NASD, the organizations mentioned in the arbitration agreement at issue in this case.").
11. *See McMahon*, 482 U.S. at 233 ("Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.").

The problem with this argument is that the Supreme Court completely overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *See id.* at 484 ("*Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."). Now that *Wilko* has been overruled, it no longer matters whether an agreement to arbitrate requires procedures that are subject to SEC oversight; federal courts must enforce the agreement regardless under the terms of the FAA.

#### 2. The Federal Arbitration Act and *Epic Systems* require the enforcement of the proposed arbitration agreement

The second and more serious problem for Johnson & Johnson is the Federal Arbitration Act, which provides that agreements to arbitrate "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. No federal statute may be interpreted to depart from this regime unless its language is sufficiently emphatic to effect a partial implied repeal of the Federal Arbitration Act. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). But implied repeals are heavily disfavored and will not be found unless the repealing statute unambiguously conflicts with the earlier enacted language.[12] So it is not enough for Johnson & Johnson to show that Section 29(a)

12. *See Epic Systems*, 138 S. Ct. at 1624 ("[W]e come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." (citations omitted)); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings,

*could* be interpreted to forbid arbitration. It must instead show that Section 29(a) meets the demanding standard for a partial implied repeal—by evincing "a clear intention to displace the [Federal] Arbitration Act." *Id.* at 1632.

Johnson & Johnson has not attempted to argue that the standard for a partial implied repeal has been met. *See* Exhibit 2. And the language of Section 29(a) comes nowhere close to an implied repeal of the Federal Arbitration Act. Section 29(a) does not even mention arbitration. *See Epic Systems*, 138 S. Ct. at 1627 ("[T]he absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act."). And the Supreme Court has already rejected the notion that an agreement to arbitrate "waives compliance" with the governing statutes.[13] So even if this Court were to think that it is *possible* to construe Section 29(a) to forbid arbitration agreements (and it isn't, *see supra*, Section I.A.1), Johnson & Johnson would still lose, because it has not shown that

namely, that there be an irreconcilable conflict between the two federal statutes at issue." (citation and internal quotation marks omitted)); *see also Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir. 2004) (Easterbrook, J.) ("[R]epeal by implication is a rare bird indeed.").

13. *See Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *McMahon*, 482 U.S. at 233–34 (enforcing an agreement to arbitrate claims arising under the Securities Exchange Act of 1934 and rejecting the argument that Section 29(a) rendered the arbitration agreement unenforceable); *Rodriguez de Quijas*, 490 U.S. at 484 (overruling *Wilko* and enforcing agreement to arbitrate claims arising under Section 12(2) of the Securities Act of 1933).

Section 29(a) so unambiguously forbids the enforcement of arbitration agreements as to effectuate a partial implied repeal of the Federal Arbitration Act.

**3. Even if Section 29(a) rendered the proposed arbitration contract unenforceable, Johnson & Johnson would not violate federal law by entering into it**

There is yet another insurmountable problem with Johnson & Johnson's argument. Even if one were to *assume* that Section 29(a) implicitly repeals the Federal Arbitration Act and renders the proposed arbitration agreement unenforceable, that would only prohibit the *courts* from *enforcing* the proposed arbitration agreement. It would not cause Johnson & Johnson to "violate" federal law by agreeing to arbitrate shareholder disputes in its corporate bylaws, even if these bylaws turn out to be unenforceable in court.

Section 29(a) does not prohibit the act of entering into a contract that waives compliance with the federal securities laws, and it does not impose civil or criminal penalties on parties who enter into agreements of that sort. It simply declares that these agreements "shall be void" and unenforceable:

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

15 U.S.C. § 78cc(a) (emphasis added). Neither Johnson & Johnson nor its shareholders will "violate" Section 29(a) (or any other provision of federal law) by entering into an agreement or adopting corporate bylaws that contain judicially unenforceable terms. The only entity that can violate Section 29(a) is a *court* that enforces a contractual provision that Section 29(a) declares to be "void." *See generally* Nicholas

Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1212–26 (2010) (explaining the need to identify the specific actor who has violated a legal prohibition, and the precise moment at which the legal violation occurs).

There will of course be occasions in which the very act of entering into an unenforceable contract will violate the law and expose someone to civil or criminal penalties. An agreement to fix prices, for example, is not merely unenforceable in court; the agreement itself is a criminal act that exposes the parties to criminal sanctions.[14] A civil or criminal conspiracy is likewise an unlawful act, and those who enter into these agreements have "violated" the law and subjected themselves to civil or criminal penalties. But the Trust's proposal will not "cause" Johnson & Johnson to "violate" federal law by entering into an arbitration agreement that happens to be unenforceable under Section 29(a). Parties to an unenforceable contract have not "violated" the law unless the law prohibits the act of entering into the particular agreement.

### B. The Trust's Proposal Will Not Cause Johnson & Johnson To Violate New Jersey Law

Johnson & Johnson's supplementary letter to the SEC asserted that the Trust's proposal would cause Johnson & Johnson to violate the law of New Jersey. *See* Exhibit 4. The Attorney General of New Jersey has made a similar claim. *See* Exhibit 6. But neither Johnson & Johnson nor the Attorney General has identified any *law*—

14. *See* 15 U.S.C. § 1 ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony").

such as a statute or court decision—that prohibits corporations and their shareholders from agreeing to arbitrate their securities law claims in a corporation's bylaws. Nor have they identified any New Jersey law that prohibits the judicial enforcement of a shareholder arbitration bylaw. Instead, their claim is based on an asserted belief that the New Jersey courts—if they were to be confronted with a hypothetical case involving a corporate bylaw requiring arbitration of securities law claims—would declare the bylaw unenforceable and allow shareholders to litigate their claims in court. *See* Exhibit 4 at 2–3; Exhibit 6 at 3–4. That is a wish, not an argument, and it does not satisfy Johnson & Johnson's burden to show that the Trust's proposal "*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) (emphasis added).

In all events, even if Johnson & Johnson could identify actual law that purports to prohibit the proposed arbitration agreement, that law would be preempted and rendered void by the Federal Arbitration Act. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."). So there is no need for this Court to explore the contours of New Jersey law or engage in *Erie* guesses about what the New Jersey courts might do. If the law of New Jersey purports to prohibit a corporation and its shareholders from agreeing to arbitrate their disputes, then that law is preempted by the FAA. And if the law of New Jersey permits these arbitration agreements, then Johnson & Johnson has failed to establish that the Trust's proposal would cause the company to violate state law. Either way, the Trust's proposal is lawful—and nothing in state law can countermand the protections that the FAA confers on arbitration agreements.

Finally, even if the New Jersey courts would refuse to enforce the proposed arbitration agreement, and even if the New Jersey courts could somehow find a way to escape the preemptive force of the FAA, Johnson & Johnson *still* cannot show that the Trust's proposal would "cause" the company to "violate" state law. That is because a company does not "violate" the law by entering a contract or adopting a bylaw that happens to be unenforceable in court. Johnson & Johnson must show that New Jersey law prohibits or penalizes the act of agreeing to arbitrate a shareholder's securities law claims; it is not enough to show that the contract or bylaws will not be enforced by the state judiciary. *See supra*, Section I.A.3.

#### 1. Nothing in New Jersey law prohibits the arbitration agreement described in the Trust's proposal

Johnson & Johnson must show that the Trust's proposal "*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) (emphasis added). Not that the proposal *might* cause the company to violate state law.[15] Not that the proposal would cause the company to violate state law that it will be subjected to *in the future*.[16] Not that the proposal would

15. *See* Exhibit 4 at 2 (asking the SEC to approve its exclusion of the Trust's proposal "even if the Staff believes that the legality of the bylaw amendment requested by the Proposal is an open question.").

16. *See* Exhibit 4 at 2–3 (claiming that "a New Jersey court, if presented the question, would likely conclude that New Jersey corporations may not lawfully mandate arbitration in their constitutive documents as the forum to resolve claims of shareholders for alleged violations of the federal securities laws.").

cause the company to violate the Attorney General's vision of how state law *ought to be interpreted*.[17] Instead, Johnson & Johnson must identify an *extant* legal obligation that it is *currently* subject to—and it must show that the company *will violate* that law if it implements the Trust's proposal. Johnson & Johnson does not come close to making this showing.

Johnson & Johnson admits that no New Jersey court has ever disapproved the shareholder arbitration agreement described in the Trust's proposal.[18] But it attempts to concoct a state-law prohibition by relying on an opinion from the *Delaware* Court of Chancery—which is not the law of New Jersey, and is not a law to which Johnson & "is subject." *See* Exhibit 4 Ex. A at 4–6 (citing *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19. 2018)). *Sciabacucchi* refused to enforce a forum-selection clause in a certificate of incorporation that would have required shareholders to litigate their claims under the Securities Act of 1933 in federal court. Johnson & Johnson claims that New Jersey courts would reach the same result because they often consider Delaware precedent when ruling on corporate law matters.[19]

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17. *See* Exhibit 6.
18. See Exhibit 4 at 3 ("[N]o New Jersey court has considered the issue of whether a mandatory arbitration bylaw requiring shareholders to arbitrate claims under the federal securities laws would be legal as a matter of New Jersey law."
19. *See* Exhibit 4 at 3 ("[T]he New Jersey Opinion . . . analogizes to case law from Delaware and the U.S. Court of Appeals for the Third Circuit, to come to an opinion as to how a New Jersey court would likely view a novel question presented by adoption of a bylaw amendment as described in the Proposal."); Exhibit 4 Ex. A at 5 ("While Sciabacucchi is a Delaware decision, the New Jersey courts have long looked to Delaware precedent when considering New Jersey corporate law matters."). The New Jersey Attorney General makes a similar

There are many problems with this argument. The first problem is that New Jersey courts are not required to follow Delaware rulings; they merely *consider* Delaware precedent and follow those rulings when they find them to be "helpful."[20] Delaware decisions offer only "guidance" and "assistance" to New Jersey courts.[21] They do not impose legal obligations on New Jersey courts—which is evident from the many New Jersey court decisions that reject or decline to follow Delaware rulings on corporate-law matters[22]—and they certainly do not impose legal obligations on New

argument. *See* Exhibit 6 at 3 ("New Jersey courts frequently look [to Delaware cases] for guidance on matters of corporate law in the absence of controlling New Jersey authority.").

20. *Balsamides v. Protameen Chemicals, Inc.*, 734 A.2d 721, 732 (N.J. 1999) ("In analyzing corporate law issues, we find Delaware law to be helpful."); *Lawson Mardon Wheaton v. Smith*, 734 A.2d 738, 746 (N.J. 1999) (same).

21. *Casey v. Brennan*, 780 A.2d 553, 567 (N.J. Super. 2001), aff'd, 801 A.2d 245 (N.J. 2002) ("When considering issues of first impression in New Jersey regarding corporate law, we frequently look to Delaware for guidance or assistance.").

22. *See, e.g.*, *Brown v. Brown*, 731 A.2d 1212, 1215 (N.J. Super. 1999) (declining to adopt Delaware's requirement that a plaintiff in a derivative action must be a stockholder at time of the lawsuit); *Asarco Inc. v. Court*, 611 F. Supp. 468, 478 (D.N.J. 1985) (holding that New Jersey courts would not follow a ruling from the Delaware Supreme Court permitting shareholders within a class of stock to be vested with different voting rights); *In re Newark Watershed Conservation & Development Corp.*, 560 B.R. 129, 147 (Bankr. D.N.J. 2016) ("Delaware corporate law also provides a stronger safe harbor for directors (and trustees) under its Business Judgment Rule than does New Jersey law."); *id.* (noting that in *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981), "the New Jersey Supreme Court established a much higher standard for a director (or trustee) to avoid liability for actions of the corporate officers undertaken under their watch" than the governing standard in Delaware); *NCP Litigation Trust v.*

Jersey corporations. A New Jersey corporation that disagrees with *Sciabacucchi* has every right to put forum-selection clauses in its certificate of incorporation until a New Jersey court or legislature adopts *Sciabacucchi* as the law of New Jersey. A shareholder proposal that contradicts *Sciabacucchi* does not cause a New Jersey corporation to violate a "law to which it is subject."

The second problem is that *Sciabacucchi* is readily distinguishable from this case. *Sciabacucchi* disapproved a *forum-selection clause* that required shareholder claims under the Securities Act to be brought in federal court. The Trust, by contrast, wants to require *arbitration* of securities law claims. This distinction is crucially important because an arbitration agreement (unlike a forum-selection clause) is protected by the Federal Arbitration Act—and the FAA will *preempt* state laws or judicial rulings that prevent the enforcement of arbitration contracts. *See Southland Corp.*, 465 U.S. at 16; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). So it is not at all apparent that *Sciabacucchi*'s unwillingness to enforce a forum-selection clause in a certificate of incorporation will carry over to an arbitration provision, because a court would first need to address whether Delaware law is even *permitted* to refuse enforcement of these arbitration requirements. Johnson & Johnson simply assumes that Delaware courts would treat the two situations alike and ignore the preemptive effects of the FAA. It also assumes that New Jersey courts would not only adopt but extend

*KMPG*, 945 A.2d 132, 140–43 (N.J. Super. 2007) (rejecting the Delaware Chancery Court's ruling in *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.,* 906 A.2d 168, 174 (Del. Ch. 2006), and holding that "deepening insolvency" is a legally cognizable form of corporate harm).

*Sciabacucchi* to arbitration provisions without pausing to consider whether the FAA has anything to say about this.

The third problem is that *Sciabacucchi* held only that forum-selection clauses in certificates of incorporation are judicially unenforceable. *See Sciabacucchi*, 2018 WL 6719718, at *18 (declaring these "Federal Forum Provisions" to be "ineffective"); *see also id.* at *8 ("[T]he Federal Forum Provisions cannot accomplish what they attempt to achieve."); *id.* at *23 ("The Federal Forum Provisions are ineffective and invalid."). *Sciabacucchi* did *not* hold that the corporations violated the law by including these legally unenforceable provisions in their certificates of incorporation. Parties to an unenforceable contract, for example, have not "violated" state law merely by entering into an agreement that the courts are unwilling to enforce, unless the act of agreement somehow violates the law. *See supra*, section I.A.3. The same goes for corporations that include a judicially unenforceable provision in their articles of incorporation or corporate bylaws. All they have done is execute a document that the courts will not enforce; they have not broken the law or exposed themselves to legal penalties.

So even if one were to indulge Johnson & Johnson's argument by pretending that the law of Delaware is the law of New Jersey and by extending *Sciabacucchi*'s holding to arbitration provisions, Johnson & Johnson *still* cannot show that the Trust's proposal would cause Johnson & Johnson to "violate" New Jersey law—because one does not *violate the law* by adopting a corporate bylaw that happens to be unenforceable in court.

### 2. The Federal Arbitration Act preempts any attempt to extend *Sciabacucchi* to arbitration provisions

There is a more fundamental problem with Johnson & Johnson's state-law argument: the Federal Arbitration Act *does not permit* New Jersey (or Delaware) to extend *Sciabacucchi* to arbitration provisions that appear in a corporation's bylaws. Corporate bylaws are a contract between the corporation and its shareholders,[23] and the FAA compels state courts to enforce arbitration clauses in these contracts:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *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 (emphasis added). The only exception to this command appears in the "saving clause" of section 2: A state may decline to enforce an agreement to arbitrate for "grounds as exist at law or in equity for the revocation of any contract." *Id.*

The opinion in *Sciabacucchi* does not provide a "ground[] . . . for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). *Sciabacucchi* declined to enforce the forum-selection clauses that forced shareholders' Securities Act claims into federal court, because it held that certificates of incorporation (and corporate bylaws) may regulate only "'internal affairs claims brought by stockholders *qua* stockholders.'" *Sciabacucchi*, 2018 WL 6719718, at *1 (quoting *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013)). The Court concluded that

23. *See* note 6, *supra*.

shareholder claims brought under the Securities Act of 1933 were "external" claims rather than "internal affairs claims"—and that they could not be controlled by forum-selection clauses that appear in certificates of incorporation or a corporation's bylaws. *See id.* at *22 ("[A] federal claim under the 1933 Act is a clear example of an external claim."); *id.* at *23 ("The nominal defendants lack authority to use their certificates of incorporation to regulate claims under the 1933 Act.").

*Sciabacucchi* made clear that its non-enforcement rule extends only to a *subset* of contracts: the certificates of incorporation or corporate bylaws that govern relationships between corporations and their shareholders. *See Sciabacucchi*, 2018 WL 6719718, at *18 ("[A] Delaware corporation does not have the power to adopt *in its charter or bylaws* a forum-selection provision that governs external claims." (emphasis added)). *Sciabacucchi* did *not* hold that provisions regulating "external" corporate affairs are unenforceable in every Delaware contract. Indeed, the Court took pains to explain that it was establishing a unique rule limited to certain *types* of contracts that differ from an "ordinary" contract:

> The certificate of incorporation differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations. When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a "body corporate"—a legally separate entity. The State of Delaware is an ever-present party to the resulting corporate contract, and the terms of the corporate contract incorporate the provisions of the DGCL. Various sections of the DGCL specify what the contract must contain, may contain, and cannot contain. The DGCL also constrains how the contract can be amended.

*Sciabacucchi*, 2018 WL 6719718, at *2. So the ground on which *Sciabacucchi* declined to enforce the forum-selection clause—that the clause purported to regulate "external" rather than "internal affairs claims"—does *not* qualify as a "ground[] . . . for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Contracts other than corporate bylaws or certificates of incorporation that include forum-selection clauses or provisions governing a corporation's external affairs remain fully enforceable in Delaware courts.

So no state can extend *Sciabacucchi* to arbitration provisions without defying the Federal Arbitration Act. A state cannot establish a rule that declines to enforce arbitration clauses in only a *subset* of contracts such as corporate bylaws. Any rule that hinders the enforcement of arbitration agreements must apply equally to *every* contract in the State. *Sciabacucchi*'s rule governs only a subset of contracts—corporate bylaws and certificates of incorporation—so it cannot be invoked to prevent the enforcement of an agreement to arbitrate under the terms of the FAA.

#### 3. ***Sciabacucchi* misinterpreted the law of Delaware and contradicts the Delaware Supreme Court's ruling in *ATP Tour, Inc. v. Deutscher Tennis Bund***

Johnson & Johnson's reliance on *Sciabucucchi* suffers from yet another problem: *Sciabucucchi* contradicts the Delaware Supreme Court's binding pronouncement in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

*Sciabucucchi* refused to enforce a forum-selection clause in a certificate of incorporation that would have required shareholders to litigate their claims under the Securities Act of 1933 in federal court. *Sciabucucchi* reached this conclusion for two reasons. First, *Sciabucucchi* held that corporate bylaws and certificates of incorporation may regulate only the corporation's "internal affairs,"[24] and that forum-selection clauses in bylaws and certificates of incorporation may govern only "intra-corporate litigation" or "internal corporate claims" rather than "external" claims.[25] Second, *Sciabucucchi* ruled that claims brought under the Securities Act of 1933 are "external" claims rather than "intra-corporate litigation" or "internal corporate claims,"[26] and therefore cannot be controlled by a forum-selection clause in a corporate bylaw or certificate of incorporation.

The second of these holdings is incompatible with *ATP Tour*, which held that corporate bylaws may include fee-shifting provisions that compel shareholders who bring unsuccessful federal antitrust claims against the corporation to pay the corporation's attorneys' fees. *See ATP Tour*, 91 A.3d at 558 ("A fee-shifting bylaw, like the one described in the first certified question, is facially valid."). *ATP Tour* limited

24. *Sciabucucchi*, 2018 WL 6719718, at *1 ("[T]he Delaware General Corporation Law . . . authorizes the bylaws to regulate 'internal affairs claims brought by stockholders *qua* stockholders.' . . . Section 109(b) does *not* authorize a Delaware corporation to regulate external relationships.").
25. *Sciabucucchi*, 2018 WL 6719718, at *18 ("[A] Delaware corporation does not have the power to adopt in its charter or bylaws a forum-selection provision that governs external claims.").
26. *Sciabucucchi*, 2018 WL 6719718, at *22 ("[A] federal claim under the 1933 Act is a clear example of an external claim.").

its approval of these fee-shifting bylaws to shareholder claims involving "intra-corporate litigation,"[27] but it determined that shareholder litigation under the federal antitrust laws was sufficiently "intra-corporate" to be subject to the corporation's bylaws.

If a corporation's bylaws can regulate the federal antitrust claims that a shareholder brings against the corporation, then it logically follows that those bylaws can regulate federal securities law claims as well. *Sciabucucchi* made no effort to explain how securities law claims brought by shareholders are less "intra-corporate" than the antitrust claims in *ATP Tour*, and it would be hard to conceive of a claim more central to the relationship between a corporation and its shareholders *qua* shareholders than a challenge to the very circumstances that either terminate or create that relationship. Instead, *Sciabucucchi* appeared to limit the authority of corporate bylaws and certificates of incorporation to shareholder claims brought under Delaware corporate law, but that stance is directly at odds with *ATP Tour*, which allowed corporate bylaws to require fee-shifting in federal antitrust litigation.

27. *See ATP Tour*, 91 A.3d at 558 ("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.'" (quoting 8 Del. Code § 109(b)).

#### 4. Johnson & Johnson's efforts to rely on the Third Circuit's interpretation of Pennsylvania law are futile

Johnson & Johnson also argues that Trust's proposal would violate the law of Pennsylvania—and it predicts that New Jersey courts would copy the law of Pennsylvania and refuse to enforce the proposed arbitration bylaws unless a shareholder "explicitly agreed" to arbitrate their securities law claims. *See* Exhibit 4 Ex. A at 7–8. Johnson & Johnson relies on *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156 (3d Cir. 2009), which refused to enforce an arbitration provision in a law firm's corporate bylaws because the plaintiff (a partner at the firm) claimed that she had never read or signed the arbitration requirement. *See id.* at 159–66. *Kirleis* acknowledged that corporate law "generally imputes to members of the corporation knowledge and acceptance of the corporate bylaws,"[28] and that shareholders are bound by the corporation's bylaws regardless of whether they affirmatively consented to particular provisions. But *Kirleis* held that *arbitration* clauses in corporate bylaws should not be enforced absent the shareholder's explicit agreement, because Pennsylvania law requires explicit agreement to arbitration contracts. *See id.* at 163 ("[U]nder Pennsylvania law, explicit agreement is essential to the formation of an enforceable arbitration contract." (citations omitted)). *Kirleis* acknowledged that the

28. *Kirleis*, 560 F.3d at 162–63; *see also Morris v. Metalline Land Co.*, 30 A. 240, 241 (Pa. 1894) (member of corporation "is subject to its constitution, and bound by its by-laws . . . which he is presumed to know and understand"); *Elliott v. Lindquist*, 52 A.2d 180, 182 (Pa. 1947) ("By-laws consistent with constitution and statute are really the private statutes of the company enacted by the stockholders for the regulation of its affairs.").

Pennsylvania courts had never ruled on whether the "explicit agreement" requirement for arbitration contracts should trump the corporate-law presumption of shareholder consent to corporate bylaws, but it predicted that the Pennsylvania Supreme Court would require "explicit agreement" to arbitration clauses that appear in corporate bylaws. *See id.* at 160–66.

All of this leads Johnson & Johnson to conclude that the Trust's proposal would "cause" the company to "violate" *the law of New Jersey* by amending its bylaws to require arbitration of shareholder disputes. This is a non-sequitur for many reasons.

First. *Kirleis*'s holding rested on the fact that Pennsylvania courts had established special rules for determining "consent" to arbitration agreements. *Kirleis* noted, for example, that the Pennsylvania Superior Court refused to enforce an arbitration clause in the employment context because the employee had not "*expressly agreed* to abide by the terms of [the] agreement." *Kirleis*, 560 F.3d at 160–61 (quoting *Quiles v. Financial Exchange Co.*, 879 A.2d 281, 285 (Pa. Super. 2005) (emphasis in *Kirleis* opinion)). It also observed that the Pennsylvania Supreme Court "has held that an agreement to arbitrate must be 'clear and unmistakable' and cannot arise 'by implication.'" *Kirleis*, 560 F.3d at 161 (quoting *Emmaus Municipal Authority v. Eltz*, 204 A.2d 926, 927 (Pa. 1964)). *Kirleis* relied on these state-court rulings to predict that the Pennsylvania courts would likewise require "explicit agreement" from shareholders before enforcing arbitration requirements in corporate bylaws. Johnson & Johnson, however, has not cited *any* New Jersey case that purports to establish heightened standards of "consent" for arbitration agreements. So it cannot ask this Court to simply assume that *Kirleis*'s Pennsylvania-specific analysis carries over to

New Jersey, especially when it admits that no New Jersey court has *ever* considered whether shareholders must affirmatively consent to arbitration provisions in corporate bylaws.[29]

Second. Even if one were to assume or pretend that *Kirleis* is the law of New Jersey (and it isn't), that *still* does not show that Johnson & Johnson would *violate the law* by amending its bylaws to require arbitration of shareholder disputes. Even in Pennsylvania, it remains perfectly legal for a corporation to adopt an arbitration requirement in its bylaws and *then* seek the "explicit agreement" from shareholders that *Kirleis* requires. *Kirleis* does not prohibit corporations and shareholders from agreeing to arbitrate their disputes; it simply holds that any such agreement must be formed through affirmative consent and cannot be inferred from a shareholder's "constructive notice" of the corporation's bylaws. *See Kirleis*, 560 F.3d at 160, 162–63 (rejecting the law firm's attempt to infer consent through "constructive notice"). This *permits* a corporation to include arbitration provisions in its bylaws, and those provisions will be fully enforced if the corporation secures "explicit agreement" to that bylaw from the relevant shareholder. And if the corporation fails to secure someone's "explicit agreement" to this bylaw, it has not broken the law by adopting a bylaw that turns out to be legally unenforceable against an individual shareholder's claims. *See supra*, Section I.A.3.

29. *See* Exhibit 4 Ex. A at 7 ("No New Jersey court has considered the issue of whether current and future shareholders who did not approve an arbitration provision contained in a corporation's bylaws would be bound to arbitrate claims under federal securities laws.").

Third. *Kirleis*'s interpretation of Pennsylvania law violates the Federal Arbitration Act. *Kirleis* describes a regime that ordinarily regards corporate bylaws as binding contractual obligations without any need for a shareholder's "explicit agreement," *unless* the bylaw requires arbitration, in which case a shareholder must affirmatively consent before a court will enforce the requirement. *See Kirleis*, 560 F.3d at 162–63. A state-law regime of that sort cannot be squared with the FAA. Pennsylvania law holds that corporate bylaws are contracts.[30] And the FAA requires courts to enforce contracts with arbitration provisions unless the court relies on "grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). *Kirleis* refused to enforce an arbitration bylaw because the shareholder had not given her "explicit agreement" to that provision, but lack of explicit agreement is *not* a ground for the revocation of *any* contract, as Pennsylvania recognizes and enforces "implied" contracts that do not require explicit agreement.[31] Indeed, *Kirleis* appeared to acknowledge that corporate bylaws outside the arbitration context

30. *See Parker v. Commonwealth*, 6 Pa. 507, 521 (1847) ("Bylaws, whether enacted in pursuance of express authority given by charter or without it, are no more than a species of contract between the individual members"); *Morris v. Metalline Land Co.*, 30 A. 240, 241 (Pa. 1894) (member of corporation "is subject to its constitution, and bound by its by-laws . . . which he is presumed to know and understand"); *Elliott v. Lindquist*, 52 A.2d 180, 182 (Pa. 1947) ("By-laws consistent with constitution and statute are really the private statutes of the company enacted by the stockholders for the regulation of its affairs.").
31. *See Konyk v. Pennsylvania State Police of Commonwealth of Pennsylvania*, 183 A.3d 981, 989 (Pa. 2018) ("A contract may be implied in fact when the actions of the parties reflect a 'mutual agreement and intent to promise, [and] the agreement and promise have simply not been expressed in words.'" (citations omitted)); *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 659 (Pa. 2009)

would remain enforceable without any need for a shareholder's "explicit agreement." *See Kirleis*, 560 F.3d at 162–63 ("[C]orporate law principles . . . generally impute to members of the corporation knowledge and acceptance of corporate bylaws"). That is a confession that *Kirleis*'s interpretation of Pennsylvania law violates the FAA.

Of course, *Kirleis* never considered or discussed whether the FAA preempts its interpretation of Pennsylvania law. But that does not excuse this Court—and it does not excuse the New Jersey courts—from enforcing the FAA as the supreme law of the land. *See* U.S. Const. art. VI, § 2. When an issue has been ignored or overlooked in a judicial ruling, the decision does not establish binding precedent on that point. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("[A]ssumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions.").[32] So Johnson & Johnson must find some way to explain how

("A contract implied in fact is an actual contract which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from [their] acts in the light of the surrounding circumstances." (quoting *Elias v. Elias*, 428 Pa. 159, 161, 237 A.2d 215, 217 (1968) ) ); 1 Williston on Contracts § 1:5 (4th ed. 1990) ("[A]n implied-in-fact contract arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words").

32. *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("[T]he unexplained silences of our decisions lack precedential weight."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

the FAA would tolerate a regime in New Jersey that enforces corporate bylaws as contracts,[33] yet requires a shareholder's "explicit agreement" for the *subset* of corporate bylaws that require arbitration of shareholder disputes.

### 5. The New Jersey Attorney General's arguments are meritless

The New Jersey Attorney General repeats Johnson & Johnson's prediction that the New Jersey courts will adopt the Delaware Chancery Court's ruling in *Sciabacucchi* and expand it to cover arbitration agreements in a corporation's bylaws. *See* Exhibit 6 at 3–4. This falls far short of showing that the Trust's proposal will cause Johnson & Johnson to violate New Jersey law, and the reasons have been well-rehearsed: (1) *Sciabacucchi* is not the law of New Jersey; (2) The Federal Arbitration Act will preempt any effort to extend *Sciabacucchi* to arbitration agreements; (3) *Sciabacucchi* incorrectly interprets Delaware law in holding that federal securities law claims, as external claims, cannot be the subject of a certificate or incorporation or bylaw provision; and (4) Even if the New Jersey courts would decline to enforce the proposed arbitration bylaw, a corporation would not *violate* New Jersey law by amending its bylaws to include a provision that turns out to be judicially unenforceable. If the courts will not enforce an arbitration provision in a corporation's bylaws, Johnson & Johnson *still* has every prerogative to add an arbitration provision to its bylaws and then seek a separate "explicit" agreement from its shareholders to comply with that arbitration requirement. *See Kirleis*, 560 F.3d at 163, 164–65. Johnson

33. *See Vergopia*, 922 A.2d at 1249 (N.J. 2007) ("[T]he certificate of incorporation, constitution and bylaws of the corporation constitute *a contract* between the corporation and its stockholders and the stockholders *inter sese*" (citation and internal quotation marks omitted)).

& Johnson can also add an arbitration bylaw in the hope that shareholders will voluntarily comply and submit their disputes to arbitration even if the courts will not compel them to do so. Nothing in New Jersey law prohibits or penalizes the *act* of adding a legally unenforceable provision to a corporation's bylaws.

The New Jersey Attorney General's opinion refuses to even engage the issue of FAA preemption, even though the Trust had flagged this issue in its correspondence to the SEC before the New Jersey Attorney General sent his letter.[34] Judges, however, do not have the luxury of ignoring relevant federal statutes, and they cannot accept an opinion of state law that entirely disregards a federal statute that is alleged to preempt its state-law interpretation. *See* U.S. Const. Article VI § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

The New Jersey Attorney General also relies on two recent amendments to the New Jersey Business Corporation Act—neither of which says anything about the legality of arbitration requirements in a corporation's bylaws. The first of these amendments is codified at N.J. Stat. Ann. § 14A:2-9(4), and it provides:

34. *See* Exhibit 5 at 10–11 ("Even if the Supplemental Letter's state law opinion is correct that New Jersey courts would either (i) hold that the bylaws cannot be used to mandate arbitration in federal securities law disputes between shareholders and the Company or (ii) require that a bylaw arbitration agreement be consented to by all current and future shareholders to form a valid contract, such state law *would be preempted by the FAA and be invalid*." (emphasis added)).

> The by-laws may contain any provision, 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. Stat. Ann. § 14A:2-9(4). This language *supports* the legality of the Trust's proposal, because the proposed arbitration bylaw—which addresses the circumstances under which the corporation–shareholder relationship is created or terminated—most assuredly "relat[es] to the business of the corporation" and "relat[es] to . . . the rights or power of its shareholders."[35]

The Attorney General, however, does not even attempt to argue from the text of this statutory provision. Instead, he observes that this language mirrors the text of the Delaware statute that *Sciabacucchi* interpreted to prevent the enforcement of forum-selection clauses. *See* Exhibit 6 at 4. But *Sciabacucchi*'s holding (which in any event is a misreading of Delaware law) cannot be extended to arbitration requirements without violating the FAA, and the Attorney General continues to ignore this problem rather than explain how the FAA can co-exist with a state-law regime that refuses to enforce arbitration agreements in a corporation's bylaws.

The second of these amendments appears at N.J. Stat. Ann. § 14A:2-9(5)(a), and it states:

> Without limiting subsection (4) of this section, the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:

35. Does the New Jersey Attorney General think that the proposed arbitration requirements are *unrelated* to the corporation's business or the rights and powers of its shareholders?

> (i) any derivative action or proceeding brought on behalf of the corporation;
>
> (ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;
>
> (iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.14A:1-1 et seq.;
>
> (iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or
>
> (v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

N.J. Stat. Ann. § 14A:2-9(5)(a). Nothing in this statute purports to *preclude* arbitration bylaws—or any other type of bylaw. Instead, it *authorizes* corporations to adopt forum-selection clauses in the circumstances described in subsections (i)–(v). The Attorney General invokes the canon of *expressio unius est exclusio alterius* and tries to assert that these are the *only* five circumstances in which arbitration agreements are allowed. *See* Exhibit 6 at 5. But *expressio unius* is inapplicable because the statute explicitly says that it is *not* limiting a corporation's power to enact bylaws under N.J. Stat. Ann. § 14A:2-9(4). *See* N.J. Stat. Ann. § 14A:2-9(5)(a) ("*Without limiting subsection (4) of this section*, the by-laws may provide that . . ." (emphasis added)). So N.J. Stat. Ann. § 14A:2-9(5)(a) may be construed *only* as a safe harbor for forum-selection clauses that fall within categories (i)–(v), not as an implied prohibition on other types of forum-selection clauses or other types of corporate bylaws. In addition, N.J. Stat. Ann. § 14A:2-9(5)(a) deals only with forum-selection clauses and not arbitration agreements, so there is no basis for inferring limitations on the permissibility of arbitration requirements from the statute's partial endorsement of forum-selection clauses.

### C. The Trust Is Likely To Succeed On Its Claim That Johnson & Johnson's Proxy Materials Must Declare The Trust's Proposal Lawful

Rule 14a-9 prohibits false or misleading proxy solicitations. *See* 17 C.F.R. § 240.14a-9. Johnson & Johnson's unwarranted exclusion of the Trust's shareholder arbitration proposal renders its proxy materials misleading *per se*. *See Grimes v. Ohio Edison Co.*, 992 F.2d 455, 458 (2d Cir. 1993) ("[T]he omission of a proposal from proxy materials that was not properly excluded under Rule 14a-8(c) makes the proxy inherently misleading under Rule 14a-9."). But it not enough for Johnson & Johnson simply to issue supplementary proxy materials that include the Trust's proposal; Johnson & Johnson must also announce in those proxy materials that the Trust's proposal is legal under both the law of New Jersey and the law of the United States.

The Trust's proposal has been tainted by the public assertions of illegality that Johnson & Johnson and the New Jersey Attorney General have made. *See* Exhibits 2, 4, and 6. To include the Trust's proposal against the backdrop of these baseless accusations—without informing shareholders that the Trust's proposal is lawful—will render the proxy materials misleading, in violation of Rule 14a-9. Johnson &

Johnson is obligated to remove this taint by affirmatively informing shareholders that the Trust's proposal is lawful.

## II. The Trust Will Suffer Irreparable Harm Absent A Preliminary Injunction

The Trust will suffer irreparable harm if its proposal is excluded from consideration at the upcoming shareholder meeting. *See New York City Employees' Retirement System v. American Brands, Inc.*, 634 F. Supp. 1382, 1388 (1986) ("[I]rreparable harm occurs to a shareholder whose proposal is wrongfully excluded from management's proxy solicitation because the shareholder loses the 'opportunity to communicate his concern with those shareholders not attending the upcoming shareholder meeting.'" (quoting *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 561 (D.D.C. 1985)). That remains the case regardless of whether the proposal is likely to pass. *See id.*; *see also New York City Employees Retirement System v. Dole Food Co., Inc.*, 795 F. Supp. 75, 103 (S.D.N.Y. 1992) (shareholder established irreparable harm from corporation's exclusion of its proposal because the it "would not be able to bring its proposal to [the corporation's] shareholders for another year."), *vacated as moot in New York City Employees Retirement System v. Dole Food Co., Inc.*, 969 F.2d 1430 (2d Cir. 1992).

## III. The Balance Of Harms Favors Preliminary Relief

As compared to the undisputable irreparable harm that will befall the Trust in the absence of a preliminary injunction, there is no conceivable harm to Johnson & Johnson if the injunction is granted. The injunction will simply allow Johnson & Johnson's shareholders to vote on the Trust's proposal at the 2019 shareholder meeting, and a company cannot suffer harm from a ruling that allows its owners to decide what the company should do. And there is no legal risk to the company if the shareholders approve this proposal, as explained in section I.

## IV. The Public Interest Favors a Preliminary Injunction

Johnson & Johnson is violating the federal securities laws by excluding the Trust's proposal from its proxy materials, and an injunction enforcing these federal statutes is by definition in the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

## CONCLUSION

The motion for order to show cause why a preliminary injunction should not issue should be granted.

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Respectfully submitted.

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## CERTIFICATE OF SERVICE

I certify that on March 26, 2019, I served this document by CM/ECF upon:

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