

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WAUNYE CALM, BRANDON
GATEWOOD, ISAIAH HARBER,
JYAIRE HENRY, DEWITT JOHNSON,
ZAKEE LLOYD, DENNIS WILLIAMS,
and DEVON YOUNG,

Plaintiffs,

v.

C.A. No. 2026-0576-JTL

TERRA TAYLOR, in her official capacity
as Commissioner of the Delaware
Department of Correction,

Defendant.

**MEMORANDUM OPINION ADDRESSING APPLICATION FOR
INTERLOCUTORY APPEAL**

Date Submitted: August 27, 2026

Date Decided: September 1, 2026

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LASTER, V.C.

The defendant has asked the court to certify two decisions for interlocutory appeal.¹ One decision—the Threshold Opinion—rejected pleading-stage arguments for dismissal.² The other decision—the Injunction Opinion—rejected a mootness argument and denied the plaintiffs’ motion for preliminary injunction.³

The Application to review the Threshold Opinion is untimely. If the Delaware Supreme Court were to overlook that issue, then the Threshold Opinion rejected one argument for dismissal that satisfies both the substantial-issue and the material-importance requirements for certification. The Injunction Opinion contains a multipart ruling that satisfies those requirements as well. The justiciability arguments that the opinions addressed do not meet those requirements and do not warrant certification.

For the two issues that could be certified, the real question is what makes the most sense for the administration of justice. Supreme Court Rule 42 requires that the trial court provide “its own assessment of the most efficient and just schedule to resolve the case.”⁴ There are two possible paths.

One path would be a two-track proceeding in which the Delaware Supreme

¹ Dkt. 64 (the “Application”).

² *Calm v. Taylor (Threshold Opinion)*, — A.3d —, 2026 WL 2082677 (Del. Ch. July 17, 2026).

³ *Calm v. Taylor (Injunction Opinion)*, — A.3d —, 2026 WL 2322604 (Del. Ch. Aug. 11, 2026).

⁴ Supr. Ct. R. 42(b)(iii).

Court hears an interlocutory appeal while the case proceeds to trial in parallel. From the trial court's perspective, staying the case at the trial-court level for a non-expedited interlocutory appeal would be inequitable because the plaintiffs have established a threat of irreparable harm. A two-track proceeding imposes burdens on both the Delaware Supreme Court and the trial court. It also has the potential to result in two appeals: one now on part of the case, and one later on the rest of the case. That is not optimal.

The other option is for the Delaware Supreme Court to consider the appeal after the entry of a final judgment. The case is scheduled for an expedited trial starting on December 14, 2026. Contrary to the defendant's contentions, trial is likely to be focused on expert testimony. The court has made clear that the only potential relief is a declaratory judgment and possibly targeted mandatory injunctive relief. The imminence of trial and the limited potential post-trial outcomes make an appeal in the ordinary course the preferable option.

It is presumptuous for a trial judge to tell the justices how to proceed, but the better option is to hear the appeal after a final judgment. This decision therefore denies certification. Of course, that does not prevent the Delaware Supreme Court from viewing the matter differently and accepting the appeal. A trial court's ruling on an application for interlocutory appeal is only a recommendation.

I. FACTUAL BACKGROUND

Oleoresin capsicum ("OC") is a chemical agent derived from the heat-generating compounds in chili peppers. Exposure to OC causes intense pain. Short-

term effects include difficulty breathing, uncontrollable coughing, temporary blindness, and a burning sensation in the eyes and throat and on the skin.

Those attributes make OC an effective non-kinetic weapon. The Delaware Department of Correction (the “Department”) uses law-enforcement-grade OC weapons to maintain safety and security in Delaware’s prisons.

The plaintiffs are prisoners in the Department’s care. On May 7, 2026, they sued the Commissioner of the Department in her official capacity on behalf of a putative class of all incarcerated persons in Delaware, defined to include both convicted prisoners and pretrial detainees.⁵

The plaintiffs contend that correction officers frequently use OC weapons on prisoners without permitting decontamination, even after a prisoner has become compliant and any disturbance has been brought under control. The plaintiffs do not challenge any initial use of force. They challenge only the absence of decontamination once a prisoner has become compliant and the area secured. As shorthand, this court has referred to that scenario as “Secure Decontamination.”

The plaintiffs contend that rather than facilitating Secure Decontamination, correction officers force prisoners to go for hours and often days without decontamination. They particularly object to being strip searched without first decontaminating their hands. During a strip search, prisoners must sweep their

⁵ In pursuing this litigation, the plaintiffs have not distinguished between the two groups, and they generally use the term “prisoners” to refer to the category of people at issue. This decision follows suit.

mouths with their fingers and handle their genitals. Undergoing a strip search without first decontaminating their hands invariably transfers OC to sensitive areas. As shorthand, this court has referred to that form of Secure Decontamination as “Pre-Strip-Search Decontamination.”

The prisoners contend that the absence of Secure Decontamination under those circumstances constitutes a “cruel punishment” that violates Article I, Section 11 of the Delaware Constitution (the “Cruel Punishment Clause”). They filed suit seeking declaratory and injunctive relief.

The case proceeded on an expedited basis. Although the case rapidly advanced beyond the pleading stage, the Commissioner moved to dismiss the complaint as non-justiciable. Relying primarily on federal caselaw, she argued that the complaint failed to identify a threatened injury sufficient to give the plaintiffs standing to seek injunctive relief (the “Standing Argument”). She also contended that the plaintiffs’ request for declaratory relief was not yet ripe (the “Ripeness Argument”). Shortly after the litigation began, the Commissioner had adopted a new policy on decontamination (the “Decontamination Policy”), and she argued that the Decontamination Policy rendered the litigation moot (the “Mootness Argument”).

The Commissioner also opposed the plaintiffs’ motion for preliminary injunction. As part of arguing that the plaintiffs had not met any of the required elements for a preliminary injunction, she contended that no private right of action exists under the Cruel Punishment Clause (the “Private Right Argument”). She next contended that even if a private right of action existed, the Cruel Punishment Clause

did not afford the plaintiffs any rights beyond what the Eighth Amendment of the U.S. Constitution confers (the “Same Meaning Argument”). Based on current federal precedent, she argued that the Eighth Amendment requires a showing of cruel intent in the form of deliberate indifference to the prisoners’ serious medical need (the “Cruel Intent Requirement”). She argued that under that reasoning, Eighth Amendment jurisprudence defeats the plaintiffs’ claim.

On June 18, 2026, the court conducted an evidentiary hearing on the plaintiffs’ motion for preliminary injunction. During the hearing, the Commissioner and four other witnesses testified live. The parties introduced depositions, affidavits, documents, photographs, and videos into evidence. They also presented argument on both the motion to dismiss and the injunction motion.⁶

⁶ The Commissioner asserts that the videos show “Plaintiffs and other inmates largely instigating the OC deployment and [Department] officers nevertheless assisting with or facilitating decontamination afterwards.” App. at 4. This litigation is not about OC deployment. The videos did not show Department officers “assisting with or facilitating decontamination afterwards.” *Id.* In fact, there was zero evidence of officers assisting with or facilitating decontamination. The court made the following observation:

Three plaintiffs and one non-plaintiff prisoner testified credibly during the preliminary injunction hearing about their experiences, including a lack of Secure Decontamination. The four prisoners also testified credibly about experiencing extreme and persistent pain because of a lack of Secure Decontamination. Video evidence of the prisoners’ real-time physical reactions corroborated their testimony. Their accounts confirmed their sworn pleading-stage allegations, which this court previously discussed.

The parties' competing motions presented the court with an admixture of arguments. Some of the Commissioner's arguments turned on issues of law; others depended on the evidence adduced during the preliminary injunction hearing. The plaintiffs' preliminary injunction motion turned on the evidence adduced during the hearing.

In an effort to approach the issues in a coherent way, the court first issued the Threshold Opinion, which addressed the threshold issues that either presented issues of law or where the Commissioner sought dismissal based on the allegations in the plaintiffs' complaint. The Threshold Opinion therefore addressed all of the arguments that the Commissioner raised in her motion to dismiss, plus the Private Right Argument. Except for the Mootness Argument, the court analyzed and ruled on each issue. As for the Mootness Argument, the Threshold Opinion explained that the analysis turned on evidence post-dating the filing of the complaint and therefore could not be resolved as a pleading-stage matter.⁷

Injunction Opinion, 2026 WL 2322604, at *9. Those prior accounts included extended periods without Secure Decontamination. *See Threshold Opinion*, 2026 WL 2082677, at *5–6.

The evidentiary record included a Department report in which a nurse explained that when a prisoner is sent to the medical facility, “[t]here is no actual decontamination other than removing an inmates [sic] clothing and changing him into an orange inmate uniform.” Dkt. 58 Ex. 10 at 10. The Commissioner testified that she was not aware of any obligation on the part of Department officers or the medical provider to offer decontamination. Taylor Dep. 13–14; Dkt. 8 Ex. P at 175.

⁷ *Threshold Opinion*, 2026 WL 2082677, at *2 (noting that the Threshold Opinion does not address the Mootness Argument because it involves “fact-laden

The Threshold Opinion rejected the Standing Argument and held that the plaintiffs had demonstrated a reasonable apprehension of future harm sufficient to seek injunctive relief under Delaware law.⁸ The Threshold Opinion also rejected the Ripeness Argument and held that a ripe dispute over Secure Decontamination existed.⁹ Most significantly for purposes of the Application, the Threshold Opinion rejected the Private Right Argument, holding that a private right of action exists under the Cruel Punishment Clause that enables a plaintiff to seek declaratory or injunctive relief.¹⁰ The Threshold Opinion did not reach the more difficult question of whether a violation of the Cruel Punishment Clause could support a damages award.¹¹

The court issued the Threshold Opinion on July 17, 2026. The deadline for seeking interlocutory review ran on July 27. The Commissioner did not file a timely application for interlocutory review.

The court next issued the Injunction Opinion, which addressed the arguments that turned on the evidence developed during the hearing on the prisoners’

issues that depend on the evidence presented during the preliminary injunction hearing”); *id.* at *8 (noting that the court would issue a separate decision addressing the Mootness Argument because it turned on “post-pleading events”).

⁸ *Id.* at *8–14.

⁹ *Id.* at *15–17.

¹⁰ *Id.* at *17–46.

¹¹ *Id.* at *2.

preliminary injunction motion.¹² The Injunction Opinion analyzed and rejected the Mootness Argument.¹³ It also denied the prisoners' request for a preliminary injunction barring the Department from using OC pending a decision after trial or the Department's implementation of a constitutionally compliant policy.¹⁴

In reasoning that the plaintiffs' request for a preliminary injunction should be denied, the Injunction Opinion considered each of the elements of the requested relief. The Injunction Opinion first held that the prisoners had established a reasonable probability of success on the merits.¹⁵ In reaching that conclusion, the Injunction Opinion rejected the Same Meaning Argument. Adhering to the weight of Delaware Supreme Court authority, the Injunction Opinion held that the Cruel Punishment Clause can have meaning independent of how the Supreme Court of the United States has interpreted the Eighth Amendment. For purposes of the plaintiffs' claims, the key question was whether the Cruel Punishment Clause incorporates a Cruel Intent Requirement, as the Commissioner argued, or whether the Cruel Punishment Clause required only a cruel effect, as the plaintiffs argued. The Injunction Opinion held that the Cruel Punishment Clause does not incorporate a Cruel Intent Requirement.¹⁶

¹² *Injunction Opinion*, 2026 WL 2322604.

¹³ *Id.* at *13–16.

¹⁴ *Id.* at *56.

¹⁵ *Id.* at *16–54.

¹⁶ *Id.*

Second, the Injunction Opinion found that the plaintiffs had demonstrated that they would suffer irreparable harm without a grant of injunctive relief.¹⁷ In reaching this conclusion, the Injunction Opinion cited the fact that the prisoners were being deprived of a constitutional right. The Injunction Opinion also relied on evidence in the record that the absence of Secure Decontamination could cause serious physical injury.¹⁸

Finally, the Injunction Opinion held that the balancing of hardships required denying the plaintiffs' motion. To reiterate, the plaintiffs sought a preliminary injunction that would prohibit the Department from using OC pending the outcome of trial or the adoption of a constitutionally adequate decontamination policy. OC and handcuffs are the only tools correction officers have—other than communication—to maintain order. The risks to safety from granting the requested injunction were simply too high.¹⁹

Because the plaintiffs had shown irreparable harm, the court ordered the case to proceed to trial within 120 days. Trial will begin on December 14, 2026.

On August 21, 2026, the Commissioner filed the Application. The Commissioner seeks to appeal all of the issues addressed in both the Threshold Opinion and the Injunction Opinion. The Commissioner implicitly acknowledges,

¹⁷ *Id.* at *54–55.

¹⁸ *Id.*

¹⁹ *Id.* at *55–56.

however, that the Standing Argument, Ripeness Argument, and Mootness Argument do not independently meet the requirements for interlocutory review. The Commissioner proposes instead that if the appeal is certified, then those issues be included as a matter of “[j]udicial economy.”²⁰

The Application attempts to depict the stakes at trial as precariously high for the Commissioner by asserting that the plaintiffs continue to seek an injunction barring the Department’s use of OC entirely pending implementation of a constitutionally adequate policy. The Injunction Opinion makes clear that expansive relief of that sort is not available. The Injunction Opinion already rejected that request as a temporary measure pending trial. It follows that the court would not grant an open-ended injunction to similar effect after trial.

For the reasons explained in the Injunction Opinion, only far narrower relief is potentially on offer.²¹ If the plaintiffs meet their burden at trial, then the court could declare that a lack of Secure Decontamination violates the Cruel Punishment Clause. The court also could issue a targeted mandatory injunction requiring the Commissioner to facilitate Secure Decontamination. Or the court could issue a targeted mandatory injunction requiring the Commissioner to adhere to a constitutionally adequate policy. If, for example, the evidence showed that the federal policy on decontamination is constitutionally adequate, then the court could require

²⁰ App. at 13.

²¹ *See Injunction Opinion*, 2026 WL 2322604, at *55–56.

the Department to comply at a minimum with its requirements. In substance, a mandatory injunction would likely require that the Department facilitate a form of Secure Decontamination that would include prisoners (1) being able to wash their hands with soap and water before touching their mouths and genitals during Pre-Strip-Search Decontamination and (2) having access to a prompt shower.²²

The Application also attempts to elevate the stakes by asserting that “the trial on the merits will involve numerous fact witnesses, multiple expert witnesses and will be a significant expense to the state.”²³ That oversells matters. During a scheduling conference held before the Commissioner filed her motion (albeit on the same day), the parties agreed that (1) no one would have to recall witnesses who testified during the evidentiary hearing, and (2) additional fact witnesses would be called only if the plaintiffs sought to introduce additional incidents involving a lack of Secure Decontamination, and only then on the new incidents. Counsel committed to discuss whether any new incidents needed to be addressed. Recognizing that the parties can and must make their own tactical and strategic decisions on how to present the case, the court anticipates that trial is likely to consist predominantly of

²² The court does not offer those observations as *sua sponte* rulings on the likely remedy, but rather as an assessment intended to help the Delaware Supreme Court evaluate the Application. The court will only determine what remedy is warranted if the plaintiffs prevail based on the evidence presented at trial.

²³ App. at 12.

expert testimony about the need for Secure Decontamination, its feasibility, and the suitability of other decontamination policies like the federal policy.²⁴

II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of interlocutory appeals. “[T]he purpose of Rule 42 is to prevent wasteful piecemeal litigation from overwhelming the docket of the Supreme Court.”²⁵

Rule 42 cautions that “[i]nterlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.”²⁶ Certification is “generally not favored.”²⁷ Thus, an application for interlocutory appeal “requires a strict analysis by the trial court.”²⁸

Rule 42 states that “[n]o interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides [1] a substantial issue [2] of material importance that [3] merits appellate review before a final

²⁴ The court does not offer that observation as a *sua sponte* ruling on the scope of trial, but rather as an assessment intended to help the Delaware Supreme Court evaluate the Application. The parties will address the scope of trial in the pre-trial order and confer with the court on trial-related matters during the pre-trial conference.

²⁵ *Stein v. Blankfein*, 2019 WL 3311227, at *1 (Del. Ch. July 23, 2019).

²⁶ Supr. Ct. R. 42(b)(ii).

²⁷ *Id.* 42 cmt.

²⁸ *Chemours Co. v. DowDuPont Inc.*, 2019 WL 2404817, at *1 (Del. Ch. June 7, 2019).

judgment.”²⁹ When applying that three-part test, the trial court first asks whether the interlocutory ruling decided a “substantial issue,” which is a term of art based on the case-specific significance of the trial-level decision. If that requirement is met, then the trial court must evaluate whether the interlocutory ruling decided an issue of “material importance,” which is a term of art based on the general importance of the question that the trial court’s ruling addressed. When assessing those two elements, Rule 42 instructs the trial court to consider a non-exclusive list of eight factors.³⁰ Finally, the trial court must conduct “its own assessment of the most efficient and just schedule to resolve the case.”³¹ The analysis must “identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice.”³² “If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.”³³

Only if all three steps support certification should the trial court recommend that the Delaware Supreme Court accept the interlocutory appeal. The Delaware Supreme Court can waive or otherwise depart from its rules on a case-by-case basis, and therefore can accept an appeal even if, for example, the substantial-issue

²⁹ Supr. Ct. R. 42(b)(i) (enumeration added).

³⁰ *Id.* 42(b)(iii)(A)–(H).

³¹ *Id.* 42(b)(iii).

³² *Id.*

³³ *Id.*

requirement is not met. Rule 42, however, constrains the trial court's recommendation.

A. Timeliness

The Application presents a threshold issue of timeliness. An application must be "filed within 10 days of the entry of the order from which the appeal is sought or such longer time as the trial court, in its discretion, may order for good cause shown."³⁴ The court issued the Threshold Opinion on July 17, 2026. The deadline for seeking interlocutory review ran on July 27.³⁵ The Commissioner did not file the Application until August 21. The Application for interlocutory appeal from the Threshold Opinion was untimely.

The Commissioner therefore has the burden to establish good cause for a late application. The Commissioner has not identified anything that prevented her from filing a timely application.

The Commissioner claims that the Threshold Opinion did not fully resolve her motion to dismiss, pointing to the Mootness Argument. That is not accurate. The Threshold Opinion rejected the Mootness Argument *as a pleading matter* by explaining that it turned on factual developments that post-dated the filing of the complaint. True, the Threshold Opinion did not resolve the Mootness Argument on

³⁴ *Id.* 42(c)(i).

³⁵ *See id.* 11(a) (providing that, "[w]hen the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and other legal holidays shall be excluded in the computation").

the merits, but it addressed all of the pleading-stage arguments that the Commissioner made.

The Commissioner next claims that because she raised the Private Right Argument in her opposition to the plaintiffs’ motion for preliminary injunction, the Threshold Opinion’s ruling on the Private Right Argument was “not appealable” until the Injunction Opinion issued.³⁶ In making that argument, the Commissioner treats her own motion as the framing device for interlocutory appeal, rather than the court’s interlocutory ruling. The ruling is what matters.³⁷ When parties present a court with multiple motions and the court makes multiple rulings, a party must apply for timely certification as to each ruling.³⁸ The Commissioner argues for an approach under which the Threshold Opinion and the Injunction Opinion would turn into one big ruling. A party cannot await the last ruling and then file an omnibus application for interlocutory appeal.

The Commissioner also complains that the court did not enter an order implementing the Threshold Opinion. Although Supreme Court Rule 42 speaks of an

³⁶ App. at 13.

³⁷ See *Kulak v. On*, 2024 WL 3178228, at *1 (Del. Ch. June 26, 2024) (ORDER) (addressing application for interlocutory appeal from multiple motions heard on the same day, where the court partially denied motions for sanctions from the bench, then later issued a letter decision addressing a motion to compel, motion to limit depositions, and the remaining aspects of the motions for sanctions; holding that application was untimely as to bench ruling and that later ruling did not extend the time for appeal for the bench ruling).

³⁸ See *id.*

“interlocutory order,” the time runs from the interlocutory ruling.³⁹ The time for appeal from the Threshold Opinion began to run on July 17. The deadline came and went on July 27. As to the issues addressed in the Threshold Opinion, the current appeal is untimely.

Of course, the Delaware Supreme Court can waive the timing requirement. In an effort to be helpful, this decision therefore analyzes whether the Threshold Opinion meets the Rule 42 requirements.

B. The Substantial-Issue Requirement

Under Supreme Court Rule 42, a trial court can only certify a ruling for interlocutory appeal if it decided a substantial issue. “The ‘substantial issue’ requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.”⁴⁰ To qualify as a substantial issue, the ruling generally must establish a legal right, meaning that the

³⁹ See *McLeod v. McLeod*, 93 A.3d 654, 2014 WL 2568545, at *1 (Del. 2014) (TABLE) (finding interlocutory appeal untimely when measured from the date of “an April 25, 2014 opinion of the Superior Court denying his motion to dismiss the counterclaims of the appellee”); *Kulak*, 2024 WL 3178228, at *1 (finding interlocutory appeal untimely when measured from the date of bench ruling notwithstanding lack of implementing order); *Envirokare Composite Corp. v. D&D Mfg., LLC*, 2024 WL 1528695, at *1 (Del. Ch. Apr. 9, 2024) (ORDER) (same).

⁴⁰ *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008); accord *Castaldo v. Pittsburgh–Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

court “determines an issue essential to the positions of the parties regarding the merits of the case.”⁴¹

In terms of the trial court’s analysis, this step in the certification inquiry evaluates the significance of the interlocutory ruling for purposes of the specific case before the trial court. The trial court must assess whether the interlocutory ruling both related to the merits of the case and involved one of the principal issues of law that the parties are litigating. The substantial-issue requirement does not concern the overarching significance of the issue the trial court decided, such as its importance as a legal matter or as a question of public policy; that assessment is part of the material-importance requirement.

Four of the eight factors in Rule 42(b)(iii) relate primarily to the substantial-issue requirement. Those factors call for considering whether:

- “The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice.”⁴²
- “The interlocutory order has vacated or opened a judgment of the trial court.”⁴³

⁴¹ *Sprint Nextel*, 2008 WL 2861717, at *1; see *Pepsico, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969) (“The rule is settled that in the absence of a determination of legal right and substantial issue, an interlocutory order is unappealable.”).

⁴² Supr. Ct. R. 42(b)(iii)(E).

⁴³ *Id.* 42(b)(iii)(F).

- “Review of the interlocutory order may terminate the litigation.”⁴⁴
- “Review of the interlocutory order may serve considerations of justice.”⁴⁵

Consistent with the substantial-issue test, each of those factors relates to the significance of the decision for the specific litigation before the trial court.

1. The Threshold Opinion

The Threshold Opinion was a pleading-stage decision. The Delaware Supreme Court has held that “an order directed to the pleadings falls within the class of interlocutory orders which are unappealable,” unless the ruling “will . . . substantively affect the merits of a case or change the status of the parties.”⁴⁶ Put differently, the substantial-issue requirement is generally not met when the only consequence of the ruling is that the plaintiff “would be afforded the right to pursue discovery related to the allegations of the complaint.”⁴⁷ Consistent with that understanding, the Court of Chancery has reasoned that orders denying motions to dismiss generally do not raise a substantial issue.⁴⁸

⁴⁴ *Id.* 42(b)(iii)(G).

⁴⁵ *Id.* 42(b)(iii)(H).

⁴⁶ *Levinson v. Conlon*, 385 A.2d 717, 720 (Del. 1978).

⁴⁷ *JB & Margaret Blaugrund Found. v. Guggenheim Funds Inv. Advisors, LLC*, 2023 WL 2562933, at *3 (Del. Ch. Mar. 17, 2023) (ORDER) (internal quotation marks omitted).

⁴⁸ *Id.*; see, e.g., *Fannin v. UMTB Land Dev., L.P.*, 2020 WL 5198356, at *2 (Del. Ch. Aug. 28, 2020) (ORDER) (determining that the opinion did not decide a substantial issue of material importance because it “merely decided, applying the liberal standard of [] Rule 12(b)(6), that the [c]omplaint stated a claim against the

The Threshold Opinion addressed arguments for dismissal as a matter of law or based on the plaintiffs’ complaint, and it therefore fits within the general rule. Indeed, because this case proceeded on an expedited basis, the court issued the Threshold Opinion after much of the fact discovery had already taken place and after the parties presented evidence during the evidentiary hearing on the plaintiffs’ motion for preliminary injunction. For purposes of the Standing Argument and Ripeness Argument, factual developments overtook the Commissioner’s pleading-stage contentions. Especially on those issues, the Threshold Opinion’s denial of the motion to dismiss did not decide a substantial issue.

The Threshold Opinion’s rejection of the Private Right Argument stands on a different footing. There, the court held that the plaintiffs could pursue declaratory and injunctive relief under the Cruel Punishment Clause. Though issued in the context of a decision denying the Commissioner’s argument for dismissal as a matter

Appealing Defendants for breach of fiduciary duty”), *appeal refused sub nom. Etter v. Fannin*, 238 A.3d 193 (Del. 2020) (TABLE); *In re Tesla Motors, Inc. S’holder Litig.*, 2018 WL 2006678, at *3 (Del. Ch. Apr. 27, 2018) (ORDER) (determining that the opinion did not decide a substantial issue of material importance where plaintiffs met their “‘minimal’ pleading-stage burden” to demonstrate controlling stockholder status and discovery could show otherwise), *appeal refused sub nom. Musk v. Ark. Tchr. Ret. Sys.*, 184 A.3d 1292 (Del. 2018) (TABLE); 2 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 18.04[b], at 18-12 to -13 (2d ed. 2025) (“[R]ulings found not to have determined substantial issues include . . . the denial of a [] motion to dismiss a derivative suit in response to the recommendation of a special litigation committee” (citation omitted)); *see also Levinson*, 385 A.2d at 720 (“[T]he Court determined that an affirmative defense was not available, and the consequence of the decision was that the parties must proceed to trial, a ruling which our cases have held is not [a] basis for an interlocutory appeal.”).

of law, that ruling permitted the prisoners' case to proceed. It gave the prisoners the right to sue and thereby established a substantial issue for purposes of interlocutory review.

2. The Injunction Opinion

The Injunction Opinion denied the plaintiffs' motion for preliminary injunction based on a discretionary balancing of the equities. A denial of a motion for preliminary injunction generally does not satisfy the substantial-issue requirement,⁴⁹ and the Delaware Supreme Court has refused efforts to take appeals from denials of preliminary injunctive relief.⁵⁰ The Injunction Opinion falls within that general rule. The plaintiffs nevertheless concede that the Injunction Opinion decided a substantial issue.

⁴⁹ See *Blommer Chocolate Co. v. Blommer*, 1992 WL 1368949, at *1 (Del. Ch. Oct. 7, 1992) ("The decision did establish that plaintiff would not be awarded a preliminary injunction by this court, but the 'establishment' of such a 'non-right' cannot satisfy Rule 42. If it could, all determinations of such applications would be heard on appeal immediately, which, of course, is not the case.").

⁵⁰ E.g., *Nguyen v. Barrett*, 146 A.3d 1072 (Del. 2015) (TABLE); *Bank of Am., N.A. v. Steel P'rs II (Offshore) Ltd.*, 976 A.2d 170 (Del. 2009) (TABLE); *Hollinger, Inc. v. Hollinger Int'l, Inc.*, 871 A.2d 1128 (Del. 2004) (TABLE); *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 817 A.2d 804 (Del. 2003) (TABLE); *Emerson Radio Corp. v. Int'l Jensen Inc.*, 683 A.2d 58 (Del. 1996) (TABLE); see *Roseton OL, LLC v. Dynegy Hldgs., Inc.*, 26 A.3d 214 (Del. 2011) (TABLE) (declining to accept interlocutory appeal from denial of TRO); *In re Pure Res., Inc. S'holders Litig.*, 812 A.2d 224 (Del. 2002) (TABLE) (declining to accept interlocutory appeal from grant of preliminary injunctive relief where plaintiffs sought a broader preliminary injunction than the court had granted).

The plaintiffs’ concession does not extend to the Mootness Argument. By rejecting the Mootness Argument, the Injunction Opinion did not decide a substantial issue. “Mootness should not be confused with the merits.”⁵¹ The mootness inquiry asks whether the defendants have taken action that negates the need for judicial intervention. It is not a merits-based inquiry and therefore cannot meet the substantial-issue requirement. The Commissioner does not argue otherwise.

C. The Material-Importance Requirement

A ruling that satisfies the substantial-issue requirement is not sufficient for a trial court to certify an interlocutory appeal. The interlocutory ruling must also have decided an issue of “material importance.”⁵² In contrast to the substantial-issue requirement, the “material importance” concept appears to capture the legal or public significance of the issue generally, beyond the specific case before the trial court. This aspect of the inquiry asks whether the interlocutory ruling addresses an issue that is sufficiently significant to warrant the immediate attention of the Delaware Supreme Court, as opposed to more quotidian questions involving settled law.

Four of the eight factors in Rule 42(b)(iii) appear to relate primarily to the material-importance inquiry. They call for considering whether:

⁵¹ 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3533.1 (3d ed.), Westlaw (database updated Apr. 2026).

⁵² Supr. Ct. R. 42(b)(i).

- “The interlocutory order involves a question of law resolved for the first time in this State.”⁵³
- “The decisions of the trial courts are conflicting upon the question of law.”⁵⁴
- “The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order.”⁵⁵
- “The interlocutory order has sustained the controverted jurisdiction of the trial court.”⁵⁶

Consistent with the material-importance inquiry, those factors relate to whether the interlocutory ruling addressed an issue that is, in colloquial terms, a big deal.

1. The Threshold Opinion

The Threshold Opinion’s rejection of the Private Right Argument addresses an issue of material importance. In reaching that outcome, the Threshold Opinion took two steps. First, it proposed a test for determining when a private right of action to seek declaratory or injunctive relief exists under a provision of the Delaware Constitution (the “Suggested Test”). Second, it applied the Suggested Test to determine whether a private right of action to seek declaratory or injunctive relief existed under the Cruel Punishment Clause. The Delaware Supreme Court has never addressed either issue, suggesting they are issues of material importance as

⁵³ *Id.* 42(b)(iii)(A).

⁵⁴ *Id.* 42(b)(iii)(B).

⁵⁵ *Id.* 42(b)(iii)(C).

⁵⁶ *Id.* 42(b)(iii)(D).

questions of first impression under Rule 42(b)(iii)(A). If the Delaware Supreme Court ignores the timeliness problem with the Application, then that requirement is satisfied.

The other issues that the Threshold Opinion decided do not involve issues of material importance. The Threshold Opinion applied settled law when rejecting the Standing Argument and the Ripeness Argument. Nothing else about those holdings suggests material importance. The Commissioner does not argue otherwise.

2. The Injunction Opinion

As the plaintiffs concede, the Injunction Opinion's rejection of the Same Meaning Argument decided an issue of material importance. Reaching that conclusion involved three steps. Initially, the Injunction Opinion followed the weight of Delaware Supreme Court authority in holding that the Cruel Punishment Clause can have meaning independent of the Eighth Amendment as interpreted by the Supreme Court of the United States. In the course of its analysis, the Injunction Opinion focused on the specific type of independent meaning that the parties put at issue: whether the Cruel Punishment Clause tracks the Eighth Amendment in containing a Cruel Intent Requirement, as the Commissioner argued, or whether it simply requires a cruel result, as the prisoners argued. The Injunction Opinion rejected the Cruel Intent Requirement. Last, the Injunction Opinion operationalized its rulings in the form of the Cruel Conditions Test.

But for the plaintiffs' concession, the holding that the Cruel Punishment Clause can have meaning independent of the Eighth Amendment would not

constitute an issue of material importance. The Delaware Supreme Court has repeatedly addressed whether the Cruel Punishment Clause has meaning independent of the Eighth Amendment. All of its rulings suggest that the answer is yes.⁵⁷ The Commissioner relies on dictum in two decisions to suggest otherwise, but the weight of authority powerfully favors independent meaning. One trial court decision admittedly holds that the Cruel Punishment Clause lacks independent meaning,⁵⁸ and the Injunction Opinion disagreed with that decision. Given the weight of Delaware Supreme Court authority, the question of independent meaning does not seem like an issue of material importance, but the parties have agreed otherwise, so further analysis is not required.

The Injunction Opinion’s rejection of the Cruel Intent Requirement constitutes an issue of material importance. The Delaware Supreme Court has not addressed that issue, which presents a question of first impression both for the Delaware Supreme Court and for courts of this state. Whether the Cruel Punishment Clause requires cruel intent qualifies as materially important under Rule 42(b)(iii)(A).

The content of the Cruel Conditions Test also qualifies as an issue of material importance. In proposing the Cruel Conditions Test, the Injunction Opinion drew from the text of the Cruel Punishment Clause, its legislative history, and Delaware’s unique history and traditions to conclude that only rehabilitation, deterrence, and

⁵⁷ See *Injunction Opinion*, 2026 WL 2322604, at *33–38.

⁵⁸ *Desmond v. State*, 2024 WL 3456225, at *6 (Del. Super. July 16, 2024).

incapacitation are legitimate penological interests under the Cruel Punishment Clause. The Delaware Supreme Court has not addressed that issue, which presents a question of first impression both for the Delaware Supreme Court and for courts of this state. The issue of which penological interests justify a punishment or condition of confinement under the Cruel Punishment Clause qualifies as materially important under Rule 42(b)(iii)(A).

Although unnecessary for purposes of establishing the importance of the Cruel Conditions Test, the Commissioner advances a version of the now-*de rigueur* argument that the trial court took action *sua sponte*.⁵⁹ The Application argues that when proposing the Cruel Conditions Test,

⁵⁹ Claiming the trial court raised an issue *sua sponte* can be successful, even when the record shows the parties litigated it. In *Leo Investments*, the defendants-appellees claimed the trial court introduced and ruled on a “duty of candor” claim *sua sponte*. *Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P.*, No. 415, 2025, Dkt. 23 at 2. The Delaware Supreme Court accepted that characterization and referenced it four times in its decision. See *Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P. (Leo Supreme)*, — A.3d —, —, 2026 WL 1993637, at *4 (Del. July 10, 2026) (“The court, however, ruled *sua sponte* that Kahlon breached his ‘duty of candor’ in his discussions with Leo Group surrounding the forced withdrawal.”); *id.* at *11 (“The court held *sua sponte* that Kahlon failed to communicate honestly with Leo Group after the phone call with Johnsen.”); *id.* at *14 (“Here, by contrast, the court held that Leo Group ‘did not succeed in a meaningful way on any of its claims for breach of fiduciary duty,’ finding that Leo Group prevailed only on the ‘candor’ claim that the court raised *sua sponte*.”); *id.* (“At bottom, Leo Group prevailed on a single issue raised *sua sponte* by the court, resulting in an award of nominal damages.”). Ultimately, the high court relied on the trial court having supposedly raised that claim and granted relief on it *sua sponte* in holding that the trial court abused its discretion by awarding attorneys’ fees to the beneficiary. See *id.* at *14.

As the Delaware Supreme Court elsewhere recognized, the duty-of-candor claim was merely the trial court’s shorthand reference to the well-developed law

holding that a director must speak honestly when communicating with a stockholder outside the context of a request for stockholder action. *See id.* at *12; *accord id.* at *11 n.77 (“Here, it is more accurate to view Kahlon’s actions as a breach of his duty of loyalty, which includes a requirement that directors ‘deal honestly with stockholders.’” (citing *Dohmen v. Goodman*, 234 A.3d 1161, 1169 (Del. 2020))). The plaintiff asserted that claim, and both parties addressed it in their simultaneous pre-trial briefs. *See Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P.*, C.A. No. 2022-0175-JTL, Dkt. 189 at 32; Dkt. 192 at 52–53. The plaintiff pursued the theory after trial, raising it in its post-trial opening brief. *See* Dkt. 240 at 32–33. The defendants argued against the theory in their post-trial answering brief. *See* Dkt. 247 at 37–39. The plaintiff responded in its post-trial reply brief. *See* Dkt. 249 at 3–6. Plaintiff’s counsel pushed the claim during post-trial argument. *See* Dkt. 265 at 33. Defendants’ counsel responded during post-trial argument. *See id.* at 105–06. The court adjudicated that claim, holding that the defendant fiduciary spoke “falsely and partially.” *Leo Invs. Hong Kong Ltd. v. Tomales Bay Cap. Anduril III, L.P. (Leo Post-Trial)*, 342 A.3d 1166, 1208 (Del. Ch. 2025), *aff’d in pertinent part*, 2026 WL 1993637. Yet on appeal, the defendants-appellees claimed that the trial court introduced and ruled on the claim *sua sponte*.

When emphasizing the supposed *sua-sponte*-ness of the “duty of candor” claim, the justices took pains to note that in *Stroud*, “we expressed our disfavor with the term ‘duty of candor’ because of its ‘confusing and imprecise’ application.” *Leo Supreme*, 2026 WL 1993637, at *11 n.77 (citing *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)). Before *Stroud*, Delaware decisions used the term “duty of candor” or “duty of complete candor” to refer to the duty of disclosure *in the context of stockholder action*. *E.g., Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 279 (Del. 1977); *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 499 (Del. 1981) (subsequent history omitted); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). That terminology was confusing in that setting because it implied a higher standard of disclosure than the duty to disclose material information. *See Stroud*, 606 A.2d at 84. The *Stroud* footnote did not condemn the “duty of candor” terminology for purposes of a director’s duty to speak honestly when communicating with a stockholder without seeking stockholder action. Delaware decisions have used duty-of-candor terminology post-*Stroud* to refer to a partner’s duty to speak honestly to other partners. *See Bren v. Cap. Realty Gp. Senior Hous., Inc.*, 2004 WL 370214, at *9 (Del. Ch. Feb. 27, 2004); *In re Cencom Cable Income P’rs, L.P. Litig.*, 2000 WL 640676, at *7 (Del. Ch. May 5, 2000); *In re Dean Witter P’ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998), *aff’d*, 725 A.2d 441 (Del. 1999); *see generally* Robert C. Montgomery, *The Fiduciary Duties of General Partners*, 17 Colo. Law. 1959, 1962 (1988) (“General partners have the duty to

the Court borrows heavily from the test developed by the Washington Supreme Court in 2021. Plaintiffs did not reference, let alone request, application of the Washington (or any other) standard in their briefs or at oral argument. Instead, Plaintiffs simply argued that failing to decontaminate inmates after OC use is “cruel” under the normal and historical meaning of that term and therefore violates the Cruel Punishment Clause. Nor did the Court preface that it would be proposing a new standard or seek input as to what that standard should be in a manner that gave either party a reasonable opportunity to respond. Thus, the Commissioner had no meaningful opportunity to

disclose to their co-partners, in utmost candor, all facts and circumstances which are material to the partnership’s business.”).

Although I did not do so in *Leo Investments*, I have often noted that history. See, e.g., *Guilbeau v. Footprint Int’l Holdco, Inc.*, — A.3d —, —, 2026 WL 1329169, at *28 n.183 (Del. Ch. May 11, 2026); *Voigt v. Metcalf*, 2020 WL 614999, at *24 n.26 (Del. Ch. Feb. 10, 2020); *In re Orchard Enters., Inc. S’holder Litig.*, 88 A.3d 1, 29 n.9 (Del. Ch. 2014); *In re Wayport, Inc. Litig.*, 76 A.3d 296, 319–20 (Del. Ch. 2013). In *New Enterprise*, I expressed regret that the phrase “duty of candor” could not be repurposed as a shorthand for the duty of loyalty that includes a requirement that directors deal honestly with stockholders. *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 173 n.53 (Del. Ch. 2023) (“[I]t would be nice to use the term ‘duty of candor’ to refer to the *Malone* obligation to speak honestly and completely, while saving the ‘duty of disclosure’ for the obligation to disclose all material information reasonably available when requesting stockholder action.”). I tried that shorthand approach in *Leo Investments*, thinking that because the case involved the general partner of a limited partnership and not a corporation, and because the communications did not involve limited-partner action, the shorthand usage would not create confusion. In the context of an already lengthy decision, I neglected to spell out the reasons for that choice. See *Leo Post-Trial*, 342 A.3d at 1208 (“When Kahlon chose to speak to Leo Group in these settings, he took on a duty to speak honestly and completely. He could not engage in partial or misleading disclosures. By speaking falsely and partially, Kahlon failed to comply with his duty of candor.”).

On appeal, counsel successfully characterized that act of shorthand labeling as the court *sua sponte* introducing and awarding relief on an entirely new legal theory. Based in part on that inaccurate description, counsel obtained the reversal of the fee award. That reversal in turn produced a complete victory for a disloyal fiduciary who had spoken falsely to his beneficiary, and whose false speech contributed to the beneficiary’s decision to file expensive litigation.

address potential application of Washington’s cruel-punishment test in this case prior to the Court’s ruling.⁶⁰

That amounts to an argument that the court can only consider the legal authorities that the parties have presented.

The law is otherwise. “When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”⁶¹ Particularly in an expedited case, a court does not have to give the parties notice that it has located a pertinent authority and offer them time to respond.

⁶⁰ App. at 8–9 (footnotes omitted).

⁶¹ *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); see *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445–47 (1993) (holding that the court of appeals properly ordered supplemental briefing on a legal issue that no party raised or took a position on; explaining that a “court may consider an issue ‘antecedent to . . . and ultimately dispositive of’ the dispute before it, even an issue the parties fail to identify and brief” (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990))); see *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 88 & n.9 (1993) (addressing a legal question even where parties agreed on the answer). Foreclosing a court from considering authorities the parties did not raise would function as a binding stipulation regarding governing law, which cannot bind a court. See *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917) (“If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.”); accord *Bank of Or.*, 508 U.S. at 448 (“After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law.”); *Fisher v. First Stamford Bank & Tr. Co.*, 751 F.2d 519, 523 (2d Cir. 1984) (“Generally, a stipulation of fact that is fairly entered into is controlling on the parties and the court is bound to enforce it. But a court is not governed by a stipulation on a question of law.” (citations omitted)).

A court has discretion to ask for supplemental briefing, but that is not required.⁶² The principle of party presentation is foundational to American law, and that principle operates as a powerful constraint on a judge going outside the factual record that the parties have crafted. But there are good reasons why courts should do their best to get the law right, even if that means considering authorities beyond what the parties cite.⁶³

⁶² In fact, it has been criticized. See *Hyde Park Venture P’s Fund III, L.P. v. FairXchange, LLC*, 2024 WL 3579932, at *16–18 (Del. Ch. July 30, 2024) (discussing the ill-fated request for supplemental briefing on a recent Delaware Supreme Court decision in the *Aruba* litigation).

⁶³ See generally Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 470–517 (2009) (presenting a balanced account of the benefits and dangers of judicial issue creation, including justifications for courts addressing authorities that the parties have not raised). For example, “[w]hen the parties fail to fully and accurately describe applicable legal standards, the norm against judicial issue creation comes into conflict with the judiciary’s law pronouncement power. Because judicial decisions are objective statements about the meaning of law, not statements about how the parties subjectively interpret the law, courts must be able to take notice of legal arguments that the parties fail to see. If litigants could constrain courts through their own truncated or inaccurate depictions of the meaning of statutes, constitutional provisions, and the like, they could effectively wrest this task away from the courts” *Id.* at 472. “Furthermore, if judges are not permitted to question litigants’ articulation of the law, then courts can be co-opted by litigants seeking to benefit from the credibility of a judicial decision that describes the law as they see it.” *Id.* at 483. Unlike the parties, judges are independent; they do not have a stake in the particular dispute. “Judicial independence, and the respect for judicial decisionmaking that accompanies it, would be compromised if courts were required to rule on the law as it is presented to them, rather than as they believe it to be.” *Id.*

Courts admittedly can issue decisions “in accordance with the parties’ view of the law,” while noting “that the parties had failed to raise key issues that might have produced a different holding.” *Id.* at 473. “However, issuing this type of qualified opinion—a one-shot, nonprecedential statement about the law that applies to one set of litigants only—is not a satisfying solution to the problem. When a court couches its

The Commissioner is correct that the plaintiffs did not cite the Washington case, but the court’s reliance on it was neither improper nor prejudicial. The court would have proposed the same test without the Washington case. The court discussed the Washington decision because that court conducted an analysis comparable to the Injunction Opinion’s treatment of the *Hunt* factors, then proposed a test analogous to what the court viewed as the correct approach.⁶⁴

If the court had proposed a test without relying on any authority, the Commissioner would take issue with that. The other alternative—no proposed test at all—would have been worse for the parties and particularly for the Commissioner. In that setting, the parties would have had no guidance as to how to frame their case for trial. The plaintiffs argued for treating cruelty as a question of fact, contending that “it is cruel within the meaning of Article I, Section 11 to leave incarcerated people doused in a dangerous chemical that can injure or kill them long after the chemical has served its purpose (presuming there was a legitimate purpose for its use in the

opinion in such tentative terms, it has abandoned its law-pronouncement function in favor of resolving the dispute on the parties’ terms. While this may be the best solution in some cases, it should not be viewed as the only option available to courts facing this problem. If it were, parties could regularly force courts to decide cases on grounds of the parties’ invention that are at odds with existing law, in the form of decisions that apply only to the parties.” *Id.* at 474. In my experience, parties who later cite the qualified decision do not call out the qualification. A court may then rely on the decision without citing the qualification, and the effort to issue a narrow decision backfires.

⁶⁴ See *Injunction Opinion*, 2026 WL 2322604, at *51–52.

first place).⁶⁵ The Cruel Conditions Test treats the issue as a mixed question of fact and law, gives the Commissioner ways to justify action that might otherwise seem cruel, and calls for “appropriate deference to the Commissioner’s judgment.”⁶⁶ If the Commissioner believed the court had misapprehended the law in crafting a test, she could have moved for reargument.⁶⁷ She can still argue that the grounds for applying a different test are sufficiently compelling to warrant revisiting the issue under the law of the case doctrine.⁶⁸

Although the Commissioner goes too far by contending that the court acted improperly when proposing the Cruel Conditions Test, the rejection of the Same Meaning Argument decided three issues of material importance. By contrast, the Injunction Opinion’s rejection of the Mootness Argument does not qualify. That ruling applied settled law and did not break new ground. The Commissioner again does not argue otherwise.

⁶⁵ Dkt. 51 at 13.

⁶⁶ *Injunction Opinion*, 2026 WL 2322604, at *52.

⁶⁷ See Frost, *supra*, at 496–99 (explaining how Professor Lon Fuller’s theory of adjudication with its heavy reliance on party presentation accommodates the law pronouncement function, including through motions for reargument).

⁶⁸ Cf. *Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sep. 23, 1994) (Allen, C.) (“Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.”).

D. Whether The Interlocutory Ruling Merits Appellate Review Before A Final Judgment

As a final step, Rule 42 directs the trial court to assess whether the interlocutory ruling merits review before a final judgment. Rule 42 instructs the trial court to conduct “its own assessment of the most efficient and just schedule to resolve the case,” then discuss “whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice.”⁶⁹ There must be “substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal.”⁷⁰ “If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.”⁷¹

The request for interlocutory appeal from the Threshold Opinion’s rejection of the Private Right Argument is untimely. If the Delaware Supreme Court overlooks that flaw, then the Private Right Argument and the Same Meaning Argument both warrant the Delaware Supreme Court’s attention. The critical question is when.

The two logical paths are either an expedited appeal now, so that the high court’s answer can arrive before the December trial, or an appeal in early 2027 after a final judgment. The plaintiffs have established a threat of irreparable harm, trial is likely to be focused, and the court has made clear that the only potential relief on

⁶⁹ Supr. Ct. R. 42(b)(iii).

⁷⁰ *Id.* 42(b)(ii).

⁷¹ *Id.* 42(b)(iii).

offer is a declaratory judgment and possibly a targeted mandatory injunction. A broad injunction barring the Department from using OC is no longer on the table.

When an interlocutory ruling has denied a motion to dismiss on an issue of material importance, and when that interlocutory ruling opens the door to wide-ranging and costly discovery, the prospect of a lengthy trial, and extensive remedial proceedings, then having the Delaware Supreme Court address a novel and potentially case-dispositive legal issue upfront can be exceedingly helpful. If the justices regard the claim as legally flawed, then having a definitive answer prevents the parties and the trial court from expending significant resources litigating the case through a post-trial remedy, only for the justices to hold that because of an outcome-determinative legal issue, the claim never should have gone forward in the first

place.⁷² *Delaware Claims Processing* provides an example of a resource-saving intervention.⁷³ So does *Maffei v. Palkon*.⁷⁴

This case is not one of those situations. The parties have already deposed the named plaintiffs and the Commissioner in preparation for the preliminary injunction hearing. The Commissioner, three of the plaintiffs, and one witness for the plaintiffs testified live during the preliminary injunction hearing. The additional discovery required between now and trial will likely be limited. The scope of trial is also likely to be narrow, because the parties agree that the witnesses who testified during the preliminary injunction hearing need not be recalled for the matters on which they testified. The principal focus of trial is likely to involve expert testimony. Given that

⁷² *E.g., In re Columbia Pipeline Gp., Inc. Merger Litig.*, 342 A.3d 324, 357 (Del. 2025) (reversing post-trial decision in multi-year litigation based on issue of law); *Boardwalk Pipeline P'rs, LP v. Bandera Master Fund LP*, 288 A.3d 1083, 1088 (Del. 2022) (reversing post-trial decision in multi-year litigation based on two issues of law); *Oxbow Carbon & Mins. Hldgs., Inc. v. Crestview-Oxbow Acq., LLC*, 202 A.3d 482, 502 (Del. 2019) (reversing post-trial decision in multi-year litigation based on issue of law).

⁷³ *Del. Claims Processing Facility, LLC v. DBMP LLC*, — A.3d —, 2026 WL 2207474 (Del. July 31, 2026). There, the trial court denied a motion to dismiss, but nevertheless certified the interlocutory appeal, noting “[t]his trial judge would not relish overseeing the case for a year or two, supervising discovery, presiding over a trial, issuing a post-trial decision, and crafting a remedy, only to find out on the appeal from the final order that the justices disagreed with the concept of the Court of Chancery intervening in the first place.” *Id.* at *9 (quoting *DBMP LLC v. Del. Claims Processing Facility, LLC*, 2025 WL 3214372 (Del. Ch. Nov. 14, 2025)). That concern proved prescient, as the Delaware Supreme Court reversed the denial of the motion to dismiss and “remanded with direction to enter judgment for the defendants dismissing the action.” *Id.* at *10.

⁷⁴ *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025).

reality, an interlocutory appeal from the Threshold Opinion’s rejection of the Private Right Argument is not warranted.

Similar considerations affect the timing of an appeal after the denial of a preliminary injunction. *Stream TV* illustrates when early high-court input would have been desirable. There, as here, the trial court denied a preliminary injunction motion, but the denial in that case allowed a transaction between a debtor and its secured creditor to close.⁷⁵ For over a year, the litigation continued at the trial-court level, with the creditor-buyer operating the assets and investing in the business. After replacing counsel, the plaintiff moved for partial summary judgment, resulting in a Rule 54(b) order and an appeal.⁷⁶ After another six months, the Delaware Supreme Court reversed on one point of law, which was sufficient to render the transaction agreement void.⁷⁷ That reversal triggered an avalanche of complex issues, including how to rescind the transaction and unwind nearly two years of operational decisions, along with efforts by the company’s secured creditors to obviate that result. On remand, the trial court confronted a series of expedited motions that necessitated the

⁷⁵ See *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 250 A.3d 1016 (Del. Ch. 2020).

⁷⁶ See *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2021 WL 5816820 (Del. Ch. Dec. 8, 2021), *rev’d in part, vacated in part*, 279 A.3d 323 (Del. 2022).

⁷⁷ *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323 (Del. 2022).

appointment of a receiver to assess factual complexities.⁷⁸ The dispute eventually shifted to the bankruptcy court.⁷⁹ Had the trial court been apprised of the fatal legal

⁷⁸ *E.g.*, *Hawk Inv. Hldgs., Ltd. v. Mediatainment, Inc.*, 2023 WL 3099122 (Del. Ch. Apr. 26, 2023) (ORDER) (order denying motion to dismiss); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2023 WL 3099112 (Del. Ch. Apr. 26, 2023) (ORDER) (order denying motion to dismiss); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2023 WL 3099113 (Del. Ch. Apr. 26, 2023) (ORDER) (order denying motion to intervene); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2023 WL 1963091 (Del. Ch. Feb. 10, 2023) (ORDER) (order granting motion to file amended complaint); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2023 WL 1816922 (Del. Ch. Feb. 4, 2023) (ORDER) (order granting motion to set cash bond); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2022 WL 17661578 (Del. Ch. Dec. 14, 2022) (ORDER) (order denying motion for reargument); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2022 WL 17258460 (Del. Ch. Nov. 29, 2022) (memorandum opinion granting partial summary judgment); *In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 2022 WL 16860930 (Del. Ch. Nov. 9, 2022) (ORDER) (order granting motion to intervene); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2022 WL 16860942 (Del. Ch. Nov. 9, 2022) (ORDER) (order denying motion to compel); *Hawk Inv. Hldgs. Ltd. v. Stream TV Networks, Inc.*, 2022 WL 12615549 (Del. Ch. Oct. 20, 2022) (ORDER) (status quo order); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 11388785 (Del. Ch. Oct. 19, 2022) (ORDER) (order denying motion for contempt); *In re Stream TV Networks, Inc.*, 2022 WL 10029844 (Del. Ch. Oct. 14, 2022) (ORDER) (order addressing motion for clarification); *In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 283 A.3d 1183 (Del. Ch. 2022) (opinion imposing sanction for contempt); *In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 2022 WL 4989617 (Del. Ch. Oct. 3, 2022) (ORDER) (order granting in part emergency motion to enforce order); *In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 2022 WL 4772886 (Del. Ch. Sep. 30, 2022) (ORDER) (order denying application for mandatory injunction); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 4398448 (Del. Ch. Sep. 22, 2022) (ORDER) (order denying application for special master); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 4356510 (Del. Ch. Sep. 16, 2022) (ORDER) (order denying application to modify temporary restraining order); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 4356514 (Del. Ch. Sep. 16, 2022) (ORDER) (order granting motion for costs); *In re Stream TV Networks, Inc. Omnibus Agreement Litig.*, 2022 WL 4491925 (Del. Ch. Sep. 28, 2022) (memorandum opinion declining to modify partial final judgment); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 3283863 (Del. Ch. Aug. 10, 2022) (ORDER) (order granting motion for partial final judgment implementing Delaware Supreme Court decision); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 3227785 (Del. Ch. Aug. 9, 2022) (ORDER) (order granting motion for temporary

error shortly after denying the preliminary injunction, much work and many headaches could have been avoided.

The Injunction Opinion's rejection of the Same Meaning Argument is not like *Stream TV*. Here, the Injunction Opinion's denial of the preliminary injunction has not enabled a transaction to close, and nothing will happen between now and trial that would be difficult to unwind later.

This is also a case where the issuance of a post-trial ruling will not impair the Delaware Supreme Court's ability to act. If the court rules for the Commissioner after trial, then the plaintiffs will likely seek an expedited appeal, and the Delaware Supreme Court can decide how fast the appeal will go. If the court rules for the plaintiffs, then the Commissioner will likely seek a stay pending appeal. Once again, the Delaware Supreme Court will be able to decide how to proceed. The scope of relief the plaintiffs realistically can obtain also does not impose any real-world constraint. The Delaware Supreme Court could readily reverse a declaratory judgment. The high court could also stay and later reverse any mandatory injunction requiring the Department to facilitate a form of Secure Decontamination.

restraining order); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 2902646 (Del. Ch. July 20, 2022) (ORDER) (order denying status quo order); *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2022 WL 17970594 (Del. Ch. July 5, 2022) (ORDER) (order granting motion to file supplemental pleading).

⁷⁹ The reversal and its consequences prompted the General Assembly to amend the Delaware General Corporation Law. *See* 84 Del. Laws ch. 98 (2023) (S.B. 114) (amending 8 *Del. C.* § 272).

Finally, this is a case that should be easy for the parties to resolve, mooted the need for an appeal. All the plaintiffs want is a meaningful and constitutionally compliant policy on Secure Decontamination. During the preliminary injunction hearing, the plaintiffs spelled out their objections to the Decontamination Policy and the comparatively easy fixes that would be necessary to moot the case. The federal decontamination policy also provides guidance. There may well be cases in the future that cannot be resolved so easily. If this case resolves and the Delaware Supreme Court does not have the opportunity to review the Private Right Argument or the Same Meaning Argument, that does not affect the high court's ability to act in the future. This court's rulings do not bind the Delaware Supreme Court. In a future case, the Delaware Supreme Court can consider, disagree with, and abrogate this court's rulings.⁸⁰ If this case resolves, then an appeal in this action will not be necessary. The Delaware Supreme Court can address the Private Right Argument and the Same Meaning Argument in due course.

In light of these considerations, the trial court believes that the most efficient and just schedule for resolving the case is for the Delaware Supreme Court to consider the appeal after the entry of a final judgment. This decision therefore recommends

⁸⁰ See, e.g., *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016), *abrogated in part by* *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013), *abrogated in part by* *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016); *Pfeiffer v. Toll*, 989 A.2d 683 (Del. Ch. 2010), *abrogated in part by* *Kahn v. Kohlberg Kravis Roberts & Co. L.P.*, 23 A.3d 831 (Del. 2011).

that the Delaware Supreme Court not accept the interlocutory appeal.

III. CONCLUSION

Ultimately, whether to permit an interlocutory appeal lies in the discretion of the Delaware Supreme Court. The justices' views, not the trial court's, determine whether the defendant's request will be granted. This court's role under Rule 42 is to make a recommendation. In this case, that recommendation is for the Delaware Supreme Court to refuse the interlocutory appeal.