IN THE

Supreme Court of the State of Delaware

MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSCHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK,

Defendants Below-Appellants,

- and -

BLUE APRON HOLDINGS, INC., STITCH FIX, INC., and ROKU, INC.,

v.

MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated,

Plaintiff Below-Appellee.

No. 346, 2019

COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. NO. 2017–0931–JTL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS BELOW-APPELLANTS AND REVERSAL

Anthony A. Rickey (Bar No. 5056)
MARGRAVE LAW LLC
8 West Laurel St., Suite 2
Georgetown, Delaware 19947
(302) 604–5190

Of Counsel:

Theodore N. Mirvis
George T. Conway III
Ryan A. McLeod
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403–1000

Stephen P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463–5337

Attorneys for Amicus Curiae *the Chamber of Commerce of the United States of America*

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of vital concern to the nation's business community, including cases applying Delaware law and the federal securities laws.

Private securities litigation imposes a significant burden on the Chamber's members, and adversely affects their access to capital markets. And many of its members are Delaware corporations. The Chamber and its members thus have a strong interest in the question presented in this case—whether Delaware corporations may adopt charter provisions that require stockholders to bring claims under the Securities Act of 1933 in federal court only.

SUMMARY OF ARGUMENT

In striking down the federal-forum charter provisions at issue in this case, the Court of Chancery asserted that it was simply applying "first principles" of Delaware corporate law. It was not. The true first principle of that law is that the statute, the Delaware General Corporation Law, determines what companies can and cannot do. But the Court of Chancery chose to divine meaning elsewhere. Out of whole cloth, it engrafted a brand-new "internal affairs" limitation on the broad provision that should have been held to authorize the federal-forum charter provisions, Section 102(b)(1).

Like much of the DGCL, Section 102(b)(1) is sweepingly worded—it permits companies to include in their charters any provision addressing the "conduct of the affairs of the corporation," or "defining, limiting and regulating the powers of … stockholders." That language should have been enough to uphold the provisions at issue here, as demonstrated by *ATP Tour, Inc.* v. *Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014)—a case involving *federal antitrust claims*—in which this Court found Section 102(b)(1) broad enough to support *fee-shifting* in any kind of member litigation, such as the antitrust litigation there.

And the legislative response to *ATP* confirms that the Court of Chancery erred below. The 2015 amendments to the DGCL did not alter Section 102(b)(1), and did nothing to undermine *ATP*'s reasoning—they simply, and quite narrowly, prohibited *fee-shifting* as to any "internal corporate claim" brought by shareholders against stock corporations. 8 *Del. C.* § 102(f). Indeed, the fact this new prohibition bars only fee-shifting as to "internal corporate claim[s]" as defined by the amendments means

that the legislature understood that Section 102(b)(1) *still* allows fee-shifting as to *other* kinds of claims, like the antitrust claims in *ATP*. And that is entirely inconsistent with the Court of Chancery's engrafting of a broad "internal affairs" or "internal claims" limitation on Section 102(b)(1) that the General Assembly chose *not* to enact.

The decision below erred in other ways as well. Even if Section 102(b)(1) were properly read to include an "internal affairs" limitation of the sort that the court posited, Securities Act claims by stockholders would fit the bill. And the court erred in concluding that the federal-forum provisions somehow violated federal law—indeed, it did not even cite the leading U.S. Supreme Court case holding that parties could agree to *arbitrate* Securities Act claims, thereby forgoing a judicial forum *altogether*.

Finally, the decision below harms Delaware corporations and undermines the historic flexibility of Delaware's corporate law. A recent event study shows, for example, that the decision coincided with a significant drop in market value of firms with federal-forum provisions. And by imposing an artificial "internal affairs" limitation that the General Assembly didn't create, the decision undermines the most important feature of the DGCL: the adaptability that allows private parties the ability "to establish the most appropriate internal organization and structure for the enterprise." *Jones Apparel Grp.* v. *Maxwell Shoe Co*., 883 A.2d 837, 845 (Del. Ch. 2004) (citation omitted).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT FEDERAL FORUM PROVISIONS EXCEED THE AUTHORITY GRANTED BY SECTION 102(b)(1) OF THE DGCL.

Section 102(b)(1). The Court of Chancery described its decision as merely following from "first principles," using that term six times in the course of its opinion. Op. 3, 38, 46, 49. Those first principles, in the court's view, involved "more fundamental starting points" than the text of the Delaware General Corporation Law, such as "the concept of the corporation and the nature of its constitutive documents." Op. 38.

But the ultimate first principle is the statute, starting with its text, which the Court of Chancery chose to elide. The DGCL is what creates every Delaware corporation, and determines what the corporation can and cannot do. As the Vice Chancellor himself rightly noted, it is that statute, not anything else, that "defines what powers the corporation can exercise." Op. 40.

Like any statute, the DGCL must be construed according to its terms, and "interpreted according to its plain and ordinary meaning." *New Cingular Wireless PCS* v. *Sussex Cty. Bd. of Adjustment*, 65 A.3d 607, 611 (Del. 2013). And the DGCL's terms are typically quite broad, befitting its role as an enabling law. That breadth, intentionally crafted by the General Assembly, in fact confers upon "the Delaware corporation … the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise." *Jones Apparel Grp.* v. *Maxwell Shoe Co*., 883 A.2d 837, 845 (Del. Ch.

2004) (quoting ERNEST L. FOLK, III, AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW 5 (1969)).

Section 102(b)(1) fits that bill precisely. It says that a "certificate of incorporation may … contain … [a]ny provision for the management of the business and for the conduct of the affairs of the corporation," as well as "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders …." Under Section 102(b)(1), "*any*" such provisions are permissible, as long as "such provisions are not contrary to the laws of this State." (Emphasis added.) Because federal-forum charter provisions address the relationship between stockholders and the corporation, and are not prohibited by any other law of this State, they fall well within the grant of authority provided by Section 102(b)(1).

ATP. The conclusion that federal-forum provisions fall well within the scope of Section 102(b)(1) is all but compelled by *ATP Tour, Inc.* v. *Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014). In that case, this Court upheld a non-stock corporation's bylaw that, as a practical matter, did far more than select a forum for litigation between the corporation's members and the corporation: It actually provided for potential liability upon plaintiffs in such litigation. The bylaw provided that a member who sued the corporation or other members—but lost—had to reimburse the corporation or other members for "all fees, costs and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)." *Id*. at 556.

Two members of the non-stock corporation sued the corporation and some of its directors in federal district court, where they asserted both federal antitrust claims and Delaware fiduciary-duty claims. *Id*. After a trial, the district court granted judgment as a matter of law in favor of the directors on the federal antitrust claims, and in favor of all defendants on the fiduciary-duty claims. *Id*. A jury then rendered a verdict for the company on the federal antitrust claim. *Id*.

The member-plaintiffs thus "did not prevail on any claim." *Id*. The corporation then moved to recover fees under its bylaw; but the district court denied the motion, concluding that federal antitrust law preempted the bylaw. *Id.* The Third Circuit vacated the district court's order, holding that the court should have first determined whether the bylaw was enforceable under Delaware law before reaching the federal question. *Id.* On remand, the district court certified to this Court the question, among others, of the bylaw's validity under Delaware law. *Id*. at 557.

This Court found the bylaw to be "facially valid." *Id*. The Court concluded that a Delaware corporation could "lawfully adopt a bylaw that shifts all litigation expenses to a plaintiff in intra-corporate litigation who," in the words of the bylaw, "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." *Id*. "Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws," the Court held. *Id*. at 558. And "no principle of common law prohibits directors from enacting fee-shifting bylaws." *Id*.

To the contrary, explained the Court, "[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 and powers of its stockholders, directors, officers or employees.'" *Id*. (quoting 8 *Del. C.* § 109(b)). By the same token, the Court added that a Delaware corporation could accomplish the same result in its *certificate* under *Section 102(b)(1)*: "The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence." *Id*.

That observation in *ATP*, and the reasoning of that case, make clear that the decision below in this case cannot stand. If the language in Section 102(b)(1) was broad enough to support fee-shifting provisions in a charter that would apply to any claims—including federal antitrust claims in federal court—brought by a stockholder against a corporation, then it should be broad enough to support a forum-selection clause in a charter that requires a stockholder to bring federal securities-law claims against the company in a federal court.

Indeed, securities-fraud claims arising from the sale of stock in a Delaware corporation to a stockholder certainly ought to be considered at least as—if not more—closely related to "the management of the business and ... the affairs of the corporation," or "creating, defining, limiting, and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders" than antitrust claims. 8 *Del. C.* § 102(b)(1). And a provision merely addressing the forum where such claims may be resolved certainly constitutes a less significant

regulation of the relationship between the stockholder and the corporation than one that could require a stockholder to pay the corporation millions of dollars in attorneys' fees.

ATP made clear, in fact, that a bylaw (and thus a charter provision) could regulate *any* litigation between the stockholders and the corporation that relates to the business of the corporation. The Court did suggest that the bylaw might be unenforceable if it were invoked inequitably. *Id*. at 558 (citing *Schnell* v. *Chris-Craft Indus., Inc*., 285 A.2d 437 (Del. 1971)). But the Court made no suggestion that the bylaw suffered from any facial infirmity, or could not be enforced as to the member-plaintiff's federal antitrust claims, or that the enforceability of the bylaw turned on the nature of the stockholder's claim, or upon any definition of "internal affairs." It was enough to fall within the DGCL's broad, enabling grant of authority that the bylaw "allocates risk among parties in intra-corporate litigation," *id.*—meaning it was enough that the litigation, whatever the subject, was between the members and the corporation.

The 2015 amendments to the DGCL, including those responding to *ATP*, do nothing to undermine *ATP*'s reasoning, or to undermine its applicability to this case. Those amendments did not change a word in Section 102(b)(1), and indeed, left *ATP*'s result intact as to non-stock corporations. Instead, by adding Section 102(f), the General Assembly merely precluded the result in *ATP* from being applied to stock corporations in connection with certain claims defined to be internal: The added provision narrowly states that a "certificate of incorporation may not contain

any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim …." 8 *Del. C.* 102(f). Thus, while Section 102(f) "limit[ed] *ATP* to its facts" by rendering it inapplicable to stock corporations, *Solak* v. *Sarowitz*, 153 A.3d 729, 734 (Del. Ch. 2016),[1] it did so by leaving Section 102(b)(1)'s full breadth in place for non-stock corporations—but also by leaving it in place for stock corporations in all respects *except* fee-shifting in connection with an internal corporate claim.

Boilermakers. In concluding that the charter provisions exceeded the authority granted by Section 102(b)(1), the Court of Chancery principally relied on then-Chancellor Strine's decision in *Boilermakers Local 154 Retirement Fund* v. *Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), which upheld a forum-selection provision in corporate bylaws, and, by extension in certificates of incorporation. But the court read too much into *Boilermakers* by taking that decision's references to "internal corporate governance" and "internal affairs claims," Op. 21, 22 (quoting 73 A.3d at 942, 950–51), and turning those references into a holding that certificates and bylaws could *only* contain provisions setting the forum for "internal affairs claims" within the meaning of the internal-affairs doctrine, *see* Op. 21–23, 43–46.

There is no basis for this transformation. The fact that the bylaw in *Boilermakers* "only regulate[d] suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine" was *not* the test that the court

[1] Quoting Corporation Law Council, *Explanation of Council Legislative Proposal* 12 (2015), *available at* http://bit.ly/2mCukWv.

applied; it was a *factual observation* about the by-law that made the test easy to apply. 73 A.3d at 939. The test was set forth in the statute's text: It was whether the bylaws "relate to the 'business of the corporation[],' the 'conduct of [their] affairs,' and regulate the 'rights or powers of [their] stockholders.'" *Id.* (quoting 8 *Del. C.* § 109(b)); *see also* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and* Sciabacucchi 27 (Rock Center for Corporate Governance, Working Paper 2019) (A435–38), *available at* https://www.ssrn.com/abstract=3448651. And as the logic of *ATP* demonstrates, federal-forum by-law provisions clearly do that, just as federal-forum charter provisions clearly relate to "management of the business," "the conduct of the affairs of the corporation," or "regulating the powers of … the stockholders," 8 *Del. C.* § 102(b)(1).

The 2015 Amendments. The 2015 amendments to the DGCL *confirm* that the Court of Chancery erred in engrafting onto Section 102(b)(1) an "internal affairs" limitation found nowhere in that section's text. Those amendments show that if the General Assembly had intended to place such a limitation on Section 102(b)(1), it knew exactly how to do so: The amendments used the phrase "internal corporate claim" in adding Section 102(f) and amending Section 109(b), and defined that phrase in Section 115.

But the General Assembly did not then, nor has it ever, used that phrase, or any phrase like it, to limit Section 102(b)(1)'s entire reach. To the contrary, Section 102(f), added in 2015, prohibits fee-shifting, but *only* as against stockholders "*in*

connection with an internal corporate claim, as defined in § 115 of this title." 8 *Del. C.* § 102(f) (emphasis added). Had the General Assembly meant to ban all fee-shifting for stock corporations, that italicized language would have been unnecessary, and superfluous. Had that been what the legislators intended, new Section 102(f) could have simply said: "The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party"—period, full stop, right there. Instead, they tacked on a limiting clause—"in connection with an internal corporate claim, as defined in § 115 of this title."

This Court has long adhered to "the canon of statutory construction that every word chosen by the legislature (and often bargained for by interested constituent groups) must have meaning." *Dorshow, Pasquale, Krawitz & Bhaya* v. *Nanticoke Mem'l Hosp., Inc*., 36 A.3d 336, 344 (Del. 2012). Applying that canon here requires that Section 102(b)(1) be construed as banning only some, but not all, fee-shifting charter provisions. For the "in connection with an internal corporate claim" clause to be given effect, the General Assembly must be understood to have intended to bar stock corporation charters from containing fee-shifting provisions for "internal corporate claims, as defined in § 115"—while at the same time *preserving* fee-shifting provisions for claims *other than claims statutorily defined to be "internal corporate claims*."

The General Assembly's inclusion of those words—limiting Section 102(f)'s fee-shifting prohibition to "internal corporate claims"—means that the General

Assembly understood, just as *ATP* made clear, that Section 102(b)(1) can *still* address claims other than "internal corporate claims" as now defined in Section 115—like the antitrust claims that were at issue in *ATP*. That is plainly inconsistent with the Court of Chancery's reasoning here. In short, the 2015 amendments not only fail to support the decision below—they *refute* it.

Securities Act claims are "internal" anyway. Even if the Court of Chancery's overreading of *Boilermakers* were the law, however, and an "internal affairs" limitation were engrafted into Section 102(b)(1), the result below would still be wrong. The claims should be considered "internal," even under that doctrine.

The court below viewed federal Securities Act claims as "external" because it assumed that "[a]t the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law." Op. 37. But in fact, because large orders to purchase securities are filled by splitting them into smaller ones, this blanket assumption is false to a very large degree: "Securities Act purchasers are frequently existing holders protected by fiduciary obligations." Grundfest, at 44. And "[e]ven if Securities Act purchasers are not stockholders, the proposition that purchasers cannot be regulated by charter or bylaw is contrary to the plain text of the DGCL. Sections 152, 157, 166, and 202 of the DGCL all regulate transactions with purchasers prior to their becoming stockholders." *Id.* at 44–45 & nn.271–74.

In any event, Securities Act claims should be considered "internal" because they are, as appellants correctly note, "in many ways the federal analogues of

Delaware fiduciary duty disclosure claims." Appellants' Br. 27. In failing to recognize this, the court below disregarded how the "historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary.'" Grundfest, at 52–53 (quoting *Malone* v. *Brincat*, 722 A.2d 5, 13 (Del. 1998)). Delaware law is clear that directors can "breach[] their more general fiduciary duty of loyalty and good faith by knowingly disseminating to the stockholders false information about … the company." *Id.* at 53 (quoting *Malone*, 722 A.2d at 10). As a result, a claim for false statements in a registration statement can "remain[] internal as it gives rise to both a cause of action alleging a breach of duty actionable under the DGCL and a federal Section 11 claim," and so "a single fact pattern can generate a DGCL claim and a Section 11 claim." *Id.* at 57–58.

At the same time, the decision below entirely ignored that the very essence of a Section 11 claim implicates the conduct of the corporation's directors and officers—the sweet spot of Delaware corporate law. Due diligence is a defense to a Section 11 claim, and establishing that defense requires directors and officers to show "reasonable investigation"—which is defined to be the standard of care "required of a prudent [person] in the management of his [or her] own property." 15 U.S.C. § 77k(c). That is as "internal" as it gets. *See* Grundfest, at 57–61.

The forum provisions comply with federal law. The Court of Chancery also justified its decision by suggesting that the federal-forum charter provisions may violate the Securities Act's venue provisions—that they are "[c]ontrary to the federal regime," and may "conflict with the forum alternatives that the 1933 Act permits,"

Op. 1, 50—and that the provisions would impermissibly extend Delaware law extraterritorially. These suggestions are mistaken.

First, the Supreme Court of the United States has made clear that it is entirely permissible for parties to contractually forego venue options made available under the securities laws. In particular, they may choose in advance to arbitrate securities-laws claims, including claims under the Securities Act of 1933. That was the holding in *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), a Section 11 case in which the Court enforced an arbitration provision in a brokerage firm's standard customer agreement. In enforcing the arbitration provision, the Court described pre-dispute "arbitration agreements" as "in effect, a specialized kind of forum selection clause" that "should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction [of federal and state courts], serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Id.* at 482–83. The Court relied as well on the fact "other federal statutes" had likewise "not been interpreted to prohibit enforcement of predispute agreements to arbitrate"—specifically, the Securities Exchange Act of 1934, RICO, and the antitrust laws. *Id.* at 482. (The opinion below does not cite *Rodriguez*.)

Second, as for the court's concern about extraterritoriality, the logic behind that concern is "deeply flawed. It reasons that, but for the imposition of a 'first principles' analysis that generates a novel internal affairs constraint, the DGCL can be broadly applied to regulate the extraterritorial conduct of Delaware-chartered

corporations." Grundfest, at 47–48. But that "concern ignores a substantial body" of federal and Delaware law "that already precludes extraterritorial application of the DGCL," *id.*—law that includes the federal dormant Commerce Clause doctrine, *see*, *e.g.*, *Edgar* v. *MITE Corp.*, 457 U.S. 624, 641–43 (1982) (White, J.; plurality opinion), and the state-law presumption against extraterritoriality, *see Singer* v. *Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger* v. *UOP, Inc.,* 457 A.2d 701 (Del. 1983).

Beyond that, none of that law of extraterritoriality prevents private *contracting* parties from stipulating that their agreements shall be governed by a particular state's law, or that disputes arising from their agreements shall be resolved by a tribunal in another state—even if the parties aren't present there. It would be one thing for Delaware to apply "labor, environmental, health and welfare … laws" to people or entities, say, in California, Op. 4, but quite another for parties there to contract that Delaware law shall apply to their contract, and that disputes between them should be litigated in a particular court. The latter is, in effect, all that the federal-forum charter provisions do here.

II. THE COURT OF CHANCERY'S DECISION IS DETRIMENTAL TO DELAWARE CORPORATIONS AND DELAWARE CORPORATE LAW.

The result reached below in this case is not only unwarranted under the DGCL, but its reasoning harms Delaware corporations and Delaware's flexible regime of corporate law. This Court is well aware of the cost of stockholder litigation to corporations and stockholders generally, a cost that includes not only state fiduciary-duty litigation, but federal securities litigation as well. The cost of litigating federal securities claims was a prime driver behind passage of the federal Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998, as reflected in the extensive legislative history of those statutes. *See*, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320–21 (2007); *Merrill Lynch, Pierce, Fenner & Smith Inc* v. *Dabit*, 547 U.S. 71, 81–82 (2006). The PSLRA in 1995 established tough pleading standards for securities claims, and SLUSA in 1998 attempted to keep class plaintiffs from using state securities laws to get around the PSLRA.

Nonetheless, although SLUSA has kept plaintiffs from invoking state law in securities class actions, it hasn't kept them from trying to avoid federal court, where the pleading standards are tougher, stays of discovery pending motions to dismiss are automatic, and important procedural restrictions on the designation of lead plaintiffs and lead counsel exist. *See* Grundfest, at 17. State courthouse doors remain open to securities plaintiffs, because the Securities Act still provides for concurrent state jurisdiction, and because the Supreme Court in *Cyan, Inc.* v. *Beaver County Employees Retirement Board*, 138 S. Ct. 1061, 1069–73 (2018), held that SLUSA

didn't change that. By the time *Cyan* was decided, "state courts came to dominate Section 11 litigation." Grundfest, at 15. Needless to say, since *Cyan*, the trend has continued unabated.

The result is that many "complaints … survive in state court … that would have been dismissed in federal court," which "contribute[s] to a proliferation of weak-merits Section 11 litigation." Grundfest, at 18. Specifically, "48 percent of federal court Section 11 claims are dismissed, [as] compared to 33 percent of state court claims." U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, CONTAINING THE CONTAGION: PROPOSALS TO REFORM THE BROKEN SECURITIES CLASS ACTION SYSTEM 12 (2019), *available* at http://bit.ly/2lq379c. In addition, the availability of state courts as a forum "increases the likelihood that a company defendant might have to fight a multi-front war, in the event of parallel state court and federal court lawsuits." *Id.* (citation omitted). Accordingly, "IPO companies now face a measurably more significant risk of getting hit with a securities lawsuit than may have been the case before *Cyan*." *Id.*

Federal-forum provisions like those at issue here are private-ordering efforts to push back: to have Section 11 cases litigated by the judges who are most familiar with the applicable law, in the courts that are best equipped—thanks to the PSLRA's procedural tools—to handle such cases.

But the decision below upended that effort, and the effects were immediately felt. A recent event study found that the Court of Chancery's decision in this case "is associated with a large negative stock price effect for companies that had

[federal-forum provisions] in their charters." Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine* 1 (2019), *available at* https://www.ssrn.com/abstract=3439078. Specifically, it appears that the decision below caused the price of equity securities of issuers with federal-forum charter or bylaw provisions to drop anywhere from between 1.39% to 9.085%, depending on the size of the event window and other considerations. *Id.* at 20–21, tbls. 6–9. If a two-day event window is used, the study found a stock price effect of around 7%—which, if "[t]aken at face value, … suggests that the decision [below] reduced the total market capitalization of a firm with [a federal-forum charter provision] by 7%." *Id.* at 22.

The authors of the event-study paper concede that "there is always a possibility that something else may have happened around the event window that may have affected the stock price of the firms in [their] sample," and that not all of the effect may be attributable to the Court of Chancery's decision. *Id.* But the result "strongly suggests that at the very least, it is safe to overrule the possibility that [the decision below] positively affected the stock price of firms that adopted [federal-forum provisions]." *Id*. And in light of what other event studies have shown about the impact of securities litigation on stock prices, the likely explanation is that the decision below did indeed reduce the value of the sample firms: "[G]iven the very high negative stock price effect of shareholder class action litigation[,] valued by one study at almost 10 percent, and the impact that litigation in state courts as opposed to federal courts has on outcomes of litigation … it may be argued that the negative stock price effect does actually reflect the [magnitude of] negative impact

of [the decision below] on firm value." Grundfest, at 25 (quoting Aggarwal *et al.* at 22). Put another way, it appears that stockholders in Delaware corporations place positive value on federal-forum provisions, value for which they are willing to pay.

Finally, and perhaps most fundamentally, the decision below threatens to undermine a basic tenet of our corporate law. "An important hallmark of the [DGCL] is its flexibility." R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 1.3 (3d ed. 1998 & Supp. 2018). Accordingly, as noted above, the DGCL provides "the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise." *Jones Apparel*, 883 A.2d at 845 (citation omitted). The DGCL "allows for the insertion of a variety of provisions in a certificate of incorporation for special purposes or to satisfy specific needs of a corporate entity." BALOTTI & FINKELSTEIN, § 1.3.

The decision below undermines that flexibility by imposing an artificial limitation on Section 102(b)(1) that is premised upon the insertion of an "internal affairs" limitation—and a cramped one at that—found nowhere in that section's text. As noted above, if the General Assembly desired to place such a limitation on Section 102(b)(1), it knew exactly how to do so: It used the phrase "internal corporate claim" in adding Sections 102(f) and amending Section 109(b), and defined that phrase in Section 115. But it chose not to use that defined term, or anything like it, to broadly limit Section 102(b)(1). *See* pp. 10–12 above. The Court of Chancery's use of its perception of "first principles" to override the original

breadth of what the General Assembly provided for thus effectively "advances a 'proto-*Marbury*' proposition governing all of Delaware's existing and future corporate law" that effectively would "invalidate legislative actions that violate 'first principles' as reflected in [the decision below's] definition of 'internal affairs'"—without *any* constitutional or statutory basis at all. Grundfest, at 4.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Chancery should be reversed.

September 27, 2019

MARGRAVE LAW LLC

By: /s/ Anthony A. Rickey

Anthony A. Rickey (Bar No. 5056)
8 West Laurel St., Suite 2
Georgetown, Delaware 19947
(302) 604–5190

Attorneys for Amicus Curiae *the Chamber of Commerce of the United States of America*

Of Counsel:

Theodore N. Mirvis
George T. Conway III
Ryan A. McLeod
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403–1000

Steven P. Lehotsky
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463–5337

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