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IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re FOX CORPORATION / SNAP INC. SECTION 242 LITIGATION	§ CONSOLIDATED § No. 120, 2023 § No. 121, 2023 § § On appeal from the Court of § Chancery of the State of Delaware, § C.A. No. 2022-1007-JTL, § C.A. No. 2022-1032-JTL

APPELLEES' OMNIBUS ANSWERING BRIEF

Dated: June 30, 2023

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NATURE OF PROCEEDINGS

This case poses the important question whether Delaware corporations can rely on generations of precedent interpreting the Delaware General Corporation Law ("DGCL") or whether long-standing interpretations of statutory law can be unsettled, not by the General Assembly, but by the Judiciary. Under an unbroken line of precedent—dating back to this Court's 1942 opinion in *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942) ("*Dickey Clay*"), and applied by Chancellor Allen in *Orban v. Field*, 1993 WL 547187 (Del. Ch. Dec. 30, 1993)—a separate class vote under Section 242(b)(2) of the DGCL is required only where the charter amendment would impair a ***peculiar*** attribute of that class of stock; that is, one that defines the specific characteristics of a class of stock, as opposed to general rights held by all stockholders. *Dickey Clay* and *Orban* properly applied the text of the DGCL and are supported by the legislative history, practitioners' understanding, and the reliance interests of Delaware corporations. *Stare decisis* demands adherence to those precedents.

Fox Corporation ("Fox") and Snap Inc. ("Snap," and together with Fox, the "Companies") adopted exculpatory charter amendments, authorized by the recent amendments of Section 102(b)(7) (the "Charter Amendments"), in reliance on the settled test for when Section 242(b)(2) applies. Because the Charter Amendments did not change any peculiar characteristic of the Companies' Class A common stock,

no class votes were held, and the amendments were adopted by the votes of the Companies' stockholders entitled to decide the question.

On the precise claims made by Plaintiffs-below/Appellants ("Plaintiffs"), settled Delaware law required judgment for the Companies as a matter of law. In the trial court's words, "[t]he decisions in *Dickey Clay* and *Orban* have paved the way, and there's an established understanding as to how Section 242(b)(2) works."[1] The trial court concluded, albeit reluctantly, that applying that "established understanding" of the statute to this case defeated Plaintiffs' claims because the Class A stockholders of Fox and Snap have no peculiar right to sue.

This appeal would be straightforward if the trial court had stopped there. And the appeal ought still be, because this Court need only follow that same precedent to affirm. But the appeal has taken on a more unusual form because the trial court did not confine its ruling to the facts and arguments before it. The Companies addressed the arguments made by Plaintiffs but were then told by the trial court, on the Friday evening before a Monday morning oral argument, to "de-emphasize" the most direct answers to Plaintiffs' arguments and instead focus on court-posed hypotheticals premised on new arguments that Plaintiffs did not make. The Companies responded on an expedited basis to each hypothetical, demonstrating that their interpretation of

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[1] Appellants' Opening Brief ("OB") Ex. A [hereinafter Tr.] 68:15-17.

Section 242(b)(2) is clear, logical, and applied consistently across the imagined scenarios.

On appeal, Plaintiffs eschew their arguments below and instead embrace alternative arguments advanced by the trial court in its pre-hearing letter and *dicta* in its bench ruling outlining why it would depart from established precedent if it were free to do so. Under long-standing principles of Delaware jurisprudence, however, claims are framed by the plaintiffs, not the trial court. This Court has instructed trial judges to refrain from issuing advisory rulings on hypothetical circumstances that are not before the court and may never come to pass. Judicial restraint is essential in corporate law, where Delaware's case-by-case approach to building the law by addressing only concrete, real-world disputes is a bedrock of our law's reliability and preeminence. Thus, this case tests not only the reliability of long-standing interpretations of the DGCL, but also the expectation that defendants in civil cases should only have to address the claims and arguments presented by plaintiffs in their pleadings, and not respond to alternative theories and speculative hypotheticals injected into the case by the trial court and adopted on appeal.

Regardless, neither Plaintiffs' own arguments, nor the trial court's *dicta*, provides any basis for this Court to abandon *stare decisis* in favor of a novel and misguided interpretation of the statute. The argument Plaintiffs made below was that the statutory term "powers," unlike the terms "preferences" and "special rights"

that surround it, should be read broadly to include any "ability to act or not" (including the ability to sue) even if possessed by all stockholders, because a 1969 amendment to the DGCL had undermined the traditional application of Section 242(b)(2) but the General Assembly, Delaware courts, and practitioners had all failed to appreciate that development for more than a half century. The Companies demonstrated that this argument was unfounded and that the traditional test, as stated in *Dickey Clay* and reiterated in *Orban*, governs. Even a trial court resistant to the application of settled law in this case held that the Companies' argument was correct and that it was bound to apply the settled interpretation. That alone mandates affirmance.

Plaintiffs fare no better with their arguments, parroting the trial court's *dicta*, that the Companies' interpretation is "incoherent" because it purportedly cannot be applied consistently across the trial court's various hypotheticals. That argument is belied by the record and grounded in Plaintiffs' fundamental mischaracterization of the Companies' position in this case, which is based on established precedents and consistent with the narrow statutory purpose of Section 242(b)(2) to protect class-based interests. The Companies never cabined their interpretation to a so-called "express rights theory," as wrongly suggested by the trial court, or any other construct proffered in the trial court's *dicta*. Rather, the Companies argued that the triad of "powers, preferences, or special rights" in Section 242(b)(2) refers to the

"peculiar" class-based interests of shares of a class designated under Section 151 and which "serve[] to distinguish them from shares of another class."[2] Those specific rights are "peculiar" and "serve to distinguish" a class, regardless of whether they are shared by other classes of the corporation, are deemed "superior" to some arbitrarily defined "baseline," or are "expressed," as opposed to incorporated via a gap-filler provision of the DGCL, in a charter. This straightforward reading of the statute is backed by longstanding precedent, flows from the language and logic of the DGCL, and has been relied upon by corporations for generations.

In posing extreme hypotheticals that bear no similarities to the Charter Amendments (which are not challenged on equitable grounds), the trial court ignored that it is not the class voting provision in Section 242(b)(2) alone that polices amendments to corporate charters and protects stockholders from abuse. The potent tool of equitable fiduciary duty review, in addition to the other provisions of the DGCL that specifically constrain what corporations can or cannot do in their governing documents (e.g., Sections 102(b)(1), 115, and 202, among others), also operate as checks against overreaching. The established statutory interpretation under *Dickey Clay* and *Orban* thus sensibly balances efficiency and fairness, and deserves deference unless and until upset by the General Assembly.

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[2] *Orban*, 1993 WL 547187, at *8 (quoting *Dickey Clay*, 24 A.2d at 318).

Accordingly, the Companies respectfully request affirmance.[3]

[3] *See Monk v. Imaging Automation*, 805 A.2d 902 (Del. 2002) (ORDER) (*Monk II*) (summarily affirming Court of Chancery's application of Section 242(b)(2) as "clearly controlled by" *Dickey Clay* and *Orban*), *aff'g In re Imaging Automation Inc.*, C.A. No. 19290 (Del. Ch. Mar. 21, 2002) (TRANSCRIPT) (*Monk I*) (available at A0687-A0733).

SUMMARY OF ARGUMENT

1. **Denied.** The trial court correctly held that Section 242(b)(2) did not require separate class votes to adopt the Charter Amendments. Delaware precedent interpreting Section 242(b)(2) compels the conclusion that the collective triad of "powers, preferences, or special rights" in Section 242(b)(2) refers to class-based interests of shares imbued under Section 151, not general rights shared by all stockholders, such as the ability to sue. This reading fits the text and framework of the DGCL, the narrow purpose of Section 242(b)(2), and generations of settled meaning and practice.

2. **Denied.** The trial court correctly held that *Dickey Clay* and *Orban* control. Plaintiffs' position that the test formulated by those opinions to determine whether a class vote is required by the statute is *dicta* is not credible because the statutory construction and resulting test they employed to decide the disputes was essential to the outcomes. Even the trial court, which desired a different result, rightly recognized these decisions were controlling.

3. **Denied.** The trial court did not rely on practitioners' understanding of Section 242(b)(2), as Plaintiffs argue, to override the statute's plain text. The trial court entered judgment for the Companies based on the interpretation of Section 242(b)(2) compelled by *Dickey Clay* and *Orban*. The trial court's consideration of generations of reliance by corporations and their legal advisors on

the settled construction of Section 242(b)(2) was proper and consonant with principles of *stare decisis*.

STATEMENT OF FACTS

The facts are drawn from the pleadings and the exhibits to the parties' summary judgment motions.

A. The Companies

Defendant-below/Appellee Snap has three classes of common stock: Class A, Class B, and Class C.[4] Only Snap's Class A shares are publicly traded and have no voting rights except as required by law.[5] Snap's Class B shares are entitled to one vote per share, and Snap's Class C shares are entitled to ten votes per share.[6]

Defendant-below/Appellee Fox has two classes of common stock, Class A and Class B Common Stock, both of which are publicly traded.[7] Fox's Class A shares do not have voting rights except as required by law or under limited circumstances in Fox's charter, none of which applies here.[8] Fox's Class B shares are entitled to one vote per share on all matters on which stockholders have the right to vote.[9]

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[4] B0019-B0020 ¶ 21.

[5] *Id.*

[6] *Id.*

[7] B0005 ¶ 16.

[8] *Id*.

[9] *Id.*

B. The Charter Amendments

In 2022, Section 102(b)(7) was amended to permit corporations to adopt charter provisions providing limited exculpation of certain officers. On August 24, 2022, Snap's Class C stockholders acted by written consent to approve an amendment to Snap's charter adopting an officer exculpation provision.[10] Likewise, at Fox's 2022 annual meeting, Fox's publicly-held Class B stockholders approved the adoption of an officer exculpation charter provision.[11]

C. Procedural History

1. The Complaints and Cross-Motions for Summary Judgment

In November 2022, Plaintiffs filed class action complaints (together, the "Complaints"), each asserting a single claim against Fox and Snap, respectively, that the Charter Amendments are invalid under Section 242(b)(2) for lack of a class vote of the Companies' Class A shares.[12] The actions were coordinated, and the parties filed cross-motions for summary judgment.[13]

In the trial court, Plaintiffs pressed a simple theory of why a class vote was required under Section 242(b)(2): they argued that following a 1969 amendment to the statute, "special" only modifies "rights" in Section 242(b)(2), meaning there is

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[10] A0265-A0266.

[11] A0474.

[12] B0011-B0012 ¶¶ 41-46; B0026-B0027 ¶¶ 43-48.

[13] A0010.

no peculiarity requirement as to "powers."[14] According to Plaintiffs, because the ability to sue is exclusively a "power" and not a "right" and because there is no peculiarity requirement for "powers,"[15] the Charter Amendments required a class vote even if the "power" was a general right held by all stockholders. Plaintiffs claimed they were the "first to correctly interpret the statute" in this broad manner.[16]

The Companies responded directly to Plaintiffs' argument below by showing that the plain language of Section 242(b)(2) was properly interpreted in *Dickey Clay*.[17] The Companies also showed the 1969 amendment was ministerial and intended to merely "clarify" the statute, as confirmed twenty-five years later in *Orban*, where Chancellor Allen interpreted Section 242(b)(2) in lockstep with *Dickey Clay* and reiterated that a class vote is only required if an amendment would impair a peculiar attribute—a "power, preference, or special right"—of a class of shares.[18] These arguments were summarized in the Companies' reply brief:

> The bottom line is that *Dickey Clay* and *Orban* read the statute properly by treating the key terms—"powers, preferences, or special rights"—as a collective and as requiring a peculiar impact to a class to trigger a vote. Those well-reasoned and careful decisions got the statutory language and its purpose right: class voting is a protection for class-specific rights. By contrast, under

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[14] *See* B0048-B0049.

[15] *See* B0037; B0072.

[16] B0073.

[17] A0577-A0610; B0114-B0137.

[18] A0608-A0610; B0116-B0119.

> Plaintiffs' newly-discovered interpretation of Section 242(b)(2), every amendment that arguably "adversely affects" the range of "powers"—even in some limited manner—available to stockholders would require a separate class vote even if that "power," indistinguishable from a "right," is not peculiar to that class within the meaning of *Dickey Clay* and *Orban*.[19]

2. Oral Argument

Oral argument was set for Monday, March 20, 2023, at 9:15 am. After the close of business on Friday, March 17, 2023,[20] the trial court issued an eight-page, single-spaced letter to counsel listing several areas for "counsel to either emphasize or de-emphasize for the hearing."[21] Nearly all topics to "de-emphasize" were the Companies' direct responses to Plaintiffs' arguments, including Plaintiffs' core argument that suing was a power and not a right.[22] The trial court also posed eight hypotheticals involving votes ***not*** at issue in this case.[23] The hypotheticals were "designed to eliminate one or two of the defendants' [] arguments."[24]

At oral argument, the Companies submitted a demonstrative responding to each of the hypotheticals.[25] Counsel for the Companies was explicit that, although

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[19] B0136-B0137 (citations omitted).

[20] A0003.

[21] B0141.

[22] B0141-B0142.

[23] B0144-B0147.

[24] B0144.

[25] B0149-B0163.

the Companies sought to be responsive to the court, they were not waiving any arguments and disagreed with the court's reframing of their arguments.[26] Even so, the Companies demonstrated that their interpretation of Section 242(b)(2) was clear, fit logically within the broader construct of the DGCL, and applied consistently across the court's hypotheticals. Plaintiffs did not respond to the hypotheticals.

3. The Trial Court's Ruling

On March 29, 2023, the trial court issued its ruling, entering summary judgment in the Companies' favor based on straightforward adherence to precedent:

> I view this case as controlled by two precedents. The first is *Hartford Accident & Indemnity Co. v. W.S. Dickey Clay Manufacturing Co.*, 24 A.2d 315 (Del. 1942), which is generally known in the corporate world as *Dickey Clay*. The second is *Orban v. Field*, 1993 WL 547187 (Del. Ch. April 1, 1997). Fealty to those precedents dictates the outcome.[27]

The trial court found *Dickey Clay* and *Orban*, as well as the Companies' "textual argument" grounded in the DGCL,[28] supported the Companies' reading of

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[26] *See* B0219-B0220 (56:23-57:3) ("[W]e don't want there to be any suggestion that we are waiving any of the arguments that are in our briefing . . . ."); B0273 (110:3-5) ("Again, Your Honor, I think that's a characterization of our argument. That's actually not what we're saying."); B0295-B0296 (132:24-133:4) ("That's why we don't necessarily adopt the [trial court's] structure . . . . What we're saying is you look to the particular legal characteristics of the class, whether or not those are changed."); B0298 (135:15-18) (noting the court's "express rights" argument missed the "nuance" in the Companies' argument); *see also* B0234 (71:5-12) (similar); B0291 (128:4-18) (similar).

[27] Tr. 4:10-18.

[28] *Id.* 61:24-62:4.

Section 242(b)(2) (as reframed by the trial court), under which Section 242(b)(2) "encompass[es not only] any power or preference or special right that is stated expressly in the charter, but also, any power, preference, or special right that is stated expressly in the DGCL."[29] Accordingly, the court concluded, "the officer exculpation amendment does not require a class vote of the company's non-voting stock because the officer exculpation amendment does not affect a power, preference, or special right that appears expressly in the charter."[30] The court's holding was buttressed by the fact that "Delaware practitioners have long viewed *Dickey Clay* as supporting" the Companies' reading of Section 242(b)(2).[31]

The remainder of the lengthy ruling expounds on how the trial court may have interpreted the statute if it were "writing on a blank slate."[32] Because, as the trial court acknowledged, "[t]he decisions in *Dickey Clay* and *Orban* have paved the way, and there's an established understanding as to how Section 242(b)(2) works,"[33] the trial court's extensive *dicta* is irrelevant.

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[29] *Id.* 62:14-17.

[30] *Id.* 69:9-14.

[31] *Id.* 66:20-23; *see id.* 67:1-3 ("The company has pointed to the absence of any commentary saying anything different over the past decades.").

[32] *Id.* 4:20-24.

[33] *Id.* 68:14-17.

Plaintiffs appealed. Rather than maintain their arguments below, Plaintiffs base their appeal on the new arguments the trial court advanced in *dicta*. These arguments were not raised below and are not properly before the Court.[34] Regardless, Plaintiffs' arguments, new and old, all fail because they are premised on a flawed reading of the case law and DGCL.

[34] *See* Supr. Ct. R. 8 ("Only questions *fairly presented to* the trial court"—not *by* the trial court—"may be presented for review[.]") (emphasis added); *see also Stroud v. Milliken Enterps., Inc.*, 552 A.2d 476, 481 (Del. 1989) (admonishing parties for "inappropriately draw[ing] the trial court into the granting of an advisory opinion upon a significant question of corporation law which, in our view, was clearly not ripe for judicial intervention"); *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987) ("The central concern is to avoid hypothetical questions . . . [because] to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment.").

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED SECTION 242(B)(2) DID NOT REQUIRE A CLASS VOTE TO ADOPT THE OFFICER EXCULPATION CHARTER AMENDMENTS.

A. Question Presented

Did the trial court correctly hold that the Companies were not required to obtain separate class votes to adopt the Charter Amendments?[35]

B. Scope of Review

The judgment below is subject to *de novo* review.

C. Merits of Argument

The Companies' position is grounded in precedent: the triad of "powers, preferences, or special rights" in Section 242(b)(2) refers to the "peculiar" class-based interests of shares of a class designated under Section 151 that "serve[] to distinguish them from shares of another class."[36] That "established understanding" of the statutory text[37] is compelled by *Dickey Clay* and *Orban*. Those decisions properly interpreted the text of Section 242(b)(2) consistent with the language and logic of the DGCL and the provision's purpose.

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[35] This argument was preserved below. A0574.

[36] *Dickey Clay*, 24 A.2d at 318; *see Orban*, 1993 WL 547187, at *8.

[37] Tr. 68:14-17.

1. This Action Is Controlled by Precedent.

"[F]ealty" to longstanding Delaware precedent "dictates the outcome" of this case in favor of the Companies.[38] This Court has long recognized the importance of *stare decisis* to preserve continuity in the law:

> Once a point of law has been settled by decision of this Court, it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside and it should be followed except for urgent reasons and upon clear manifestation of error. The need for stability and continuity in the law and respect for court precedent are the principles upon which the doctrine of stare decisis is founded.[39]

"Considerations of *stare decisis* have special force in the area of statutory interpretation, [because] . . . the legislative power is implicated . . . ."[40] Continuity in statutory interpretation is essential for the public and the General Assembly:

> In the area of statutory interpretation, *stare decisis* plays a critical role in ensuring that citizens can rely upon the law in ordering their affairs, and that the legislature can legislate based on the assumption that the statutory law means what it has been determined to mean in binding adjudications.[41]

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[38] *Id.* 4:17-18.

[39] *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) (alterations and citation omitted).

[40] *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

[41] *Harvey v. City of Newark*, 2010 WL 4240625, at *7, 12 (Del. Ch. Oct. 20, 2010); *accord State v. Barnes*, 116 A.3d 883, 890-91 (Del. 2015); *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2014 WL 5667334, at *8 (Del. Ch. Nov. 5, 2014).

For those reasons, Delaware courts "take seriously the longstanding interpretation of a statute . . . especially when it has been relied upon by the key actors in our . . . justice system."[42] "When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation."[43]

(a) Delaware's Precedent Interpreting Section 242(b)(2)

Eighty years of precedent supplies the "longstanding interpretation" of Section 242(b)(2) this Court should follow.[44] Case law beginning with *Dickey Clay* has consistently interpreted Section 242(b)(2) (and its predecessor) as requiring a class vote only if an amendment adversely affects a peculiar legal characteristic of the shares of a class as opposed to rights shared generally by all stockholders.

In *Dickey Clay*, the defendant-corporation proposed a charter amendment to increase the number of shares authorized for its Class A stock.[45] The amendment was approved by a class vote of the Class A shares and a majority vote of the two other classes (preferred and common), voting together.[46] A common stockholder argued a separate class vote of the common was required by Section 242(b)(2)'s

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[42] *Barnes*, 116 A.3d at 890-91.

[43] *Id.*

[44] *Id.*

[45] 24 A.2d at 317.

[46] *Id.*

predecessor, Section 26, because increasing the number of Class A shares adversely affected the class rights of the common stock by diluting the shares' relative voting power, share of dividends, and assets upon dissolution.[47]

To determine whether a class vote was required, the Delaware Supreme Court interpreted the scope of the class rights protected by Section 26, including its triad of "preferences, special rights or powers."[48] To do so, the Court looked to identical language in Section 13, the predecessor of Section 151(a), governing the issuance of classes of shares with specific class-based rights.[49] The Court explained that a class vote is required only where the "peculiar, or special, quality with which [a class of shares] are endowed" is adversely affected:

> The statute, in listing the amendable rights, or rights and powers, attached to stock, first speaks of preferences. It then speaks of rights, and employs specific descriptive words, followed by the general and embracive words, 'other special.' Whatever may be said with respect to the necessity for the use of the word 'special', as applied to a right attached to stock, in view of the prior descriptive words, it is clear enough that the word was used in the sense of shares having some unusual or superior quality not possessed by another class of shares. . . . [T]he relative position of one class of shares in the scheme of capitalization is not to be confused with rights incident to that class as compared with other classes of shares. . . . ***The peculiar, or special, quality with which they are***

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[47] *Id.* at 317-18.

[48] *Id.* at 318-19.

[49] *Id.* at 319.

> ***endowed, and which serves to distinguish them from shares of another class***, remains the same.[50]

The Court applied this interpretation and concluded that, although the charter amendment would "obviously" affect the relative position of the common adversely, the common was not entitled to a separate class vote because the amendment did not adversely affect the "rights incident ***to that class*** as compared with other classes of shares."[51] *Dickey Clay*'s interpretation of statutory class voting rights is good law and was relied upon by the drafters of the DGCL in the 1960s; "indeed Section 242(b)(2) codifies the result."[52]

Fifty years later in *Orban*, Chancellor Allen embraced *Dickey Clay* and confirmed, "The language of [Section 242(b)(2)] makes clear that it affords a right to a class vote when the proposed amendment *adversely affects the peculiar legal characteristics of that class of stock.*"[53] In *Orban*, common stockholders argued a class vote of the common was required to approve a recapitalization and merger involving the issuance of a new class of preferred diluting the relative voting power of the common.[54] Chancellor Allen rejected the claim, explaining the plain text of

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[50] *Id.* at 318-19 (emphasis added).

[51] *Id.* at 318-21 (emphasis added).

[52] 2 Robert S. Saunders, et al., *Folk on the Delaware General Corporation Law* § 242.03 (7th ed. 2023-2 Supp.).

[53] 1993 WL 547187, at *8 (emphasis in original).

[54] *Id.* at *1, *3, *7-8.

Section 242(b)(2) "and existing authorities [were] fully sufficient to compel the conclusion" that the alleged dilution was not a harm to the "peculiar legal characteristics" of the class.[55]

Following *Dickey Clay*'s interpretation of Section 242(b)(2), the court treated the triad of "powers, preferences, or special rights" collectively and made clear that an amendment must adversely affect the "peculiar or special quality with which [a class of shares] are endowed" to trigger a class vote:[56]

> The language of the statute makes clear that it affords a right to a class vote when the proposed amendment ***adversely affects the peculiar legal characteristics of that class of stock.*** The right to vote is not a peculiar or special characteristic of common stock in the capital structure of Office Mart. All classes of stock share that characteristic . . . . That this is correct is demonstrated by the important case of [*Dickey Clay*]. There the Delaware Supreme Court held that an amendment increasing the number of authorized preferred shares was not subject to a class vote by common stock. ***In so concluding the Court held that the stock rights that trigger a statutory right to a class vote are rights ("powers, preferences or special rights") not shared with other classes*** . . . .[57]

Applying this interpretation, Chancellor Allen concluded the challenged amendment did not trigger a class vote because the common's right to vote "is not a peculiar or special characteristic of common stock."[58]

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[55] *Id.* at *8.

[56] *Id.* (quoting *Dickey Clay*, 24 A.2d at 319).

[57] *Id.* (emphasis added) (quoting *Dickey Clay*, 24 A.2d at 318).

[58] *Id.*

The vitality of *Dickey Clay* and *Orban*'s construction of Section 242(b)(2), including the "peculiarity" requirement, was confirmed a decade later in *Monk v. Imaging Automation*. In *Monk I*, the Court of Chancery ruled that a dilutive charter amendment did not trigger class voting rights because "*Orban* teaches that under Section 242, voting powers or vote percentages are not *peculiar legal characteristics* of the class."[59] This Court summarily affirmed, noting the issue was "clearly controlled by this Court's decision in [*Dickey Clay*]. *See also* [*Orban*]."[60]

(b) *Dickey Clay* and *Orban* Control

Inspired by the trial court's *dicta*, Plaintiffs invite this Court to repudiate *Dickey Clay* and *Orban*'s interpretation of Section 242(b)(2) either as *obiter dicta* or because the cases "do not lead to a coherent rule of law."[61] The Court should decline the invitation.

The statutory intepretation set forth in *Dickey Clay* and *Orban* is not *dicta*. Those cases reflect thoughtful (and necessary) analysis from titans of the Delaware bench. Both cases concerned whether a proposed charter amendment adversely affected the "powers, preferences, or special rights" of a class of shares under Section 242(b)(2) (or its predecessor). The courts' interpretations of what that

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[59] A0725 (*Monk I*, at 39) (emphasis added).

[60] *Monk II*, 805 A.2d at 902.

[61] OB 32-42.

language means was a necessary step to determining whether the amendments at issue implicated a class-specific "power, preference, or special right" under the statute, and thus were pivotal parts of the holdings. The whole purpose of articulating a test for applying a statute is to provide a consistent, workable framework for how that statute should be applied in future situations. *Dickey Clay* and *Orban* articulated the test that applies under Section 242(b)(2) to determine when a class vote is required. Plaintiffs' argument that the test articulated in *Dickey Clay* and *Orban* is *dicta* rests on the untenable proposition that a court's declaration of the meaning of a statute will differ depending on the unique facts of each case.[62] Of course, that makes no sense. "The interpretation of a statute by the highest court of a state by which the statute was enacted is generally regarded as an integral part of the statute until the legislature amends it contrary to that interpretation."[63] Once our Supreme Court declared the meaning of Section 242(b)(2)'s predecessor statute, that declaration provided the framework by which the statute is to be applied in future situations. That is precisely what the trial court did in rendering judgment for the Companies.

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[62] OB 34-42.

[63] 73 AM. JUR. 2D *Statutes* § 55 (June 2023 Update) (citing *Guaranty Tr. Co. of N.Y. v. Blodgett*, 287 U.S. 509, 512 (1933)); *see also Capriglione v. State*, 279 A.3d 803, 810 (Del. 2021).

Endorsing Plaintiffs' expansive view of *dicta* would empower judges to interpret statutes on a blank slate without regard to how they had been interpreted in the past and the way this Court has said they should be applied, so long as the facts at hand were not directly analogous to those addressed in the prior case. That is not how our legal system works. If it were, this Court could not ensure the predictable and consistent application of statutes by trial courts,[64] and the fundamental tenets of *stare decisis*—predictability and consistency in the application of the law—would be undermined.

Plaintiffs' fallback argument that the cases sponsor "nonviable" and incoherent statutory interpretations also fails. Generations of evidence show *Dickey Clay* and *Orban* provide a viable, coherent interpretation of Section 242(b)(2).[65] By contrast, Plaintiffs identify no real-world confusion with Section 242(b)(2)'s settled application and rely purely on hypothetical scenarios conceived by the trial court to suggest the settled approach might produce different results.

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[64] Although this Court sometimes has good faith disputes over how to interpret the Delaware Constitution or a statute—*see, e.g.*, *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017)—there is no doubt the test adopted by the Court in *Bridgeville* is binding. *See Del. State Sportsmen's Assoc. v. Garvin*, 196 A.3d 1254, 1258 (Del. Super. 2018) (involving a "straightforward application" of the test articulated in *Bridgeville*). So too is *Dickey Clay*. One of the main reasons the U.S. Supreme Court accepts *certiorari* is to resolve circuit splits about how to apply federal statutes and determine the test trial courts must employ to decide future cases involving diverse facts. *E.g.*, *Dubin v. U.S*, 143 S. Ct. 1557 (2023) (resolving circuit split about test for determining when aggravated identity theft has occurred).

[65] *See infra* pp. 39-44.

Plaintiffs misconstrue *Dickey Clay* and *Orban*, contending the cases say Section 242(b)(2) protects only rights that are exclusive to a class or superior to some "baseline"—interpretations Plaintiffs claim are unworkable when subjected to the trial court's hypotheticals.[66] Plaintiffs are wrong. Under Section 151, classes and series of stock are imbued with powers, preferences, and special rights—the inherent qualities that shape the class or series. *Dickey Clay* and *Orban* stand for the common-sense proposition that the phrase "powers, preferences, or special rights" in Section 242(b)(2) refers to the same suite of class-based rights imbued under Section 151. Neither decision states that those class-based interests must be "superior" to some arbitrary "baseline" to be peculiar. That construct was invented by the trial court, was not argued by Plaintiffs below, and is not in the DGCL.[67] Indeed, in stating that peculiar characteristics "distinguish a class," the cases are not saying that class voting rights can be invoked only when a charter amendment adversely affects a right held exclusively by a particular class. Rather, the cases recognize that, as contemplated by Section 151, classes of shares are created with

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[66] OB 18-22.

[67] *See* Tr. 12:9-23. When a corporation creates a class of shares under Section 151(a), the corporation can customize the suite of characteristics that define that class consistent with the private ordering contemplated by the DGCL. There is no "baseline" set of peculiar class-specific rights that a class starts with before the corporation delineates those rights. For example, there is no "baseline" right to receive dividends. The DGCL may fill certain gaps when a charter is silent. *See, e.g.*, 8 *Del. C.* § 212(a). But that gap-filler does not establish any "baseline."

specific class-based attributes that define and distinguish a class, some of which may be shared by other classes.[68]

Plaintiffs also misconstrue the Companies' argument to be that "Section 242(b)(2) only applies to powers or rights expressly set forth in the certificate of incorporation."[69] The Companies never adopted the trial court's "express rights theory," which misses the nuance. The Companies argued that "powers, preferences, or special rights" are class-based rights imbued under Section 151, which are typically stated in the charter or certificate of designations but can include class-based rights incorporated via gap-filler provisions of the DGCL—such as Section 212(a), supplying voting power of one vote per share for a class if not otherwise specified in the charter.[70]

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[68] Nor was *Orban* advancing the trial court's "equal treatment exception" (Tr. 38:2-19) when it stated a charter amendment diluting each class pro-rata did not adversely affect a peculiar class right. *Orban*, 1993 WL 547187, at *8. The decision simply highlighted that the abstract right to vote, as distinguished from the voting power (i.e., number of votes per share) assigned to a class of stock, is not a peculiar class-based right.

[69] OB 29.

[70] *See* B0158 (explaining class vote would be required for charter amendment modifying the voting power for a class supplied by Section 212(a) because it affects "a particular right (the right to 1 vote per share supplied by Section 212(a)) imbued in the shares of [the class] pursuant to Section 151").

2. The Established Meaning of Section 242(b)(2) Flows from the DGCL and the Provision's Plain Text.

The thoughtful construction of Section 242(b)(2) articulated in *Dickey Clay* and *Orban* is consistent with the framework of the DGCL and Section 242(b)(2)'s text. The "fundamental goal of a court in the application and interpretation of any statute is to 'ascertain and give effect to the intent of the legislature.'"[71] "[W]here the language of a statute is plain, and conveys a clear and definite meaning . . . the Court will accept the language as it finds it. It will not exercise its imagination in an effort to discover some obscure, uncertain or merely possible meaning, but will give to the language the meaning clearly demanded by it."[72]

As the trial court found, the Companies "trace[d] a textual argument that links powers, preferences, and special rights [in Section 242(b)(2)] to the powers, preferences, and special rights made express in a charter under Section 102(a)(4)" and imbued in the shares under Section 151.[73] Plaintiffs' interpretation, by contrast, is untethered from the statutory context and impracticable.

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[71] *Daniels v. State*, 538 A.2d 1104, 1109 (Del. 1988).

[72] *Dickey Clay*, 24 A.2d at 320.

[73] Tr. 61:24-62:4.

(a) The Companies' Construction Harmonizes DGCL Sections 151, 102, and 242

The DGCL "must be read and considered in its entirety."[74] A straight line through Sections 151, 102, and 242 of the DGCL confirms the "powers, preferences, or special rights of the shares of such class" in Section 242(b)(2) are the peculiar characteristics assigned to a class under Section 151 and expressed or incorporated in a charter or certificate of designation under Section 102(a)(4).

The class voting mechanism in Section 242(b)(2) has long been construed by looking to parallel language in Section 151,[75] titled "***Classes and series of stock***; *redemption; rights*."[76] Section 151(a) authorizes corporations to create different classes of stock. When a corporation creates a class of stock, Section 151(a) offers a menu of "powers," "preferences," and "special rights" that corporations can assign to the shares:

> Every corporation may issue 1 or more **classes of stock** or 1 or more series of stock within any class thereof . . . which classes or series may have such ***voting powers,*** **full or limited, or no voting powers, and such designations,**

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[74] *Dickey Clay*, 24 A.2d at 319; *see also Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010) (statutes should be read so as to produce a "harmonious whole").

[75] *Dickey Clay*, 24 A.2d at 319 ("The Chancellor, in his effort to discover, if possible, the meaning of 'special' shares [in Section 242(b)(2)'s predecessor], was compelled to refer, and did refer, to the language of [Section 151's predecessor] authorizing the issuance of various kinds or classes of shares."); *Garfield v. Boxed, Inc.*, 2022 WL 17959766, at *8-9 (Del. Ch. Dec. 27, 2022) (interpreting Section 242(b)(2) by looking to Sections 102 and 151).

[76] 8 *Del C.* § 151 (emphasis added).

> ***preferences*** **and relative, participating, optional or other** ***special rights,*** **and qualifications, limitations or restrictions thereof**, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto . . . .[77]

Similarly, Section 151(f) requires corporations to summarize the "powers," "preferences," and "special rights" of the shares of a class on a share certificate:

> If any corporation shall be authorized to issue more than 1 **class of stock** or more than 1 series of any class, **the** ***powers*****, designations,** ***preferences*** **and relative, participating, optional, or other** ***special rights*** **of each class of stock** or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights **shall be set forth in full or summarized on the face or back of the certificate** which the corporation shall issue to represent such class or series of stock . . . .[78]

The powers, preferences, and special rights imbued in the shares of a class under Section 151 are the peculiar attributes of that class.

Section 102(a)(4), in turn, requires those attributes to be spelled out in the corporation's charter as "a statement of the designations and **the** ***powers, preferences and rights*****,** and the qualifications, limitations or restrictions thereof, **which are** ***permitted by § 151*** of this title **in respect of any class or classes of stock or any series of any class of stock** of the corporation . . . ."[79] The importance of

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[77] *Id.* § 151(a) (emphasis added).

[78] *Id.* § 151(f) (emphasis added).

[79] *Id.* § 102(a)(4) (emphasis added).

having a "sure and definitive place" for determining the peculiar characteristics of shares has been recognized for nearly a century.[80]

The class-voting mechanism in Section 242(b)(2) is implicated only when a proposed charter amendment would "alter or change the ***powers, preferences, or special rights*** **of the shares of such class** so as to affect them adversely."[81] The phrase "of the shares of such class" makes explicit that class voting extends only to class-based "powers, preferences, or special rights."[82]

Interpreting the DGCL coherently requires ascribing consistent meaning to the overlapping references to "powers," "preferences," and "special rights" found in Sections 151, 102(a)(4), and 242(b)(2).[83] The use of the triad of "powers," "preferences," and "special rights" is unique to those sections; that sequence of terms does not appear in any other DGCL provision. This deliberate linkage of those sections, which specifically concern ***class***-based interests, confirms the phrase "powers, preferences, or special rights" in Section 242(b)(2) refers to the same class-based "powers," "preferences," and "special rights" in Section 151. Because the

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[80] *Gaskill v. Gladys Belle Oil Co.*, 146 A. 337, 339 (Del. Ch. 1929).

[81] 8 *Del. C.* § 242(b)(2) (emphasis added). Section 242(b)(2) also requires a class vote for changes to (i) the par value of the shares of a class, and (ii) the number of authorized shares of a class, *id.*, neither of which is at issue here, but both of which address the attributes specific to a class.

[82] Plaintiffs do not address this language.

[83] Section 102(a)(4) uses the shorthand "powers, preferences and rights" but expressly cross-references Section 151. 8 *Del. C.* § 102(a)(4).

general right to sue is not a peculiar class-based right imbued in shares under Section 151(a) (or "set forth" on stock certificates under Section 151(f)[84]), it is not a "power" for purposes of Section 242(b)(2).

(b) Plaintiffs' Construction Conflicts with Other Provisions of the DGCL and Ignores Context

Plaintiffs fail to address the connection between Sections 151, 102(a)(4), and 242. Despite the trial court's acknowledgement that this connection supports the settled meaning of Section 242 provided by *Dickey Clay* and *Orban*,[85] Plaintiffs do not cite Sections 102(a)(4) or 151 in their brief. Plaintiffs instead cite to other DGCL provisions using the word "power" in unrelated contexts, arguing that "power" includes the right to sue any time it appears in the DGCL.[86] Those provisions concern the "powers" of *corporations* as artificial citizens being granted the ability to act like humans in certain circumstances, including to sue and be sued, and not of shares or stockholders.[87] They do not inform the meaning of the unique triad of

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[84] *Id.* § 151(f). Although the trial court acknowledged at oral argument that corporations do not legend the common law ability to sue in charters or stock certificates, B0252 (89:15-22), it did not confront this point in its ruling.

[85] Tr. 61:24-62:4.

[86] OB 26-28.

[87] *See* 8 *Del. C.* § 122(2) ("Every corporation . . . shall have power to: . . . [s]ue and be sued . . . ."); *id.* § 279 (trustees and receivers of dissolved corporations have "power to prosecute and defend [lawsuits], in the name of the corporation"); *id.* § 291 (receivers for insolvent corporations have "power to prosecute and defend, in the name of the corporation . . . , all claims or suits"). Notably, Section 123, which concerns the "rights, powers and privileges of

class-based terms—powers, preferences, and special rights—found only in Sections 151, 102(a)(4), and 242(b)(2).

Plaintiffs also fail to account for the words surrounding "powers" in Section 242(b)(2). "[A] word is known by the company it keeps."[88] Below, Plaintiffs acknowledged "preferences" and "special rights" have specific, limited meanings grounded in the corporate context that define a class,[89] yet they argue that "powers" should be read expansively to mean any "ability to act or not act" even if possessed by all stockholders.[90] Doing so swallows the terms "preferences" and "special rights," violating another canon of construction—that statutory terms not be rendered surplusage.[91] Plaintiffs' approach does violence to the text and the narrow, class-based focus of Sections 151 and 242(b)(2).

Further, Plaintiffs' proffered interpretation of Section 242(b)(2) is discordant with other DGCL provisions. For instance, Plaintiffs suggest that alienability (i.e., the right to sell) is a "power" and that adopting transfer restrictions in a charter

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ownership" of shares of another entity held by the corporation, refers only to the corporation's right to vote shares and does not mention the right to sue. *Id.* § 123 (emphasis added).

[88] *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995); *see also Agar v. Judy*, 151 A.3d 456, 473-75 (Del. Ch. 2017) (explaining statutory words must "be interpreted in the context of words surrounding them").

[89] B0069.

[90] OB 25.

[91] *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013).

requires a class vote under Section 242(b)(2).[92] But alienability is not a peculiar class-based interest imbued in shares under Section 151, and thus is not a "power, preference, or special right" under Section 242(b)(2). For one, transfer restrictions are governed exclusively by Section 202 of the DGCL, including the rule that transfer restrictions are not binding "unless the holders of the securities . . . voted in favor of the restriction."[93] Moreover, transfer restrictions "may be imposed by the [charter] or by the bylaws or by an agreement."[94] Plaintiffs' construction, drawn from *dicta* below, runs into Sections 102(a)(4) and 151(f), requiring that the powers, preferences, and special rights of a class be contained in the charter and set forth on the stock certificate. As such, transfer restrictions cannot be governed by Sections 102(a)(4), 151(a), and 242(b)(2).[95]

For similar reasons, Plaintiffs' position cannot be squared with Sections 102(b)(1) and 109(b) and this Court's opinions interpreting them. For example,

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[92] *See* OB 16, 19 n.67.

[93] 8 *Del. C.* § 202(b)

[94] *Id*.

[95] *Capano v. Wilm. Country Club*, 2001 WL 1359254, at *5-6 (Del. Ch. Nov. 1, 2001) (rejecting that transfer restrictions are governed by Sections 151 and 102(a)(4)). The Companies demonstrated that several of the court's hypotheticals were inapposite because they involved transfer restrictions governed by Section 202. B0243 (80:11-20); B0159-B0161. The trial court handwaved these "objections" as "distracting" and pivoted to new hypotheticals, without addressing the statutory inconsistency created by its novel interpretation. Tr. 40:23-41:17; *see also* B0243-B0245 (80:20-82:7).

under Plaintiffs' broad construction of "powers," a forum selection provision—which restricts where stockholders can sue and thus, like officer exculpation, limits in some respect their ability to sue—would have to be stated in the charter under Section 102(a)(4). But as *Salzberg v. Sciabacucchi* makes clear,[96] forum selection provisions can be adopted in charters ***or bylaws*** via the enabling authority in Section 102(b)(1) and Section 109(b).[97]

More fundamentally, Plaintiffs' position below placed dispositive weight on whether a charter amendment affects a "right" (such that, under their construction, it must be peculiar to the class because it is preceded by "special") or a "power" (such that it does not).[98] Plaintiffs then argued that the ability of stockholders to sue is a power, not a right.[99] This contrived distinction is backed by zero authority. As the Companies showed below,[100] each of the cases Plaintiffs cite for the proposition

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[96] 227 A.3d 102 (Del. 2020).

[97] *Id.* at 123. Section 109(b) (similar to 102(b)(1)) uses the terms "rights" and "powers," broadly permitting bylaws "relating to the business of the corporation, the conduct of its affairs, and its ***rights*** or ***powers*** or the ***rights or powers*** of its stockholders, directors, officers or employees." This demonstrates why the terms in the triad "powers, preferences, or special rights" must be read in the context in which they are used in Sections 151(a) and 242(b)(2)—to refer to class-based attributes that are assigned to a class and require a class vote to be amended—as compared with "powers" and "rights" used interchangeably elsewhere in the statute to broadly refer to the rights of the corporation's various constituents.

[98] B0071-B0073.

[99] *Id.*

[100] B0125-B0131.

that stockholders have three fundamental "powers" (to vote, sell, and sue) characterizes those abilities as "*rights*," not "powers,"[101] and even Plaintiffs (both in their briefs below and in an article authored by one of their lead attorneys) regularly describe the ability to sue as a "right" as opposed to a "power."[102] The trial court observed that the terms "rights" and "powers" are used "interchangeably," thereby rejecting the centerpiece of Plaintiffs' "plain language" argument below, but then failed to square that observation in its *dicta*.[103]

3. The Prevailing Interpretation of Section 242(b)(2) Is Consistent with the Statute's Purpose.

Plaintiffs ask the Court to transform Section 242(b)(2) from a tailored protection for class-based interests to a freewheeling guarantee of any "foundational power" of stockholders generally triggered any time a class of shares is "vulnerable" (whatever that means).[104] Nothing supports that essentially legislative act.

Section 242 already contains a general protective provision for stockholders: Section 242(b)(1) requires the affirmative vote of a majority of the *outstanding* stockholder voting power to approve any charter amendment.[105] On top of that

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[101] *See* OB 26 n.90 (citing cases).

[102] *Compare* B0069, B0073, B0079 ("power to sue"), *with* B0073, B0080, B0084 ("right to sue"); *see also* B0040, B0047, B0058 ("right to sue").

[103] Tr. 21:24-22:17.

[104] OB 3 (quoting Tr. 63:23-64:9); OB 4 (quoting Tr. 59:12-59:24); OB 44.

[105] 8 *Del. C.* § 242(b)(1).

general protection, Section 242(b)(2) adds a narrow protection through the class-voting mechanism, which "is intended as a safeguard"[106] of the peculiar characteristics "of the shares of [a] class."[107] The second sentence of Section 242(b)(2), providing for series voting, works similarly as a narrow protection for amendments affecting one or more (but not all) series within a class.[108]

Separate from the protections built into the statute, the potent tool of equitable fiduciary review exists to protect stockholders from inequitable charter amendments.[109] In this way, *Dickey Clay* and *Orban*'s interpretation of Section 242(b)(2) is even more sensible because it confines class voting to situations where a peculiar attribute of a class of stock would be adversely affected and does not require class votes when an amendment affects general rights held by all stockholders. This is both efficient (by not overly inhibiting corporate freedom through excessive mandates for class-specific votes) and fair (because improper, self-interested uses of the amendment process can be condemned in equity).

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[106] Ernest L. Folk, *Review of the Delaware Corporation Law (1965-67)* at 176 (1967), https://delawarelaw.widener.edu/files/resources/folkreport.pdf [hereinafter 1967 Folk Report].

[107] 8 *Del. C.* § 242(b)(2).

[108] 1967 Folk Report at 176-77.

[109] *See Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007) ("Corporate acts . . . must be 'twice-tested'—once by the law and again by equity." (quoting Adolphe A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931))).

For these reasons, in addition to incorrectly applying the DGCL, the irrelevant hypothetical referenced on pages 41-42 of Plaintiffs' brief exemplifies why there is no need to undermine the settled interpretation of the statute: because equity protects against attempts to use charter amendments to improperly shift value from certain stockholders to insiders or controlling stockholders. Notably, in *Orban*, Chancellor Allen did not dismiss the fiduciary challenge to the charter amendment, even while rejecting the argument that a class vote was required.[110]

The purposeful structure of Sections 242(b)(1) and (b)(2) is no accident. In enacting Section 151's predecessor, the General Assembly broke from the common law rule that all shares must have the same characteristics and instead authorized corporations to issue multiple classes of stock with different rights.[111] From its inception, Section 242(b)(2)'s predecessor, Section 26, served to protect those class-specific rights. It gave holders of preferred stock a class vote if the proposed charter amendment would "alter or change the preferences given to any one or more classes of preferred stock."[112] Section 26 later was amended to eliminate "preferred stock"

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[110] *Orban*, 1993 WL 547187, at *1, *4-5.

[111] *Gaskill*, 146 A. at 339.

[112] *Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 21 A.2d 178, 182 (Del. Ch. 1941) (quoting predecessor statute).

and to add "special rights" and "powers" to protect class-specific interests of common stock as defined in Section 151.[113]

The General Assembly carried over Section 26 into Section 242 as part of the DGCL's 1967 overhaul.[114] Contemporaneous commentaries from two central figures in the revision, Samuel Arsht and Walter Stapleton, signaled no intent to deviate from *Dickey Clay*.[115] Indeed, echoing the narrow scope of Section 242(b)(2), Professor Folk explained at the time, "[C]lass voting on amendments adversely affecting *class interests* is intended as a safeguard."[116] The statute was amended in 1969 to "clarify" the language by reordering the triad to the modern phrasing of "powers, preferences, or special rights," but again Arsht and Stapleton explained the statute would operate just "like the prior one."[117] Through

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[113] *See id.* at 181 (quoting statute).

[114] *See* 8 *Del. C.* § 242(b)(2) (1967) (referring to "preferences, special rights or powers given to any one or more classes of stock by the certificate of incorporation").

[115] S. Samuel Arsht & Walter K. Stapleton, *Analysis of the New Delaware Corporation Law*, 2 P-H CORP. 311, 337 (1967), https://www.law.upenn.edu/live/files/6904-analysis-1967-delaware-corporate-law-amendments.

[116] 1967 Folk Report at 176 (emphasis added).

[117] S. Samuel Arsht & Walter K. Stapleton, *Analysis of the 1969 Amendments to the Delaware Corporation Law*, 2 P-H CORP. 351, 353-54 (1969), https://www.law.upenn.edu/live/files/6906-analysis-1969-delaware-corp-law-amendments; *see also* Tr. 66:20-67:3 (noting lack of commentary suggesting Section 242(b)(2)'s meaning changed since *Dickey Clay*).

the amendments, the statute maintained its narrow purpose of protecting class- (and series-)

specific interests.

Plaintiffs' conception of Section 242(b)(2) as extending to "foundational power[s]" of *all* stockholders or any time a class is "vulnerable"[118] would override the General Assembly's demonstrated intent for Section 242(b)(2).[119]

4. Delaware Corporations Have Relied on the Prevailing Construction of Section 242(b)(2) for Decades.

Plaintiffs are wrong in claiming the trial court "deferred" to practitioner understanding to override the text of Section 242(b)(2).[120] The trial court ruled in the Companies' favor based on precedent,[121] noting the "established understanding as to how Section 242(b)(2) works" bolstered its conclusion.[122] Considering such "established understanding" and corporations' reliance on cases such as *Dickey Clay*

As noted, Plaintiffs argued below that this rewording seismically shifted the meaning of "powers" in the statute. B0048-B0049; B0071. They have dropped this argument on appeal, implicitly acknowledging the contemporaneous evidence—to which they had no response, *see* B0179-B0180 (16:12-17:23)—refutes it.

[118] OB 3 (quoting Tr. 63:23-64:9).

[119] Belying the notion Section 242(b)(2) was intended to protect "foundational powers," the DGCL does not require class votes for transformative transactions, like mergers and dissolutions, where stockholders stand to lose all their rights. Instead, like Section 242(b)(1), Sections 251 and 275 require the vote of a majority of the outstanding shares. 8 *Del C.* §§ 251(c), 275(b).

[120] OB 43-44.

[121] *E.g.*, Tr. 69:4-14.

[122] *Id.* 66:15-68:17.

and *Orban* was proper. "[T]he existence of a usage or custom may call for, and influence, a construction of the statute."[123] Accordingly, "courts look to 'established usage' and the meaning attached by people affected by an act, and the public at large, for persuasive interpretative guidance."[124]

The trial court rightly viewed the Companies' evidence of practitioners' historic and modern understanding of Section 242(b)(2) as compelling.[125] The Companies identified nine public multi-class corporations that adopted director exculpation charter amendments shortly after Section 102(b)(7) was enacted. Eight did not seek a separate class vote, and the ninth stated such a vote was not required, though it sought one because the proposal was presented to stockholders along with a suite of other charter amendments.[126] "Those [1987] amendments pose the same issue as the officer exculpation amendments, yet there is no evidence of any commentary suggesting that in a multi-class structure, a class vote would be required."[127] The trial court also recognized that corporate practitioners, "draw[ing]

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[123] *Agostini v. Colonial Tr. Co*., 44 A.2d 21, 22 n.1 (Del. Ch. 1945); *accord Speiser v. Baker*, 525 A.2d 1001, 1008 (Del. Ch. 1987) ("reasonably precise words" in DGCL must be afforded "their usual and customary meaning to persons familiar with this particular body of law").

[124] *Young v. Red Clay Consol. Sch. Dist*., 159 A.3d 713, 767 n.380 (Del. Ch. 2017) (quotation omitted).

[125] Tr. 66:20-68:17.

[126] A0596-A0598; A0614-A0617; A0806-A0919.

[127] Tr. 67:7-10.

on *Dickey Clay*," understand Section 242(b)(2) as requiring a class (or series) vote only when the specific rights of a class (or series) are adversely affected.[128]

Plaintiffs offer no evidence to the contrary. "In the nearly 40 years since 1986 and the adoption of Section 102(b)(7) for directors, *no one* has taken the position until this case that an exculpation amendment requires a class vote."[129] That is because under *Dickey Clay* and *Orban*, no such vote is required.

5. There Is No Reason To Overrule Longstanding Precedent.

As the trial court recognized, this Court must overturn *Dickey Clay* and *Orban* for Plaintiffs to prevail on appeal. But Plaintiffs offer no justification for overruling this sound, longstanding precedent.

None of the factors this Court considers in determining whether to overturn precedent favors doing so here. "One consideration is the nature of any reliance

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[128] Tr. 66:20-24, 69:4-7; *see also* 2 David A. Drexler et al., *Delaware Corporation Law & Practice* § 32.04[3] (2022) ("[T]he adverse effect must be a direct change in the charter provisions relating to the class in question and . . . an indirect effect caused by the enhancement of some other class's size, preferences, powers, or special rights does not give rise to a statutory class vote."); *accord* 1 R. Franklin Balotti & Jesse A. Finkelstein, *Balotti & Finkelstein's Delaware Law of Corporations and Business Organizations* § 8.11 (4th ed. 2023-1 Supp.); Frederick H. Alexander & Melissa A. DiVincenzo, *Is Common Stock the Preferred Security? Recent Judicial and Legislative Developments Affecting Preferred Stock*, A.B.A. (2010), https://www.researchgate.net/publication/228435499_Is_Common_Stock_the_Preferred_Security_Recent_Judicial_and_Legislative_Developments_Affecting_Preferred_Stock.

[129] Tr. 67:24-68:3 (emphasis added).

interests in the decision. . . . Because parties have a right to have confidence that long-established rules will be retained, the 'antiquity' of the precedent is accorded importance[.]"[130] *Dickey Clay*'s longevity deserves deference. Its sound reasoning has guided over 80 years of Delaware class voting law. *Orban*'s consistent reading a quarter-century ago underscores the reasonableness of corporate reliance on the established test.[131]

"The area of law the precedent addresses is likewise a consideration, since some subjects are more apt to induce reliance than others."[132] Delaware corporate law cannot serve its value-creating purpose unless corporations can rely on its predictable application.[133] Corporate planners have long depended on the settled test for applying Section 242(b)(2) when designing transactions or choosing particular class and voting structures.

Institutional considerations also matter when this Court is asked to upset settled law. When a statute like the DGCL is attended to every year, Delaware courts

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[130] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1278-79 (Del. 2021).

[131] *Hilton*, 502 U.S. at 202 (following *stare decisis* in deference to 30-year-old decision).

[132] *Brookfield*, 261 A.3d at 1279.

[133] *See Hilton Hotels*, 780 A.2d at 248 ("[*S*]*tare decisis* finds ready application in Delaware corporate law."); *Kinder Morgan*, 2014 WL 5667334, at *8 ("Delaware courts, when called upon to construe the technical and carefully drafted provisions of our statutory business entity law, do so with a sensitivity to the importance of the predictability of that law").

adhere to settled interpretations and leave to the correct branches of government to amend the statute if they see fit.[134] The General Assembly has had 80 years to overturn *Dickey Clay*, including in the proposed 2023 amendments to Section 242, but has not. That is "persuasive of legislative recognition that the judicial construction is the correct one."[135]

Finally, the Court has considered whether a precedent case "is amenable to consistent, stable, and thus predictable application" when weighing whether to overturn it.[136] As explained, *Dickey Clay* and *Orban* present a logical paradigm providing for a separate class vote only where a charter amendment affects the peculiar attributes of a class of stock, which is consistent with the plain language of the DGCL as a whole, Section 242(b)(2)'s legislative history, and corporate practice. This settled interpretation—which no one ever cast doubt upon prior to this case—reasonably balances efficiency and fairness, recognizing that equitable review provides a safeguard limiting the need to statutorily mandate a class vote when an amendment does not affect a peculiar attribute of a class of stock. For that reason,

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[134] *See Barnes*, 116 A.3d at 892 ("When the prior judicial interpretation was subject to being overturned by the operation of the legislative process and was not overturned, the justification for departing from *stare decisis* is even more tenuous." (alterations and quotations omitted)).

[135] *Id.* at 892.

[136] *Brookfield*, 261 A.3d at 1279.

this case stands in stark contrast to those where this Court has overturned confusing or impractical precedent.[137]

It is a bedrock advantage of Delaware corporate law that corporations and stockholders alike can rely on settled interpretations of the DGCL, and that our courts do not issue advisory rulings on hypotheticals that may never come to pass.[138] Adhering to these fundamental principles reduces the potential for value-inhibiting error and promotes the value-increasing certainty the DGCL offers for corporations. Predictability, one of the hallmarks of Delaware law, would be undermined if this Court upended venerable, well-reasoned precedent that has guided corporate planners for approaching a century.

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[137] *See id.* at 1267 (tracing significant confusion caused by *Gentile*); *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1034 (Del. 2004) (discussing "confusing jurisprudence on the direct/derivative dichotomy" under overruled "special injury" test).

[138] Although the Companies are reluctant to enmesh the Court in speculation about future hypotheticals of the kind the trial court introduced, it bears noting that embracing Plaintiffs' argument—that any change in the ability of stockholders to act in any way triggers a class vote, even if that ability is not peculiar to a class—would result in an inefficient extension of mandated class voting to any number of charter amendments modifying corporate governance provisions that affect stockholders generally. By asking the Court to overrule *Dickey Clay* and *Orban* as unworkable, Plaintiffs are obliged to suggest an alternative interpretive approach that will sensibly guide Delaware corporations going forward, and they have failed to do so. Their proffered interpretation offers no limiting principle for when a separate class vote is required and unhinges the statute from its historic purpose of protecting peculiar class-based interests.

CONCLUSION

The Companies respectfully request the Court affirm the judgment below.

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