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IN THE

Supreme Court of the State of Delaware

IN RE DELAWARE PUBLIC SCHOOLS LITIGATION

NO. 138, 2023

On Appeal from the Court of Chancery of the State of Delaware,
C.A. No. 2018-0029 JTL

APPELLANTS' OPENING BRIEF

Dated: June 30, 2023

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NATURE AND STAGE OF PROCEEDINGS

This appeal arises from an order (the "Order", Exhibit 1) and award (the "Award", Exhibit 2) of the Delaware Court of Chancery ("Court of Chancery") awarding attorneys' fees and expenses[1] to two organizations in public interest litigation, ostensibly under the common benefit exception to the American Rule. "Ostensibly," because the Order did not apply the common benefit exception in any manner previously recognized by this Court or the Court of Chancery, nor did it comport with the limitations on fee shifting in public interest litigation imposed in *Dover Historical Society, Inc. v. City of Dover Planning Commission*[2] and taxpayer suits in *Korn v. New Castle County*.[3]

The Order should be reversed because: (1) the Court of Chancery ignored *Dover* and awarded fees to Plaintiffs for purportedly compelling government entities to "perform properly"; (2) although this matter was not a taxpayer suit, the Court of Chancery relied on *Korn*—which only extended the common benefit exception to taxpayer suits—to award Plaintiffs fees; (3) the Court of Chancery is requiring defendants to pay fees for benefitting parties with whom those defendants have no identity of interest, which is both unprecedented and unwarranted; and (4) the Court of Chancery adopted—in all but name only—the "private attorney general"

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1 The term "fees" is used as shorthand for "attorneys' fees and expenses."
2 902 A.2d 1084, 1091 & n.16 (Del. 2006) ("*Dover*").
3 922 A.2d 409 (Del. 2007) ("*Korn*").

exception to the American Rule, which was rejected by this Court in *Dover*. Consistent with *Dover*, the Court of Chancery's expansion of fee shifting in public interest litigation should be curtailed in the absence of legislative action by the General Assembly.

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On January 16, 2018, Delawareans for Educational Opportunity ("DEO") and NAACP Delaware State Conference of Branches ("NAACP" with DEO, "Plaintiffs") filed their Complaint ("Complaint") against several Delaware officials and the Director of Finance of Kent County, Chief Financial Officer of New Castle County, and Finance Director for Sussex County ("County Defendants") seeking increased funding for Delaware's public schools. A129-84. The Plaintiffs claimed that the failure of Delaware's three counties ("Counties") to reassess real property was negatively impacting public school funding.

The Court of Chancery denied County Defendants' motion to dismiss the Complaint.[4] Plaintiffs filed an amended complaint ("Amended Complaint") on December 26, 2018. A017, D.I. 77.[5]

Trial occurred on July 17 and 18, 2019. On May 8, 2020, the Court of Chancery determined that the Counties were violating Article VIII, Section 1 of the

[4] *Delawareans for Ed. Opp'y v. Carney*, 2018 WL 4849935 (Del. Ch. Oct. 5, 2018) ("*DEO I*").

[5] Plaintiffs second amended complaint was inapplicable to County Defendants.

Delaware Constitution ("Uniformity Clause") and 9 *Del. C.* § 8036(a) ("True Value Statute") by failing to reassess real property.[6]

Plaintiffs and each County Defendant entered into a stipulation pursuant to which the Counties agreed to conduct general reassessments. A459-76.

Plaintiffs filed their fee application on May 10, 2021. A108, D.I. 442. The issues of (i) whether Plaintiffs were entitled to fees and, (ii) the reasonable amount of fees to be awarded, were bifurcated. County Defendants filed their opposition to awarding Plaintiffs fees on June 1, 2021 (A511-61), Plaintiffs replied on June 11, 2021 (A562-94), and the Court of Chancery heard argument on March 11, 2022. A595-641.

The Court of Chancery entered the Order on March 28, 2022. *See* Ex. 1. County Defendants' application for certification of an interlocutory appeal (A642-57) was denied by the Court of Chancery[7] and this Court.[8]

County Defendants filed their brief regarding the unreasonableness of the Plaintiffs' fee request on September 14, 2022. A123, D.I. 495. Plaintiffs replied on September 29, 2022. A124, D.I. 498. The Court of Chancery heard argument on

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[6] *In re Del. Pub. Sch. Litig.*, 239 A.3d 451 (Del. Ch. 2020) ("*DEO II*").

[7] *In re Del. Pub. Sch. Litig.*, 2022 WL 1220075 (Del. Ch. Apr. 26, 2022) ("*DEO III*").

[8] *In re Del. Pub. Sch. Litig.*, 2022 WL 1552592 (Del. May 17, 2022).

March 22, 2023 (A126, D.I. 505) and awarded Plaintiffs $1,549,471.90 in attorneys' fees and expenses on March 29, 2023.[9]

County Defendants timely appealed from the Order and Award on April 28, 2023. A126, D.I. 508. This is the County Defendants' opening brief on appeal.

[9] *See* Ex. 2. Because the Award is dependent upon the Order, the Award will be invalidated if the Order is reversed. *See, e.g.*, 5 C.J.S. *Appeal & Error*, § 1127 (2023) ("An order [or] judgment … dependent on or ancillary and accessory to a judgment, order or decree which is reversed or vacated falls with it.") (citations omitted).

SUMMARY OF ARGUMENT

1. The Order contravenes *Dover* and *Korn* by awarding fees in public interest litigation that (a) was purportedly brought to compel government entities to perform properly, and (b) was not a taxpayer suit.

2. The Court of Chancery erred by requiring the County Defendants to pay fees to Plaintiffs—ostensibly under the common benefit exception to the American Rule—for speculative benefits inuring to parties unrelated to the Counties or County Defendants, which is a "totally unprincipled result [that] runs counter to the rationale that those who receive the benefit from … litigative efforts should share the costs of creating that benefit."[10]

3. Despite asserting that it was relying on the common benefit exception, the Court of Chancery actually—and erroneously—applied the private attorney general exception to the American Rule, which this Court rejected in *Dover*.

[10] *Mentor Graphics v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1233 (Del. Ch. 2001), *aff'd*, 818 A.2d 959 (Del. 2003).

STATEMENT OF FACTS

A. The Vice Chancellor Invites Reassessment Litigation.

In 2017, the Vice Chancellor below expressed his opinion—through extensive *dicta*—that the Counties should conduct general reassessments to make Delaware's education funding system perform effectively because, *inter alia*, he surmised that inflation erodes school taxes and school tax referenda sometimes fail.[11] He then concluded—without any evidence or a trial—that New Castle County was violating the True Value Statute,[12] and invited "an institutional plaintiff that could represent the interests of minors currently disadvantaged by the [school funding] system" to commence litigation to compel the Counties to reassess.[13]

The Vice Chancellor also observed the following regarding taxpayers:

> Some residents object as a matter of principle to having their taxes raised. More object if they think their tax dollars are not being used wisely…. The natural reaction of some citizens to regular requests for tax increases is to suspect that school officials are wasting money.[14]

The Vice Chancellor subsequently observed that "school districts risk backlash from voters confronted with recurring requests to have their taxes raised."[15]

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11 *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 725-26 (Del. Ch. 2017).
12 *Id.* at 722, n.32.
13 *Id.*
14 *Id.* at 725; *see also DEO I*, 2018 WL 4849935, at *3.
15 *DEO II*, 239 A.3d at 471.

B. Plaintiffs Accept the Vice Chancellor's Invitation.

Plaintiffs accepted the Vice Chancellor's invitation and commenced the underlying litigation. Plaintiffs asserted precisely what the Vice Chancellor suggested: The Counties were violating the True Value Statute by failing to reassess. A145, ¶52; A181, ¶185. In fact, Plaintiffs invoked the Vice Chancellor's *dicta* from *Young* in their Complaint. A144, ¶51. Plaintiffs asserted that their litigation was "tangentially related" to *Young* (A185), essentially ensuring that the Vice Chancellor who had already telegraphed his decision would hear their case.[16]

C. The Litigation Was Not a Taxpayer Suit.

DEO is "a nonprofit association of Delawareans concerned about the state's failure to provide all children with an adequate education." A133, ¶8. The members of DEO were identified as concerned parents, not taxpayers. *Id.* ¶9. NAACP's interest in the litigation was "ensuring that all students in Delaware have an equal opportunity to obtain high quality public education." A134, ¶11. The interested members of NAACP were "parents of children enrolled in public schools in Delaware," not taxpayers. *Id.* ¶12.

Plaintiffs admitted that they were not pursuing their claims to correct the property tax system for the benefit of taxpayers, but to increase school funding. A274 ("Plaintiffs' interests are not their own individual property assessments.

[16] *See* Del. Ch. Ct. R. 3(a)(2) and Form CA-SIS.

Rather, their interests are in the way the property tax system is underfunding their schools.").

County Defendants argued that *Korn* applied only to taxpayer suits, which the litigation was not. A535-36. Plaintiffs did not argue that the litigation was a taxpayer suit, but asserted (incorrectly) that *Korn* is not limited to taxpayer suits. A568-71. Plaintiffs admitted that they had no intention of benefiting taxpayers through the litigation. A638, 44:13-15.

D. Plaintiffs Sought to Compel County Defendants to "Perform Properly."

Despite claiming they were seeking an injunction against the collection of taxes on outdated assessments to avoid dismissal (A201), Plaintiffs ultimately conceded that "the [C]ounties' violations of the True Value Statute and Uniformity Clause were clear, and there was only one plausible corrective" – reassessment. A501. Plaintiffs also characterized the litigation as "a public-interest case" brought for the purpose of "getting compliance with the law." A599, 5:1-5. Thus, the litigation was brought to compel the County Defendants to "do their job" and "perform properly"[17] by reassessing.

[17] *Dover*, 902 A.2d at 1091.

E. Plaintiffs Assumed School Districts Will Raise Taxes by the Maximum Amount.

Generally, elected school boards[18] must conduct referenda to increase property taxes.[19] However, school boards may increase tax revenue by 10% without a referendum following reassessment.[20] The 10% increase is not self-effectuating; it must be approved by elected school board members and appointed vocational school board members.[21] Nevertheless, throughout the litigation, Plaintiffs assumed that school districts would uniformly increase tax revenues by the maximum 10% permitted. A195-96; A406-07, n.220. The Court of Chancery adopted that assumption.[22]

F. Plaintiffs Never Proved That School Boards Will Raise Taxes.

Plaintiffs never identified or called a witness purporting to speak on behalf of all of Delaware's school or vocational boards. A314-15. There was no testimony supporting the assumption that all school and vocational districts will raise tax revenue by 10% following reassessment. Nevertheless, the Court of Chancery

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18 *See* 14 *Del. C.* § 1051(a). Vocational district board members are appointed. *Id.* § 1064(a).

19 *Id.* § 1903. Vocational district boards can set tax rates, up to a statutory maximum per $100 of assessed value. *Id.* § 2601(a).

20 *Id.* § 1916(b). Vocational districts may also collect an additional 10% in tax revenue following reassessment under 14 *Del. C.* § 2601(c), though that amount would appear to be capped in 14 *Del. C.* § 2601(a).

21 *See supra* nn.19-20.

22 *DEO I*, 2018 WL 4849935, at *2 (accepting Plaintiffs' assertion that school districts would realize $64 million in new tax revenue).

concluded—without citation to any part of the record—that "it is highly likely that school districts will happily accept the 10% increase in revenue that would result from a general reassessment."[23]

G. The Counties' Reassessments.

The Counties agreed to conduct reassessments. Order ¶6. Kent County's reassessment will be completed in 2024. A465. New Castle County's reassessment will be completed in 2025. A121, D.I. 486; Exs. 4 & 5. Sussex County's reassessment will also be completed in 2025.[24] Thus, the school and vocational districts cannot increase tax revenues in Kent County until 2024, and in New Castle and Sussex Counties until 2025, even if inclined to do so.

H. Benefits and Beneficiaries Identified by Plaintiffs.

Plaintiffs identified three indirect beneficiaries receiving three collateral benefits from the litigation: (1) Delaware's 16 school districts and three vocational districts, which "will have the right to a 10% increase in local tax revenue," following reassessment; (2) Disadvantaged Students who may be helped by additional school funding; and, (3) taxpayers "who now pay more than their fair

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23 *DEO II*, 239 A.3d at 532.

24 *See* Sussex County, Sussex County reassessment project deadline shifts to 2025 (May 16, 2023), *available at* https://sussexcountyde.gov/news/sussex-county-reassessment-project-deadline-shifts-2025 (last viewed Jun. 27, 2023).

share of property taxes because of the lack of uniformity in each county's property assessments." A491.

Plaintiffs admitted that they were unable to quantify the benefit to taxpayers paying an unfair share of property taxes. A492, n.5. They also admitted that their "proposed fees calculation [was] based solely on the expected increase in school tax revenue." A577; *see also* A638-39, 44:22-45:6. Plaintiffs ultimately abandoned the argument that they had benefitted taxpayers, stating that they referred to benefitting taxpayers because they "thought the Court would want to know about this incidental benefit, not because … Plaintiffs are seeking fees on account of that benefit." A578.

County Defendants challenged Plaintiffs' speculative claim that they benefitted school and vocational districts when those districts must independently choose to raise taxes, cannot do so for several years, and there was no evidence they will do so. A524-26; A537-40. In response, Plaintiffs did not cite any evidence in the record establishing that school and vocational districts will increase taxes or by how much; rather, they parroted the observations the Court of Chancery made in *Young* about inflation and referenda.[25]

I. Benefits and Beneficiaries Identified by the Court of Chancery.

The Court of Chancery identified several indirect beneficiaries and collateral benefits emanating from the Counties' reassessments, including:

[25] *Compare* A575 *with Young*, 159 A.3d at 719-26.

a. School and Vocational Districts – "After the general reassessments, each of the sixteen local school districts will have the right to claim a 10% increase in property tax revenue without having to succeed in a tax referendum … and the three vocational-technical school districts will have the right to a 10% increase in property tax revenue without seeing legislative approval." Order ¶19. The Court of Chancery also concluded, *sans* evidence, that all school and vocational districts "will happily accept the 10% increase in revenue" because "[n]ot doing so would be irrational." *Id.* ¶20.

b. Disadvantaged Students – "The additional revenue will make more funds available to support the needs of Disadvantaged Students, which will benefit all students." *Id.* ¶19.

c. Some Taxpayers – "The reassessment will re-establish vertical equity and restore price-related uniformity, thereby benefitting those disadvantaged taxpayers who were injured by the counties' regressive system…. [O]ther taxpayers will see their tax bills go up, but those taxpayers were freeriding on the broken system…." *Id.* ¶21. "[T]he counties' residents will benefit from the more equitable tax system…." *Id.* ¶23.

d. The Counties – "After conducting the general reassessments, the counties will be in compliance with the True Value Statute and the Uniformity

Clause. Bringing an organization into compliance with the law is a benefit to the organization…." *Id.*

J. Public Policy Basis for the Court of Chancery's Order.

The Court of Chancery concluded that "[p]ublic policy supports providing an incentive for litigants … who take on difficult statutory and constitutional issues like those litigated" by Plaintiffs. Order ¶13. According to the Court of Chancery, "Delaware policymakers have long recognized that the counties' failure to update their assessments undermined Delaware's system for funding public schools," yet elected officials failed to act. *Id.* Thus, according to the Court of Chancery, "[a]bsent a legal challenge, Delaware's inequitable system of property tax assessment would have persisted." *Id.*

The Court of Chancery also concluded that it was unlikely "that anyone except groups like the plaintiffs would be able to mount a meaningful challenge." *Id.* ¶14. The Court of Chancery quoted its own conclusion in *DEO II* that taxpayers were unlikely to demand reassessment because "'it would take a brave and civic-minded person to assert the claim'" and "'it is hard to imagine an individual suing to fix a dysfunctional system when the outcome could irritate as many as half of her fellow property owners.'" *Id.* (quoting *DEO II*, 239 A.3d at 539). Thus, the Court of Chancery declared: "If ever there was a setting that called for rewarding **courageous** plaintiffs for litigating, this was it." *Id.* (emphasis supplied).

ARGUMENT

I. THE ORDER CONTRAVENES *DOVER* AND *KORN*.

A. Question Presented.

Did the Court of Court of Chancery exceed the limitations on awarding fees in public interest litigation and taxpayer suits established in *Dover* and *Korn*, respectively?

The County Defendants argued below that this Court's decisions in *Dover* and *Korn* precluded awarding fees to Plaintiffs for causing the County Defendants to reassess. *See, e.g.*, A531-46; A605-08, 11:10-14:17.

B. Standard of Review.

The Court of Chancery's failure to follow *Dover* and *Korn* in awarding fees to Plaintiffs is subject to *de novo* review.[26]

C. Merits of the Argument.

As detailed below, the Court of Chancery erred by awarding Plaintiffs fees for compelling government entities to "perform properly" through public interest litigation—ostensibly under the common benefit exception to the American Rule—which is precisely what this Court rejected in *Dover*.[27] The Court of Chancery also

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[26] *See Gannett Co., Inc. v. Bd. of Mgrs. of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1240 (Del. 2003) ("To the extent the award [of fees] requires the formulation of legal principles … that formulation is subject to *de novo* review.") (citations omitted); *Dover*, 902 A.2d at 1089 ("[W]e review the Superior Court's formulation of the appropriate legal standard *de novo*.").

[27] 902 A.2d at 1091.

erred by expanding the common benefit exception to the American Rule for taxpayer suits recognized in *Korn*[28] to litigation that was not a taxpayer suit and that failed to meet any of the requirements for fee shifting under *Korn*. The Order should be reversed because it contravenes both *Dover* and *Korn*.

1. The American Rule and its Recognized Exceptions.

Delaware adheres to the "American Rule," under which "a litigant must, himself, defray the cost of being represented by counsel."[29] The American Rule has its origin in the United States Supreme Court's 1796 decision in *Arcambel v. Wiseman*, which reversed an award of fees because "[t]he general practice of the United States is in opposition to it" and that practice "is entitled to the respect of the court, till it is changed, or modified, by statute."[30] The American Rule may have been recognized in Delaware as early as 1800[31] and was clearly ensconced by the

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[28] 922 A.2d at 410 & 413.

[29] *Dover*, 902 A.2d at 1089 (quotation omitted); *see also Johnston v. Arbitrium (Cayman I) Handels AG*, 720 A.2d 542, 545 (Del. 1998) ("Under the American Rule, absent express statutory language to the contrary, each party is normally obliged to pay only his or her own attorneys' fees, whatever the outcome of the litigation.") (citation omitted).

[30] 3 U.S. (Dall.) 306 (1796); *see also Johnston*, 720 A.2d at 545 ("Since the United States Supreme Court disallowed an award of attorneys' fees to the winning party in a 1796 admiralty matter, the courts of this nation have generally followed what is commonly referred to as the American Rule.") (citing *Arcambel*).

[31] *Cf. Evans v. Swain*, 1 Del. Cas. 265, 267 (Del. 1800). The appellee argued that costs, including attorneys' fees, could only be had by statute. The court held that costs were payable by agreement of the parties.

middle of the 20th Century.[32]

"Express statutory authorization and certain equitable doctrines provide limited exceptions to [the American] [R]ule."[33] The three recognized equitable exceptions in Delaware are bad faith, common fund, and corporate (or common) benefit.[34] Only the common/corporate benefit exception is at issue here. The "corporate benefit" exception "allows a litigant to recover fees and expenses from a corporation where the litigation has conferred some other (non-monetary) valuable benefit upon the corporate enterprise or its shareholders."[35] The "corporate benefit" exception is synonymous with the "common benefit" exception.[36] The corporate or common benefit exception was recognized in Delaware as early as 1962.[37]

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[32] *In re Equitable Tr. Co.*, 30 A.2d 271, 272 (Del. Ch. 1943) ("The general and well recognized rule, subject to but few exceptions, is that a litigant must himself defray the costs of representation by counsel.").

[33] *Dover*, 902 A.2d at 1091.

[34] *Id.* at 1090 & 1093.

[35] *Id.* at 1090 (citation omitted).

[36] *See Korn v. New Castle Cnty.*, 2007 WL 2981939, at *2 n.12 (Del. Ch. Oct. 3, 2007) ("Korn II") ("The common benefit doctrine is most frequently used in our state in the context of corporate litigation and applies where a shareholder's suit has resulted in a significant, substantial (but non-monetary) benefit to the entire corporation."); *Almond as Trustee for Almond Family 2001 Tr. v. Glenhill Advisors LLC*, 2019 WL 1556230, at *4 n.21 (Del. Ch. Apr. 10, 2019), *aff'd*, 2019 WL 6117532 (Del. Jan. 6, 2020) ("The Supreme Court in [*Dover*] referred to a 'common benefit' instead of a 'corporate benefit.' I view these phrases to be interchangeable.").

[37] *See Richman v. DeVal Aerodynamics, Inc.*, 185 A.2d 884, 886 (Del. Ch. 1962).

"[T]he American Rule with its three generally recognized exceptions is so embedded into our civil jurisprudence that it has become the authoritative statement of the governing legal principle…. [B]y virtue of its ancient origins and its repeated reaffirmation, [it] is so 'inextricably woven into the warp and woof of the judicial fabric of this court' that it has become the established rule of law on the question of the award of attorneys' fees.'"[38]

2. *Dover* Rejected Fee-Shifting in Public Interest Litigation.

At issue in *Dover* was an application by property owners to build an office building, which would have required demolishing historic buildings located in an Historic District.[39] The application required approval by the Dover Planning Commission ("DPC") and recommendation by Dover's Historic District Commission ("HDC"), which was required to apply the Historic District provisions of the City of Dover Code.[40] After HDC recommended approval and DPC approved the application, plaintiffs sued to compel DPC to comply with the City of Dover Code and deny the application.[41] The Superior Court held that DPC failed to comply

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38 *Potomac Residence Club v. W. World Ins. Co.*, 711 A.2d 1228, 1242-43 (D.C. 1997) (King, J., concurring and dissenting) (quoting *Washington v. A&H Garcias Trash Hauling Co.*, 584 A.2d 544, 548 n.6 (D.C. 1990) (Schwelb, J., concurring and dissenting)), *vacated en banc*, 711 A.2d 1250 (D.C. 1998).

39 *Dover Historical Society v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1107 (Del. 2003).

40 *Id*. at 1107-08.

41 *Dover*, 902 A.2d at 1088.

with the City of Dover Code in approving the application.[42] The plaintiffs sought fees under the common benefit doctrine, which the Superior Court denied.[43]

This Court in *Dover* characterized the "the benefit resulting from" the plaintiffs' efforts as DPC being "ordered to reevaluate the application," in compliance with guidelines within the City of Dover Code.[44] The Court then affirmed denial of the fee application, holding:

> In essence, this case is not unlike one where a citizen sues successfully on behalf of the public interest as a **private attorney general**, and then seeks reimbursement of his or her attorneys' fees for having successfully caused a government agency (here, the DPC) to do its job properly. **In the public interest litigation context, absent legislative authorization, fee-shifting applications are disfavored.** Historically, **our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance**. Here, to the extent this lawsuit caused the DPC to perform properly, it clearly created a social benefit. But, that benefit is not of the kind that justifies creating a new judge-made exception to the American Rule.[45]

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42 *Id.*

43 *Id.* at 1088-89.

44 *Id.* at 1091.

45 *Id.* (citing *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Jones v. Muir,* 515 A.2d 855 (Pa. 1986); *N.M. Right to Choose/NARAL v. Johnson*, 986 P.2d 450 (N.M. 1990); *Hamer v. Kirk*, 356 N.E.2d 524 (Ill. 1976); *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001); *Robes v. Town of Hartford*, 636 A.2d 342 (Vt. 1993); *Walsh v. Hotel Corp. of Am.*, 231 A.2d 458, 462 (Del. 1967)) (emphasis supplied).

3. This Court Allowed Fee Shifting in Taxpayer Suits Resulting in Quantifiable Monetary Benefits for All Taxpayers in *Korn*.

In Delaware, taxpayer suits are "a narrow set of claims involving challenges either to expenditure of public funds or use of public lands."[46] Taxpayer standing "is focused on whether use of public funds or property itself is legal, not merely on the process by which decisions regarding such use are made—otherwise the breadth of taxpayer standing would be near-limitless."[47]

Korn was a taxpayer suit challenging New Castle County's accumulation of a $200 million surplus reserve, the issuance of $80 million in county bonds, and the existence of a $650,000 surplus in the county's light tax fund.[48] The Court of Chancery granted the taxpayers summary judgment regarding the $200 million in surplus reserves, but declined to enjoin the bond sale because the county voluntarily stayed that sale.[49] The County then used the surplus in the light tax fund to reduce

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46 *Reader v. Wagner*, 2009 WL 1525945, at *2 (Del. Jun. 2, 2009) (quotation omitted); *see also Lechliter v. Del. Dept. of Nat. Res. & Envtl. Control*, 2015 WL 9591587, at *11 (Del. Ch. Dec. 31, 2015), *aff'd*, 2016 WL 4437954 (Del. Aug. 22, 2016) (taxpayer standing only arises where there is misuse of taxpayer dollars or misuse of public land).

47 *Lechliter v. Del. Dept. of Nat. Res. & Envtl. Control*, 2016 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015), *reargd. denied*, 2016 WL 878121 (Del. Ch. Mar. 8, 2016); s*ee also Korn v. Wagner*, 2012 WL 5355662 at *2-3 (Del. Super. Ct. Sept. 28, 2012) (plaintiff lacked taxpayer standing where he sought to compel auditor to audit school district use of funds).

48 *Korn*, 922 A.2d at 410-11.

49 *Id.* at 411.

light taxes, mooting that claim, resulting in its dismissal.[50] Korn sought fees.

The *Korn* Court noted that in *Dover* the plaintiffs were "not entitled to a fee award because"—although they created a social benefit by causing the DPC to "do its job properly"—that "social benefit [did] not justify an exception to the traditional rule that each party must pay its own fees."[51] However, the Court concluded, the plaintiffs in *Korn* "did more than merely achieve the social benefit that invariably results when a government agency is required to its job."[52] The Court agreed with the Court of Chancery that the interest savings from the non-issuance of County bonds was "too speculative to be considered in evaluating [an] application for fees."[53] On the other hand, the return of $540,000 to light tax payers provided "a tangible benefit that [was] both substantial and quantifiable," and therefore the "taxpayers who received that benefit should, as a matter of equity, share the attorneys' fees incurred to obtain it."[54]

The *Korn* Court held that "the rationale of the common benefit exception applies to **taxpayer suits** that result in a **quantifiable monetary benefit** for **all taxpayers**."[55]

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50 *Id.*
51 *Id.* at 413.
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.* at 410 (emphasis supplied).

4. The Court of Chancery Ignored *Dover* and Expanded *Korn* Beyond Taxpayer Suits.

County Defendants below argued that, under *Dover*, the Court of Chancery could not award fees in the underlying litigation because compelling reassessment amounted to causing the County Defendants, as governmental entities, to "perform properly." A532; A606-07. County Defendants also argued that *Korn* was inapplicable because Plaintiffs were not taxpayers, the litigation was not a taxpayer suit, Plaintiffs had not created a quantifiable monetary benefit, and Plaintiffs were seeking to have their fees paid by parties other than identifiable and benefitted taxpayers. A533-45; A605-07.

i. *The Court of Chancery Ignored Dover and Should be Reversed Under the Doctrine of Stare Decisis.*

In the Order, the Court of Chancery never directly addressed the limitation imposed on awarding fees in public interest litigation established in *Dover*.[56] Instead, the Court of Chancery framed its Order as purportedly relying on general principles regarding the common benefit exception under Court of Chancery precedent. Order ¶¶8-9 & 12. However, general Court of Chancery precedent

[56] County Defendants raised the argument that the Court of Chancery had not followed *Dover* again in their application to certify an interlocutory appeal. A642-44 ¶¶2-4; A649 ¶ 18. The Court of Chancery never mentioned *Dover* in its decision denying that application. *See DEO III*, 2022 WL 1220075.

cannot preempt *Dover*,[57] which specifically precluded fee shifting when the benefit obtained is causing government entities to purportedly perform properly.[58]

Plaintiffs brought the litigation to compel the Counties to comply with the True Value Statute and Uniformity Clause by reassessing.[59] The Court of Chancery concluded that the only way to compel the Counties to reassess was through the litigation. Order ¶13. The Court of Chancery also held that bringing the County Defendants "into compliance with the law" is a benefit to County Defendants that justified awarding Plaintiffs fees. *Id.* ¶23. The inescapable conclusion is that the litigation was brought to cause the County Defendants to "properly perform" their obligation to comply with the True Value Statute and Uniformity Clause by reassessing, and that the Court of Chancery awarded fees on that basis in direct contravention of this Court's admonition against doing so in *Dover*.[60]

"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

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[57] *See inTEAM Assoc., LLC v. Heartland Payment Sys., LLC*, 2021 WL 5028364, at *11 (Del. Ch. Oct. 29, 2021) (the Court of Chancery is "bound by … most recent pronouncement of … controlling" law by Delaware Supreme Court); *XRI Inv. Holdings LLC v. Holifield*, 283 A.3d 581, 611 (Del. Ch. 2022) ("This court must follow binding Delaware Supreme Court precedent.").

[58] *See Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) ("The doctrine of *stare decisis* operates to fix a specific legal result to facts in a pending case based on a judicial precedent directed to identical or similar facts in a previous case in the same court or one higher in the judicial hierarchy.") (citation omitted).

[59] *See supra*, Statement of Facts, Part D.

[60] *Dover*, 902 A.2d at 1091; *see also Korn*, 922 A.2d at 413.

aside ... and [it] should be followed except for urgent reasons and upon clear manifestation of error."[61] The Court of Chancery's disregard for *Dover* should be reversed under the doctrine of *stare decisis*.

ii. *The Court of Chancery Expanded Korn Beyond Taxpayer Suits.*

According to the Court of Chancery, the *Korn* "decision applied the common benefit doctrine to a suit brought by a taxpayer for the benefit of taxpayers, but the Delaware Supreme Court did not limit the doctrine to that setting." Order ¶11. That expansionary reading cannot be derived from the *Korn* decision and should be rejected.

The first sentence of *Korn* states: "In this appeal, we consider whether **taxpayers** may recover attorneys' fees if their litigation satisfies the requirements of the so-called 'common benefit' exception to the standard rule, under which each party bears its own attorneys' fees."[62] Within the same paragraph, the Court stated: "We hold that that the rationale of the common benefit exception applies to **taxpayer suits** that result in a quantifiable monetary benefit for all **taxpayers**."[63] The use of the phrase "taxpayer suit" in *Korn* is itself limiting, because such suits are a "a

61 *Account*, 780 A.2d at 248 (quotation omitted).
62 922 A.2d at 410 (emphasis supplied).
63 *Id.* (emphasis supplied).

narrow set of claims involving challenges either to expenditure of public funds or use of public lands,"[64] not public interest litigation broadly.

The *Korn* Court further limited the scope of its review by observing that the Court of Chancery "did not address the question of whether the common benefit exception to the standard rule should be applied in the context of a **taxpayer suit**."[65] The *Korn* Court did not frame the Court of Chancery's error in *Korn* as failing to apply a sufficiently expansive view of the common benefit exception in public interest litigation (as the Court of Chancery did in the Order), but failing to consider whether the common benefit exception applies in taxpayer suits.

Furthermore, if—as the Court of Chancery (Order ¶11) and Plaintiffs (A568-69) contend—the *Korn* Court intended to extend the common benefit exception to public interest litigation like the litigation in *Dover*, it made little sense to **distinguish** the litigation in *Dover* from the litigation in *Korn*, as the *Korn* Court did.[66]

Finally, the Court of Chancery and Plaintiffs insist that the *Korn* Court meant to apply the common benefit exception to public interest litigation generally, despite failing to expressly do so. "[A] decision does not provide authority for a subject if

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64 *See supra* nn.46-47.

65 *Korn*, 922 A.2d at 412 (emphasis supplied).

66 *Id.* at 413.

the court did not address it at all."[67] There is no plausible reading of *Korn* as applying beyond taxpayer suits. Because this is not a taxpayer suit, *Korn* is inapplicable.

5. None of the Requirements of *Korn* were Satisfied.

The *Korn* Court awarded fees: (1) in a taxpayer suit;[68] (2) for benefits provided to an identifiable group of taxpayers;[69] (3) that were substantial and quantifiable;[70] and, (4) payable by the benefitted taxpayers.[71] None of those conditions were satisfied in the litigation.

The litigation was not a taxpayer suit.[72] Plaintiffs were not challenging the County Defendants' use of public funds; they were challenging the process by which the Counties assess property for taxation.[73] Plaintiffs were incapable of identifying the taxpayers benefitted or quantifying any benefit provided to taxpayers (A492 n.5) and abandoned any argument that they were entitled to fees based on taxpayer benefit. A578. The Court of Chancery concluded that some taxpayers will benefit from reassessment if their tax liability is reduced, but failed to quantify that benefit

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67 *250 Executive, LLC v. Christina Sch. Dist.*, 2022 WL 588078 at *5 (Del. Ch. Feb. 28, 2022).

68 922 A.2d at 410; *see also supra*, Part I.C.3.

69 *Id.* at 413 (light-tax paying taxpayers).

70 *Id.*

71 *Id.*

72 *See supra*, Statement of Facts, Part C; Part I.C.4.ii.

73 *See Wagner*, 2012 WL 5355662, at *2-3 (rejecting taxpayer standing where plaintiff sought audit of school district funds but alleged no misuse of those funds).

(Order ¶21) and then incorrectly concluded that Plaintiffs' fees should be borne by **all** County taxpayers, not just benefitted taxpayers. *Id.* ¶¶23-25. By requiring all taxpayers to bear the burden of unquantified benefits to a subset of taxpayers, the Court of Chancery "sanction[ed] the invidious treatment of [taxpayers], which [is] *inequitable* and … lead[s] to the absurd result of exposing [taxpayers] to non-*pro rata* liability" for Plaintiffs' fees.[74] The *Korn* elements have not been satisfied and the Court of Chancery erred by purporting to apply *Korn* in awarding Plaintiffs fees.

6. Summation: The Order Should Be Reversed.

The litigation was brought to compel government entities to purportedly "perform properly." Under *Dover*, fees cannot be awarded to compel government entities to "perform properly." The Court of Chancery ignored that proscription altogether. *Korn* expanded the common benefit exception only in taxpayer suits. The litigation was not a taxpayer suit, yet the Court of Chancery awarded fees under *Korn*. The Order countermands both *Dover* and *Korn* and should be reversed.

[74] *City of Miami Gen'l Emp. & Sanitation Emp. Ret. Tr. v. C&J Energy Services, Inc.*, 2018 WL 508583, at *6-7 (Del. Ch. Jan. 23, 2018) (rejecting plaintiff's effort to have the estate of a 26% shareholder of the benefitted company pay all fees).

II. THE COURT OF CHANCERY ERRED IN AWARDING FEES FOR SPECULATIVE BENEFITS INURING TO BENEFICIARIES UNRELATED TO THE COUNTY DEFENDANTS.

A. Question Presented.

Did the Court of Chancery misinterpret the common benefit exception in awarding fees based on speculative benefits afforded to beneficiaries unrelated to the County Defendants?

The County Defendants argued below that: (i) the Court of Chancery could not award fees to Plaintiffs, payable by the Counties, for benefits realized by school and vocational districts and Disadvantaged Students whose interests were not represented by County Defendants; and (ii) future tax increases that may or may not be imposed were too speculative a basis upon which to award fess under the common benefit exception. *See* A537-42; A603-04, 9:16-10:3; A607, 13:14-19.

B. Standard of Review.

The Court of Chancery's interpretation of the common benefit exception is subject to *de novo* review.[75]

C. Merits of the Argument.

The Court of Chancery erred by: (1) awarding fees payable by County Defendants based on benefits inuring to school and vocational districts and Disadvantaged Students who are unrelated to County Defendants; and, (2) awarding

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[75] *See Gannett Co., Inc.*, 840 A.2d at 1240; *Dover*, 902 A.2d at 1089.

fees based on speculative tax increases that require intervening action by independent elected and appointed officials to come into existence.

1. Requiring Parties to Pay Attorneys' Fees and Expenses for Benefits Realized by Unrelated Beneficiaries is Unprincipled.

"The purpose underlying … fee-shifting doctrines is to balance the equities to prevent **persons who obtain the benefit of a lawsuit** without contributing to its costs from being unjustly enriched at the successful litigant's expense."[76] The Court of Chancery turned this principle on its head, declaring that equity allows the Court to "require a party to pay the award when it is best positioned to compensate the plaintiffs on behalf of the parties that benefitted." Order ¶24. In other words, according to the Court of Chancery, under the common benefit exception, it is irrelevant who benefits, provided the defendants have deep pockets. However, "[t]he common benefit doctrine does not operate as a generalized mechanism for achieving redistributive justice."[77]

The common benefit exception to the American Rule is premised upon the plaintiff and the beneficiaries sharing an identity of interests.[78] For instance,

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[76] *Dover*, 902 A.2d at 1091 (quotation omitted) (emphasis supplied); *see also Korn*, 922 A.2d at 410 ("The exception is premised on the equitable principle that those who benefit from litigation would be unjustly enriched fit he entire cost of the action were borne by the successful plaintiff.").

[77] *Judy v. Preferred Comm'n Sys., Inc.*, 2016 WL 4992687 at *15 (Del. Ch. Sept. 19, 2016).

[78] *See, e.g., Richman*, 185 A.2d at 885 ("Recovery of expenses in [common benefit] cases is predicated on the conferring of some benefit on the interested class

shareholders of a company benefitted by a derivative suit hold an identity of interest in the company as shareholders with the plaintiff.[79] Indeed, the Court of Chancery acknowledged that it is shareholders' interest in the corporation's assets that justifies having the corporation pay fees. Order ¶24.[80]

Here, however, no identity of interest exists between County Defendants and the school and vocational districts or Disadvantaged Students as students. The County Defendants are political appointees whose only role in public education is to collect and remit school taxes.[81] Neither the County Defendants nor the Counties have any authority to administer schools.[82] As the Court of Chancery stated,

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and not merely on petitioner himself."); *Market St. Securities, Inc. v. Midwest Air Grp., Inc.*, 2009 WL 2985451, at *5-6 (E.D. Wisc. Sept. 15, 2009) ("Without [an] identity of interest between the defendant and beneficiaries, it would be improper to charge a defendant with plaintiff's attorney's fees….") (citing *Alyeska*, 421 U.S. at 265 n.39); Alan Hirsch *et al., Awarding Attorneys' Fees and Managing Fee Litigation*, 104 & n.585 (3d ed. Fed. Jud. Ctr. 2015) ("If the defendant and the beneficiaries have no … identity of interests, an award against the defendant is improper because it would shift the costs unfairly.") (citing *Johnson v. HUD*, 939 F.2d 586, 590 (8th Cir. 1991); *Oster v. Bowen*, 682 F. Supp. 855, 857 (E.D. Va. 1988), *appeal dismissed*, 859 F.2d 150 (4th Cir. 1988); *Home Sav. Bank v. Gillam*, 952 F.2d 1152, 1163 (9th Cir. 1991)).

79 *See Richman*, 185 A.2d at 885 ("[T]he assets of the corporation [are] a fund belonging to the stockholders in common.") (citation omitted).

80 Citing *In re First Interstate Bancorp Consol. S'holder Litig.*, 756 A.2d 353, 362 (Del. Ch. 1999), *aff'd sub nom. First Interstate Bancorp v. Williamson,* 755 A.2d 388 (Del. 2000); *Richman*, 185 A.2d at 886.

81 *See* 9 *Del. C.* §§ 1371; 4123; 4124; 7004; 14 *Del. C.* § 1917.

82 *See generally*, Del. Const. art. X, § 1. As the Court of Chancery discussed at length, the Education Clause of the Delaware Constitution was adopted to take control of schools away from the Counties. *Delawareans for Ed. Opp'y v. Carney*, 199 A.3d 109, 143-49 (Del. Ch. 2018). The Counties represent the interests of

Delaware's "commitment to provide a free public education to all of Delaware's children … is a constitutional obligation **that rests squarely on the State**."[83]

The Plaintiffs (A583-84) and the Court of Chancery (Order ¶24) cited *First Interstate Bancorp* to justify the redistribution of fees based on the Counties' ability to pay. *First Interstate Bancorp* is not analogous to this case. The plaintiff in *First Interstate Bancorp* challenged the proposed acquisition of a target company by a suitor, resulting in the target's acquisition by Wells Fargo.[84] The plaintiff sought fees from Wells Fargo. The Court of Chancery required Wells Fargo to pay the fees because: (i) the benefitted shareholders of the target became shareholders of Wells Fargo; (ii) Wells Fargo likely agreed to pay plaintiffs' fees; and, (iii) Wells Fargo benefitted from the plaintiff's efforts to scuttle the acquisition by the unsuccessful suitor.[85] No similar circumstances obtain here.

The Court of Chancery rejected shifting fees onto a litigant for having benefitting unrelated third parties in *Mentor Graphics*.[86] There, the benefit asserted

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Disadvantaged Students in other areas delegated to the Counties, but not in their education.

83 *Carney*, 199 A.3d at 114 (emphasis supplied); *see also id.* at 121 (Title 14 of the Delaware Code "vested 'the general administration of the education interests of the State … in a Department of Education of the Executive Branch.'") (quoting 14 *Del. C.* § 101); *id.* at 137 ("Providing public schools ranks at the very apex of the function of a State.") (quoting *Wis. v. Yoder*, 406 U.S. 205, 213 (1972)).

84 756 A.2d at 356.

85 *Id.* at 360-62.

86 789 A.2d at 1231.

was, primarily, the creation of a common fund through an unsuccessful bidder's litigation and pursuit of the target company.[87] The common fund was the increased share price realized by the target's shareholders.[88] However, the plaintiff was not seeking fees from the target's shareholders, but from the successful bidder, who was not a beneficiary of the fund created by the acquisition.[89] The Court of Chancery held that requiring the acquirer to pay the plaintiff's fees "would be a totally unprincipled result which runs counter to the rationale that those who receive the benefit from a shareholder's litigative efforts should share the costs of creating that benefit."[90] Awarding fees to Plaintiffs, payable by the Counties, for benefits to school and vocational districts or Disadvantaged Students, is an equally unprincipled result.

The Plaintiffs (A582-83) and the Court of Chancery[91] sought to distinguish *Mentor Graphics* factually (while insisting that *First Interstate Bancorp* is relevant), but it is the principle that matters—**there must be an identity of interest between the defendant and the beneficiaries to shift fees under the common benefit exception.** Because there is no identity of interests between the County Defendants

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87 789 A.2d at 1222. The plaintiff in *Mentor Graphics* also asserted that it created non-monetary benefits, which was rejected because the plaintiff did so in pursuit of its own interests. *Id.* at 1226.

88 *Id.* at 1233.

89 *Id.*

90 *Id.*

91 *DEO III*, 2022 WL 1220075 at *12.

and the school and vocational districts or Disadvantaged Students, the Court of Chancery's award of fees to Plaintiffs, payable by the Counties, is an unprincipled and unprecedented application of the common benefit doctrine that should be reversed.

2. The Benefit to School and Vocational Districts and Disadvantaged Students Are Attenuated and Speculative.

A causal connection must exist between the litigation and the benefit to permit fee shifting. Order ¶17.[92] Additionally, in *Korn*, this Court held that "speculative" benefits cannot sustain fee shifting[93] and the Court of Chancery has held that fee shifting is improper where the existence of the benefit depends upon theoretical conduct.[94] The Order disregards all of these limitations.

The school tax revenue increases that Plaintiffs and the Court of Chancery assumed into existence will occur only if a majority of the members on 16 school boards and three vocational boards (approximately 101 individuals)[95] vote to adopt

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92 Citing *Dover*, 902 A.2d at 1089.

93 922 A.2d at 413.

94 *See Judy*, 2016 WL 4992687 at *17 (applicant's "theory of causation is the proverbial horseshoe nail that lost the kingdom"); *La. St. Empl. Retir. Sys. v Citrix Sys., Inc.*, 2001 WL 1131364, at *7 (Del. Ch. Sept. 19, 2001) (fees denied where benefit required theoretical conduct); *Wis. Inv. Bd. v. Bartlett*, 2002 WL 568417, at *6 (Del. Ch. Apr. 9, 2002), *aff'd*, 2002 WL 31443536 (Del. Oct. 25, 2002) (rejecting "benefit theory" that "relie[d] on an abstract theoretical model lacking connection to the real world").

95 *See* 14 *Del. C.* § 1052(a) (five members on school boards); *id.* § 1064(a) (seven members on vocational boards).

those tax increases[96] at some point in 2024 or 2025.[97] Neither Plaintiffs nor the Court of Chancery cited any evidence in the record to support the conclusion that school and vocational board members will "happily" increase taxes because not doing so would be "irrational."

In fact, the Court of Chancery's inference that school and vocational boards would be "irrational" not to increase taxes following reassessment is contradicted by the Court of Chancery's own observations regarding taxpayer behavior. Elected school board members—who face "backlash from voters confronted with recurring requests to have their taxes raised"[98] **with** voter consent (through referenda)—might rationally think twice before raising school taxes **without** taxpayer consent following reassessment, given the general opposition to tax increases observed by the Court of Chancery, particularly if they may need to ask taxpayers to approve referenda in the future.[99]

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96 *See supra*, nn. 19-21.

97 *See supra*, Statement of Facts, Part G.

98 *DEO II*, 239 A.3d at 471.

99 *See Young*, 159 A.3d at 725; *DEO I*, 2018 WL 4849935 at *3.

III. THE COURT OF CHANCERY INCORPORATED THE PRIVATE ATTORNEY GENERAL EXCEPTION TO THE AMERICAN RULE INTO DELAWARE JURISPRUDENCE DESPITE ITS REJECTION IN *DOVER*.

A. Question Presented.

Did the Court of Chancery err by adopting the private attorney general exception to the American Rule in contravention of *Dover*?

The County Defendants asserted that the Plaintiffs were asking the Court of Chancery to create a new exception to the American Rule. A607-08, 13:14-14:17. They then argued that the Court of Chancery had created a new exception to the American Rule in their application to certify an interlocutory appeal from the Order (A644; A649), which the Court of Chancery addressed while denying that application.[100]

B. Standard of Review.

The Court of Chancery's expansion of the exceptions to the American Rule to include the private attorney general exception is subject to *de novo* review.[101]

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[100] *DEO III*, 2022 WL 1220075 at *11: *see also Watkins v. Beatrice Cos., Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("In determining whether an issue has been fairly presented to the trial court, this Court has held that the mere raising of the issue is sufficient to preserve it for appeal. In a case where the trial court noted in passing that it finds an argument unpersuasive, such issue was deemed to have been fairly raised for the purpose of Supreme Court Rule 8.") (citing *Sergeson v. Del. Tr. Co.*, 413 A.2d 880, 881-82 (Del. 1980)).

[101] *See Gannett Co., Inc.*, 840 A.2d at 1240; *Dover*, 902 A.2d at 1089.

C. Merits of the Argument.

The Court of Chancery erred by effectively adopting the private attorney general exception. Although the Court of Chancery did not overtly adopt the private attorney general exception, it tacitly did so by relying on criteria adopted by courts that have adopted that exception in awarding plaintiffs fees. Unless reversed, the Order establishes precedent upon which fees may be awarded under the private attorney general exception rejected in *Dover*.

1. The Private Attorney General Exception.

The private attorney general exception is an equitable exception[102] that:

> [R]ests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practice matter frequently be infeasible.[103]

"[T]he fundamental objective of the private attorney general doctrine of attorney fees is 'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees … to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.'"[104]

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102 *See, e.g.*, *Serrano v. Priest*, 569 P.2d 1303, 1313-15 (Cal. 1977) (discussing equitable nature of exception).

103 *In re Head*, 721 P.2d 65, 67 (Cal. 1986) (citation omitted).

104 *Id.* at 67 (quoting *Serrano*, 569 P.2d at 1303).

A commonly used three-factor analysis under the private attorney general exception considers: "(1) the societal importance of the vindicated right; (2) the necessity for private enforcement and the accompanying burden; and (3) the number of people benefitting from the decision."[105] The private attorney general exception is premised upon society at large paying for the creation of a societal benefit.[106]

2. The Court of Chancery Adopted the Private Attorney General Exception in All But Name.

Plaintiffs advocated for the adoption of the private attorney general exception without naming it as such, telling the Court of Chancery that the litigation was "not likely to be brought by a private individual" and that:

> it is … important that the Court indicate for parties who will have problems in the future, that a fee is possible for lawyers … who take a case that nobody else is willing to take, that addresses a significant violation of law that is hurting people…. A599.

The Court of Chancery applied the private attorney general exception in all but name in the Order. The Court of Chancery declared that "[t]he litigation that the plaintiffs pursued is the type of socially beneficial litigation that should be

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[105] *Town of St. John*, 751 N.E. 2d at 662 (citing *Serrano*, 569 P.2d at 1314): *see also* Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 Cal. L. Rev. 1929, 1932-33 (Dec. 1985) (same factors) (citations omitted) [hereinafter "Cheng"].

[106] *See, e.g.*, Cheng, 73 Cal. L. Rev. at 1931 ("[T]he courts undoubtedly felt that by placing the plaintiff's litigation costs on the defendant-state, those costs would be borne by those receiving the benefits, society in general.").

rewarded." Order ¶15. It also held that "[p]ublic policy supports providing an incentive for litigants like the plaintiffs who take on difficult statutory and constitutional issues like those litigated" by Plaintiffs. *Id.* ¶13. It is unclear whether the Court of Chancery viewed the right vindicated through the litigation as the right to a public education, the right to tax uniformity, or both. *Id.* Nevertheless, the Court of Chancery believed that awarding fees advanced an important public policy. *Id.*

The Court of Chancery also declared that it was not "reasonably likely that anyone except groups like the plaintiffs would be able to mount a meaningful challenge." *Id.* ¶14. Indeed, the Court of Chancery went so far as to characterize the Plaintiffs as "courageous." *Id.* Thus, it concluded that there was a need for private enforcement.

The Court of Chancery took an expansive view of the pool of beneficiaries benefitted by the underlying litigation, including school and vocational districts (*id.* ¶19), Disadvantaged Students (*id.*), some taxpayers (*id.* ¶21), the Counties (*id.* ¶23), and even all county residents (*id.*). The Court of Chancery's conclusion that all County residents benefitted from the litigation is antithetical to the common benefit exception,[107] but is consistent with the private attorney general exception.

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[107] *See Stevens v. Mun. Ct. for San Jose-Milpitas Jud. Dist.*, 603 F.2d 111, 113 (9th Cir. 1979) ("The common benefit exception to the rule has no application to a benefit to all citizens of a county … for such a broad class would merge the exception

Finally, the Court of Chancery held that the Counties were best situated to pay Plaintiffs' fees, rather than the beneficiaries identified in the Order. *Id.* ¶¶24-25. The Court of Chancery previously held that "permitting plaintiff to cherry-pick which [beneficiaries] should foot the bill for a potential fee award cannot be squared with the equitable rationale of the [common benefit] doctrine."[108] By cherry-picking the Counties' pockets rather than having the myriad beneficiaries it identified pay Plaintiffs' fees, the Court of Chancery must have been applying an exception other than the common benefit exception; namely, the private attorney general exception, which does not consider whether the fees are paid by beneficiaries.[109]

3. The Private Attorney General Exception Has Been Widely Rejected, Including by This Court.

The United States Supreme Court rejected the private attorney general exception in *Alyeska*.[110] Prior to *Dover*, numerous state courts rejected that

into the private-attorney-general concept rejected in *Alyeska*, 421 U.S. at 263….") (citing, among other authorities, *Satoskar v. Ind. Real Est. Comm'n*, 517 F.2d 696, 698 (7th Cir. 1975), *cert. denied* 423 U.S. 928 (1975)).

108 *C&J Energy Services, Inc.*, 2018 WL 508583 at *6-7; *cf. John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 963 (Cal. 1989) ("The court's proper function is not to search for deep pockets.") (Eagleson, J. concurring & dissenting).

109 *See supra* nn.102-106.

110 421 U.S. 240 (1975).

exception, and more have done so since.[111] When provided the opportunity to adopt the private attorney general exception in *Dover*, this Court declined to do so.[112]

In *Alyeska*, the Supreme Court recognized that Congress is best enabled to determine which rights justify fee shifting.[113] This Court, in *Dover*, similarly deferred to the General Assembly in creating new exceptions to the American Rule in public interest litigation.[114]

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111 *See Shelby Cnty. Comm'n v. Smith*, 372 So.2d 1092, 1096-97 (Ala. 1979); *Doe v. Heintz*, 526 A.2d 1318, 1323 (Conn. 1987); *Hamer*, 356 N.E.2d at 528; *Town of St. John*, 751 N.E.2d at 664; *Pearson v. Bd. of Health of Chicopee*, 525 N.E.2d 400, 403 (Mass. 1988); *Nemeth v. Abonmarch Dev., Inc.*, 576 N.W.2d 641, 651-53 (Mich. 1988); *Fordice v. Thomas*, 649 So.2d 835, 846 (Miss. 1995); *N.M. Right to Choose*, 986 P.2d at 453-54; *Jones*, 515 A.2d at 862; *Providence J. Co. v. Mason*, 359 A.2d 682, 688 (R.I. 1976); *Van Emmerik v. Mont. Dak. Utils. Co.*, 332 N.W.2d 279, 284 (S.D. 1983); *Robes*, 636 A.2d at 349-50; *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986). The doctrine has also been rejected by intermediate appellate courts in several states, including in decisions left undisturbed for decades. *See, e.g.*, *The League of Women Voters of Fla. v. Detzner*, 188 So.3d 68, 74 (Fla. Ct. App. 2016); *Moore v. City of Pacific*, 534 S.W.2d 486, 505 (Mo. Ct. App. 1976); *Hoke Cnty. Bd. of Edu. v. State*, 679 S.E.2d 512, 519 (N.C. Ct. App. 2009) (applying *Stephenson v. Bartlett*, 628 S.E.2d 442, 445 (N.C. Ct. App. 2006)); *Sutherland v. Nationwide Gen. Ins. Co.*, 657 N.E.2d 281, 300 (Ohio Ct. App. 1995), *appeal denied*, 652 N.E.2d 799 (TABLE) (Ohio 1995); *Tex. Empl. Comm'n v. Camarena*, 710 S.W.2d 665, 670-71 (Tex. Ct. App. 1986), *rev'd on other grounds*, 754 S.W.2d 149 (Tex. 1988). The Utah Supreme Court adopted the exception and was overturned by the legislature. *See Utahns for Better Dental Health-Davis, Inc. v. Davis Cnty. Clerk*, 175 P.3d 1036, 1040-41 (Utah 2007); Utah Code Ann. § 78B-5-825.5.

112 902 A.2d at 1091.

113 421 U.S. at 263-64.

114 902 A.2d at 1091 (emphasizing that public benefits do not justify "a new *judge*-made exception to the American Rule").

The Indiana Supreme Court articulated why courts should be charry about adopting the private attorney general exception in *Town of St. John*.[115] *First*, the private attorney general exception requires courts to decide which rights are sufficiently important to justify fee shifting and which are not, and there is no workable basis upon which to make that determination.[116] *Second*, the private attorney general exception could attract "bounty hunters."[117] This case illustrates the merit of both concerns.

First, it is unclear what rights were vindicated through the litigation. Was it the right of children to a public education, or the rights of taxpayers to property tax uniformity? Regardless, how did the Court of Chancery determine that the vindicated right was sufficiently important to merit fee shifting? How will future courts decide whether a right is sufficiently meritorious to justify fee shifting? Is the

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115 751 N.E.2d at 664.

116 *Id.* at 662 ("societal importance is in the eye of the beholder"); *see also Alyeska*, 421 U.S. at 263-64 ("[I]t would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former."); Cheng, 73 Cal. L. Rev. at 1935 ("The problem is apparent: the determination of importance is essentially a subjective one, perhaps inherently incapable of principled judicial resolution. Where a court's decision on whether to award attorneys' fees is dependent on subjective criteria, the outcome of the court's determination can vary with each judge's personal values. Inconsistent outcomes, in turn, undermine the judiciary's credibility.").

117 *Town of St. John*, 751 N.E.2d at 662.

standard premised upon anything more than subjective judicial impressions of the plaintiff's courage?

For example, the Delaware Superior Court properly declined to award fees in a case involving the health insurance benefits of retired Delaware employees;[118] a case that could possibly qualify for fee shifting under the private attorney general exception.[119] What principle justifies awarding fees to some plaintiffs based upon the perceived public benefit but not others? No such principle exists, because the private attorney general exception turns on whether individual judges deem a cause sufficiently worthy to award fees. The *Dover* court wisely left those determinations to the General Assembly. This Court should do the same and reverse the Order.

Second, Plaintiffs deployed a "litigate to legislate" strategy. The Vice Chancellor invited the underlying litigation to force elected officials to reassess; Plaintiffs accepted that invitation[120] and were awarded $1.5 million in fees. Even if future litigation is not invited through expansive *dicta* as in *Young*, public interest litigants now have an incentive to circumvent elected officials and achieve their policy goals through Delaware courts, because doing so will pay better. The private

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118 *See RiseDelaware Inc. v. DeMatteis*, 2023 WL 1859735, at *2 (Del. Super. Ct. Feb. 8, 2023), *appeal dismissed*, 2023 WL 2761690 (Del. Apr. 3, 2023).

119 *See, e.g.*, *City of Oakland v. Oakland Police & Fire Ret. Sys.*, 29 Cal. App. 5th 688 (Cal. Ct. App. 2018) (awarding fees to retiree association for prevailing in dispute over retirement benefits under private attorney general exception).

120 *See supra*, Statement of Facts, Part B.

attorney general exception invites the usurpation of elected officials by unelected litigants and Delaware courts.[121]

4. This Court Should Reject the Private Attorney General Exception Under the Doctrine of *Stare Decisis*.

The *Dover* Court rejected the private attorney general exception in deference to the General Assembly,[122] and the Court should do the same under the doctrine of *stare decisis*.[123] The majority of courts outside of Delaware have rejected the private attorney general exception because it requires courts to make policy decisions best left to the legislature and invites litigation usurping elected officials to effectuate public policy. The Court of Chancery adopted the private attorney general exception implicitly. This Court should again reject that exception explicitly and overturn the Order.

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121 The Court of Chancery peremptorily rejected this argument in the Order, noting that Chancellor Chandler expressed concern that this Court's decision in *Korn* would invite more public interest litigation, but public interest litigation did not proliferate. Order ¶11 (citing *Korn II*, 2007 WL 2981939, at *2). If everybody prior to Plaintiffs recognized *Korn* as limited to taxpayer suits, that might explain why public interest litigation did not proliferate after *Korn*.

122 *Dover*, 902 A.2d at 1091.

123 *See Account*, 780 A.2d at 248.

CONCLUSION

The Order (i) contravenes *Dover* by awarding fees for compelling government entities to "perform properly;" (ii) exceeds *Korn* by awarding fees in a non-taxpayer suit; (iii) upends the common benefit exception by awarding fees payable by defendants who have no identity of interest with the putative beneficiaries; and, (iv) improperly relies upon the application of the private attorney general exception to the American Rule that was rejected by the Court in *Dover* and by nearly every other court in the United States. County Defendants respectfully request that this Court reverse the Order.

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