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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TED D. KELLNER, Plaintiff Below, Appellant/Cross-Appellee, v. AIM IMMUNOTECH INC., THOMAS EQUELS, WILLIAM MITCHELL, STEWART APPELROUTH, and NANCY K. BRYAN, Defendants Below, Appellees/Cross-Appellants.	)	No. 3, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2023-0879-LWW

APPELLANT'S REPLY BRIEF
AND CROSS-APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

If any corporation ever needed a contested board election, it is AIM ImmunoTech Inc. Under the incumbents' tenure, AIM's stock lost 99% of its value. That is where "[t]his case starts." Br. 1. It can also end there because stockholders' right to vote trumps Appellees' desire to maintain their seats without contest. Nothing in Appellees' bylaw obstacle course has anything to do with a transparency interest. It is a pretext. The incumbents cannot win a contested election, so they have ensured none will occur. This Court should draw a predictable line to ensure what the Board did will not happen again.

Appellees attempt to distract the Court from their own disloyalty by dropping the word "felon" early and often in their brief. But their assertions have nothing to do with this case. The trial court found that neither individual they reference (Tudor or Xirinachs) was involved in the 2023 proxy campaign. Moreover, the Kellner Notice—which Appellees neglect to address—prominently discloses Tudor and Xirinachs, naming each nearly 30 times. Any non-pretextual disclosure interest is satisfied. It is time for voters to vote. If stockholders agree with Appellees' assertions, they are free to re-elect the incumbents; if not, they can oust them. But without this Court's intervention, stockholders will have no choice at all.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

4. Denied. The trial court had no choice but to conclude that four Bylaw Amendments that are preclusive and coercive, and untailored to any legitimate interest, fail enhanced scrutiny.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY APPLIED INEFFECTIVE PRIOR BYLAWS

Kellner demonstrated two errors in the trial court's application of the repealed 2016 AAU Provision: (1) it was not the basis of the Rejection and (2) it lacked legal effect as of August 2023. Kellner Br. 12-18. Appellees do not justify this *deus ex machina* outcome.

A. The Trial Court Erred in Concocting *Post Hoc* Justifications

The Rejection rested exclusively on the 2023 Bylaw Amendments. *See* A1056-57. Appellees provide reasons that "[t]he Court of Chancery … properly invoked" the 2016 AAU Provision. Br. 59. But the trial court lacked authority to invoke justifications that "did not drive" the Rejection. *Pell v. Kill*, 135 A.3d 764, 790 (Del. Ch. 2016).

Appellees respond that "the Board did 'rely' on the arrangements or understandings clause" of the 2023 Bylaws and propose the "result is the same" "whether titled '2016' or '2023.'" Br. 16. But the Board did *not* rely on the 2016 AAU Provision, and the result is *not* the same because board members "cannot justify their conduct based on … beliefs they did not hold." *Williams Companies S'holder Litig.*, 2021 WL 754593, at *23 (Del. Ch. Feb. 26, 2021); *see Chesapeake Corp. v. Shore*, 771 A.2d 293, 332 (Del. Ch. 2000). The Rejection contains every basis the Board's counsel could concoct, with both the skill and incentive to be

exhaustive.[1] The 2016 AAU Provision was beyond their imagination. Enhanced scrutiny is meant to "expos[e] pre-textual justifications" by placing the "burden on the party in power to identify its legitimate objectives and to explain its actions as necessary to advance those objectives." *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007). The trial court invented pretexts to benefit the party in power.

Appellees cite no authority supporting that approach. They note a "bylaw must be 'construed as it is written,'" Br. 61 (citation omitted), but the Court here must also construe the Rejection as written, which unambiguously cites only the 2023 AAU provision. A1056. Even if "[t]he Board never 'repealed' the 2016 arrangements or understandings clause," Br. 62, Appellees' argument would not work. Nor does it matter whether the 2016 AAU Provision is "narrower" than the 2023 AAU Provision. Br. 61. The material fact is that the provisions are *different*; the Board knew invoking the 2023 AAU Provision was not invoking the 2016 AAU Provision.

[1] This included a reason the SEC found incomprehensible and inconsistent with proxy rules. SEC Letter to AIM ¶8 (Oct. 19, 2023), https://www.sec.gov/Archives/edgar/data/946644/000000000023011470/filename1.pdf

B. A Repealed Provision Could Not Support the Rejection

The 2016 AAU Provision was, besides, unavailable. The Board replaced it with the 2023 AAU Provision. Appellees are incorrect in contending that "[t]he Board never 'repealed'" the 2016 AAU Provision. Br. 62. The Board relied on "a redline showing all changes" of the 2023 Amendments "against the current [2016] bylaws," A272, and it shows every word of the 2016 AAU Provision crossed out, *see* A277-78.

Appellees propose that reversion to the 2016 AAU Provision was a proper remedy after the trial court declared the 2023 AAU Provision void, Br. 58-59, but they do not explain why they should benefit from their own breach of fiduciary duties. One case Appellees oddly cite rejected that concept, holding that "an individual who abuses governance power granted to him should not inappropriately remain in a position superior to those he or she seeks to govern illegitimately," that remedies must "favor … the franchise," and that "[j]udicial review did not find its justification in protecting aristocrats." *Friends of Vill. of Cinderberry v. Vill. of Cinderberry Prop. Owners Ass'n, Inc.*, 2010 WL 1843706, at *8 & n.44 (Del. Ch. May 5, 2010) (citation omitted).

Regardless, the trial court lacked authority to apply a repealed provision. Appellees rely principally on a decision (which did not apply enhanced scrutiny) holding that "the remedy for an invalid charter [or bylaw] provision is refusal to

enforce it, not setting aside the whole charter [or bylaws]." *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 334 (Del. 1993), *as corrected* (Dec. 8, 1993). That proves Kellner's point: the trial court's obligation was to declare the 2023 AAU provision unenforceable, not to go outside AIM's bylaws for other provisions.

Appellees also cite *Clark v. State*, 287 A.2d 660 (Del. 1972), which considered proper remedies when a statute is held unconstitutional. *Id.* at 663-64. AIM's bylaws are not statutes. Even if canons of statutory construction inform "the interpretation of corporate charters and bylaws," *Strougo v. Hollander*, 111 A.3d 590, 597 (Del. Ch. 2015), the question at hand concerns not interpretation, but remedial power. Because "bylaws are contracts among a corporation's shareholders," *id.* (citation omitted), the proper rules of decision come from the law of contractual, not statutory, remedies. Kellner's opening brief demonstrated (at 15-17) that contractual remedies like blue-pencil doctrine and reformation do not fit this case. Appellees do not contest this analysis.[2] *See* Br. 58-61.

[2] The law of statutory remedies does not support Appellees. *Clark* is of questionable authority, as the Third Circuit found the application of a repealed law so problematic as to compel a grant of *habeas corpus*. *See U.S. ex rel. Clark v. Anderson*, 502 F.2d 1080, 1081-82 (3d Cir. 1974). Moreover, *Clark*'s rationale that unconstitutional statutes cease to exist is unsound and subject to revisiting in an appropriate case. *See, e.g.*, *Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209-10 (9th Cir. 2018) (criticizing the "writ-of-erasure fallacy").

Appellees' other authority does not support their position. *Rainbow Mountain, Inc. v. Begeman* held that bylaw amendments never came into being for lack of a board quorum. 2017 WL 1097143, at *11 (Del. Ch. Mar. 23, 2017). *Friends of Village of Cinderberry* rejected infirm amendments to an association's governing documents without reviving repealed provisions. *See* 2010 WL 1843706, at *7-8. And *In re Seminole Oil & Gas Corp.*, invalidated a bylaw amendment changing a company's annual meeting date and reverted to the prior meeting date. 155 A.2d 887, 551-52 (Del. Ch. 1959). But a company must have an annual meeting, *see* 8 *Del. C.* § 211; by contrast, it need not have an AAU provision, or any advance-notice bylaw.

It may be more appropriate for a court to revert to a prior bylaw where an *entire* amendment is invalidated—if doing so benefits the franchise and stockholders. But here, the 2023 Restated and Amended Bylaws will continue to exist. Stitching old and new bylaws together creates a Chimera, "lion-fronted and snake behind, a goat in the middle," Homer, *The Iliad* 158 (Richard Lattimore trans., Univ. of Chicago Press 1951), which engenders unpredictability and confusion. Under that approach, no shareholder can know what bylaws govern future elections.

II. THE TRIAL COURT INCORRECTLY UPHELD CERTAIN BYLAW AMENDMENTS

Kellner's opening brief demonstrated multiple errors in the trial court's ratification of two specific 2023 provisions and a larger package adopted as a singular response to a single perceived threat. Kellner Br. 18-32. Appellees' responses cannot overcome this Court's clear precedent.

A. The Trial Court Failed to Evaluate Inextricably Related Bylaws Together

This Court has long held that all parts of "a unitary response to [a] perceived threat" must be evaluated together. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995); *see also Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1343 (Del. 1987); *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1145 (Del. 1990). That principle resolves this case. The parties agree the trial court analyzed six 2023 Bylaw Amendments in isolation, and Appellees admit that those portions crafted in response to a perceived activist threat are so related that they are "a single measure." Br. 45. The trial court erred in not evaluating a single measure *as* a single measure.

Appellees' defense of the decision below "is more a matter of semantics than substance." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1288 (Del. 1989). Appellees try to distinguish cases involving multiple defensive measures "*combined with*" each other—which they admit must be analyzed together—from those involving a "single measure" comprising "discrete" parts—which they insist

must be analyzed individually. Br. 44-45. But there is no difference between one measure consisting of multiple parts and multiple parts constituting one measure. The rationale of *Unitrin* is that function may triumph over form in a board's self-interested thwarting of shareholder rights, so function must triumph over form in determining whether that occurred. *See Unitrin*, 651 A.2d at 1387 & n.8. Accordingly, *Williams* evaluated a poison pill's "combination of features"—including "a parsimonious trigger of 5% with the AIC Provision and a limited passive ownership exception"—as a unitary response in finding the "combination of features" was "disproportionate." *Williams*, 2021 WL 754593, at *20; *see id.* at *37. The acting-in-concert provision in *Williams* is no more "combined with" the pill's "passive investor" definition than is, say, the First Contact Provision combined with the 2023 AAU Provision, which requires disclosure of contacts. Appellees' word-play is what enhanced scrutiny should penetrate, not accommodate.

No authority supports their reasoning. The cases Appellees cite that evaluate bylaw provisions one-by-one, Br. 44, are not enhanced-scrutiny cases. *See Stroud v. Grace*, 606 A.2d 75, 92 (Del. 1992); *Beck v. Greim*, 2020 WL 6742708, at *8 (Del. Ch. Nov. 17, 2020); *Capano v. Wilmington Country Club*, 2001 WL 1359254, at *5 (Del. Ch. Nov. 1, 2001). Those that consider multiple measures together *are* enhanced-scrutiny cases. *Unitrin*, 651 A.2d at 1387; *Gilbert*, 575 A.2d at 1145. And *Hollinger International, Inc. v. Black* evaluated individual bylaw amendments

separately for a DGCL challenge and together for an enhanced-scrutiny challenge. *See* 844 A.2d 1022, 1097-81 (Del. Ch. 2004). Appellees' authorities show merely that the *Unitrin* rule is a feature of enhanced scrutiny.

Appellees also attempt to erode the *Unitrin* standard, suggesting it reaches only "defensive measures that [are], literally, inextricably intertwined." Br. 34. No case uses that formulation. Instead, the decisions deem coordinated actions "inextricably related" unless there is "some independent transaction with legal significance other than as a response to" the perceived threat. *Gilbert*, 575 A.2d at 1145. In *Gilbert*, the Court construed as a single defensive measure "the directors' initial response to [a hostile acquirer's] bid, their subsequent decision to sell the company, and their negotiation of a new, more favorable offer to all [company] shareholders." 575 A.2d at 1145; *see also Newmont*, 535 A.2d at 1343 (analyzing dividend, standstill agreement, and "street sweep" sale together). Those holdings demonstrate that multiple bylaw amendments adopted as "a single measure," Br. 45, must be evaluated together. Insofar as Appellees believe a different standard applies to advance-notice bylaws, they do not justify an exemption from enhanced-scrutiny principles. *Unitrin* treats "advance notice by-laws" as within its unitary-review rule, *Unitrin*, 651 A.2d at 1387 & n.8, and coordinated advance-notice bylaws have been evaluated together, *In re Ebix, Inc. S'holder Litig.*, 2016 WL 208402, at *19 (Del. Ch. Jan. 15, 2016); *Hollinger*, 844 A.2d at 1080-81.

Appellees' policy arguments, Br. 45-46, are a full-throated attack on this Court's precedents and the stockholder franchise. They criticize any legal doctrine that treats "otherwise identical" bylaws differently, Br. 45, but enhanced scrutiny has always done that. This Court rejected a December 8 meeting date, *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971), and a seven-member board, *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003), even though identical meeting dates and board compositions ordinarily pose no problem. Appellees also say that bylaw amendments should not fall "by association" with others, but this Court crossed that bridge long ago: a poison pill alone can be valid, *see Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985), as can a "stock repurchase plan," *see Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985), but *Unitrin* deemed their combination inequitable, *see* Br. 43 (acknowledging this). What Appellees say "cannot be correct," Br. 45, is the settled doctrine of "iconic" precedents. *Coster v. UIP Companies, Inc.*, 300 A.3d 656, 666 (Del. 2023) (*Coster II*). And these precedents make sense. Enhanced scrutiny requires that a board "tailor its response to only what is necessary to counter the threat." *Id.* at 673. That inquiry depends on whether multiple defensive measures are adopted together, because multiple measures can easily be more coercive or preclusive, or less tailored, than each alone.

AIM's disclosure requirements have a combined effect that the trial court missed—despite uncontroverted expert opinion that they "must be viewed in their totality," *see* A1229 (Expert Freedman). The Board regarded a large portion of its bylaw amendments as one "response to significant activist activity during 2022," A174, these amendments utilize common terms like "stockholder-associated person" (SAP), stockholders must comply with them *all*, and the disclosure requirements operate together like an obstacle course, with aggregate burdens and traps. Just as rating the difficulty obstacle courses requires considering the combined difficulty of all obstacles—not each alone—the inquiry here requires collective evaluation. That is not just good policy; it is governing law. *Unitrin*, 651 A.2d at 1387.

B. Reversal Is Required

Kellner's opening brief showed (at 24-27) that, under *Unitrin*, the combined Bylaw Amendments cannot stand. Appellees do not respond to this argument, they make all their contentions concerning Bylaw Amendments in isolation, *see* Br. 43-52, and they have waived any argument that the disclosure amendments can withstand enhanced scrutiny if analyzed as a unitary response. *See Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). Accordingly, if this Court concludes (as it should) that the *Unitrin* standard applies, the only available outcome is reversal.

C. The Isolated Provisions the Trial Court Upheld Fail Enhanced Scrutiny

Even taken in isolation, the First Contact Provision and Questionnaire Provisions fail enhanced scrutiny. *See* Kellner Br. 46-52. Appellees' defense of these provisions, Br. 43-52, is not informed by "the spirit animating *Blasius*." *Coster II*, 300 A.3d at 668.

Their brief does not acknowledge the "question of loyalty that pervades all fiduciary duty cases," which arises when "board action … interferes with a corporate election or a stockholder's voting rights." *Id.* at 672. AIM's incumbents are preventing competition for their own seats using a bylaw maze they adopted to target a specific set of challengers. Delaware courts rightly cast "a gimlet eye" on contentions that shareholders benefit when their opportunity to vote is denied in such ways. *Id.* at 668. Boards making such assertions must prove that "an important corporate interest" justifies their action and that it "was reasonable" and limited "to only what is necessary to counter the threat." *Id.* Rather than argue to that standard, Appellees implicitly propose an alternative that would emasculate enhanced scrutiny. Contrary to Appellees' invocation of the clear-error standard, Br. 46, the trial court's legal standard presents "a question of law" that this Court "review[s] de novo." *Coster v. UIP Companies, Inc.*, 255 A.3d 952, 959 (Del. 2021) (*Coster I*).

1. The Date of First Contact Provision

Legitimate Threat to Important Interest. The Date of First Contact Provision is not a proper response to "a threat to an important corporate interest." *Coster II*, 300 A.3d at 672 (quotation marks omitted). Rather than defend it as such, Appellees deny that importance is a factor. Br. 47 n.19. But decades before *Coster II* required "an *important* corporate interest," 300 A.3d at 672 (emphasis added), this Court had made clear that *Unocal* "requires an evaluation of the *importance* of the corporate objective threatened," *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (emphasis added; citation omitted), making a showing of importance "a condition precedent to any judicial consideration of reasonableness and proportionality," *Liquid Audio*, 813 A.2d at 1132. Appellees erroneously reduce the inquiry to whether the board conducted some kind of investigation, Br. 46-48, but no investigation will "save the board" if "the threat is not legitimate," *Williams*, 2021 WL 754593, at *22; *accord Air Prod. & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48, 92 (Del. Ch. 2011).

This Court's precedent "reject[s] the notion that directors know better than the stockholders who should run the company." *Coster II*, 300 A.3d at 670 (quotation and alteration marks omitted). Appellees must have missed that point. What they call a "plot to take over" AIM, Br. 1, is called in common parlance an electoral campaign, and it is the essence of democracy. *See Harrah's Entertainment, Inc. v.*

JCC Holding Co., 802 A.2d 294, 310 (Del. Ch. 2002) (reaffirming that the right to vote is meaningless without the right to nominate). Without competitive elections, corporations are left with "an aristocracy of directors and officers which can continue in office indefinitely, immune from the wishes of the shareholder-owners of the corporation." *Durkin v. Nat'l Bank of Olyphant*, 772 F.2d 55, 59 (3d Cir. 1985); *see also EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). Here, AIM lost 99% of its value since 2016, but the incumbents' bylaw labyrinth has immunized them from shareholder will. Appellees' "arguments about 'corporate raiders' and 'acting in concert' appear directed at anyone who the Board does not approve, and exempts anyone who is a member of the incumbent Board." *Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *28 (Del. Ch. May 31, 2022), *aff'd*, 302 A.3d 387 (Del. 2023); *see also Sutton Holding Corp. v. DeSoto, Inc.*, 1991 WL 80223, at *5 n.3 (Del. Ch. May 14, 1991).

Appellees try to reframe their disloyalty as an "information-gathering objective," Br. 50, but cite no enhanced-scrutiny decision ratifying such an interest. *Compare* Br. 46 n.18 (citing Op. 46 for such cases) *with* Op. 46 (citing no such cases). Given that "the determination of the appropriate standard of judicial review frequently is determinative of the outcome," *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986), an interest that satisfies the business-judgment rule does not necessarily satisfy *Unocal*. The Court should

proceed with caution before endorsing such a sweeping, ill-defined interest as "transparency," Br. 49, which has no cabining principle and is "notoriously susceptible to weaponization." AR316-17, Institutional Shareholder Service Inc., Advance Notice Provisions During Year One of Universal Proxy, ISS Special Situations Research, 2 (December 11, 2023).

One key consideration is "alternative methods of protecting [the] objective." *Paramount*, 571 A.2d at 1154 (citation omitted). In this setting, transparency is served by bylaws enacted on proverbial clear days, boards' campaign speech, and federal proxy regulations, which require extensive disclosure concerning "the participants in the solicitation" (broadly defined to include "any member" of a "group which solicits proxies"), including any "substantial interest," their criminal-conviction histories, securities of the registrant they own or recently bought or sold, their "arrangements or understandings" "with respect to the securities of the registrant," "any arrangement or understanding" between a nominee and any other person "pursuant to which he was or is to be selected as a director or nominee," nominees' "business experience" and "family relationships," and "other directorships held during the past five years." 17 C.F.R. § 240.14a-101, Note E, Item 4(a)(2), Item 4, Instruction 3, and Item 5(b)(1)(iii), (iv), (v), (vi),(viii); 17 C.F.R. § 229.401(b), (d), (e)(1)-(2). All that is in addition to a backdrop prohibition against "false or misleading" statements and material omissions. *Id.*

§ 240.14a-9(a). The regime is enforceable privately, *Koppel v. 4987 Corp.*, 167 F.3d 125, 131 (2d Cir. 1999), and by the SEC, *see, e.g.*, 15 U.S.C. §§ 78u, 78u-2, 78u-3.

An independent disclosure regime applicable to 5% holders or groups (which Kellner complied with), requires disclosure of the source of funds for the relevant securities, plans and proposals related to those securities or to the registrant, ownership and transaction information, and arrangements and understandings related to the securities. 17 C.F.R. § 240.13d-101, Items 3, 5, 6. These reticulated regimes, enforceable by disinterested government officials, ensure that "a corporation is run for the benefit of its stockholders and not for that of its managers" and that management may not "place obstacles in the path of shareholders" or "treat modern corporations with their vast resources as personal satrapies." *Med. Comm. for Hum. Rts. v. SEC*, 432 F.2d 659, 681 (D.C. Cir. 1970), *vacated on other grounds*, 404 U.S. 403 (1972). The SEC's expansive disclosure rules and enforcement powers should inspire heavy skepticism towards presumptively disloyal board claims that disclosure requirements (enforceable by incumbents to exclude their competitors) are necessary for important corporate purposes.

The Court, however, need not now decide the strength or parameters of a disclosure interest, as its invocation here is insufficient. Appellees insist that a supposed 2022 "conspiracy" prompted their presumptively disloyal demand for new disclosures. Br. 49. But an election campaign is no conspiracy, the SEC did not see

fit to intervene, and even if there were something wrong afoot, AIM's 2016 Bylaws were amply sufficient to (and did) exclude the Jorgl slate from the ballot in 2022. To satisfy enhanced scrutiny a "threat must be real and not pretextual," and "the board bears the burden of proof." *Coster II*, 300 A.3d at 672. Appellees never explain why AIM's successful effort to thwart the 2022 campaign justified new disclosure requirements in 2023.

Tailoring. Even assuming a cognizable interest, the Board did not "tailor" the First Contact provision "to only what is necessary to counter the threat." *Coster II*, 300 A.3d at 673. Appellees again ignore the governing standard by failing to acknowledge this least-restrictive-means component. If the true concern were disclosure of nominees' association with "a felon," Br. 1, more tailored options (*e.g.*, seeking criminal-history disclosures) were available.

Appellees have no meaningful response to Kellner's point that a first contact date provides no material information to shareholders. Kellner Br. 27-28. A transparency interest must implicate only information "a reasonable shareholder would consider … important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 463 (1976)). Appellees do not say why a reasonable shareholder would make a voting choice based on when a nominating stockholder, nominee, and/or SAP first spoke about AIM. Appellees' reference to an August 2022 draft letter to Kellner's

college fraternity, Br. 50, bears no logical connection to this question—as that message would not have been swept into the Date of First Contact Provision. Nor do Appellees establish why any reasonable shareholder would care. The question is whether "a reasonably investor would consider" this information "important," "not what a director considers important." *Zirn v. VLI Corp.*, 621 A.2d 773, 779 (Del. 1993). At best, this requirement (with others) appears designed "simply to bury the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking." *TSC Indus.*, 426 U.S. at 448-49.

In truth, the Date of First Contact Provision is another "tripwire," Op. 55, to thwart electoral competition. Contrary to Appellees' assurances that its embrace of the SAP definition does not sweep in "far-flung, multi-level relationships," Br. 51 (quoting Op. 56), the definition reaches—in all uses—any person "acting in concert" with the nominating stockholder, as well as a "family" member and "Associate." A212. Kellner presented unrebutted expert testimony that this term creates an "ill-defined daisy chain of individuals," A1256, and the context does not change that. Neither the parties nor the trial court had any idea what date of first contact *should* have been reported between Kellner and Chioini in this case. Br. 51-52. Appellees contend that "the point of the trial was not to divine dates of first contact," Br. 52, but the point *was* to determine whether the Date of First Contact Provision is

"preclusive or coercive." *Coster II*, 300 A.3d at 675. A definition that thwarts compliance is just that.

2. The Questionnaire Provision

Threat to Important Interest. The Questionnaire Provision stands in a comparatively weaker position on the first *Unocal* element. Even assuming transparency is a cognizable interest, Appellees admit questionnaire responses are not disseminated to shareholders. Br. 47. Appellees respond with a *second* interest in enabling incumbents to "make recommendations about nominees." Br. 47-48 (quoting Op. 39). But that interest is "disloyal." *Coster II*, 300 A.3d at 672. In the enhanced-scrutiny setting, "inherent conflicts of interest" arise, *id.* at 668 (citation omitted), because board members are competing with the nominees they seek to regulate or exclude. They cannot be assumed likely to recommend voting for those nominees over themselves. An interest of incumbents in recommending themselves is not one they share with stockholders; it is an adverse interest.

Regardless, the circumstances of this case do not establish a threat to any interest. Appellees' reliance on the 2022 campaign, Br. 47-48, does not justify the Questionnaire Provision any more than the Date of First Contact Provision. Moreover, Appellees admit that, as of March 2023, the Board had no revised questionnaire prepared and did not prepare it until it was requested by Kellner in July. *See* Br. 48-49. Appellees' actions show they did not genuinely believe it was

important to have a new questionnaire. Indeed, the incumbent directors did not complete their Questionnaires until September 2023, A1069-1154, and they disclosed their many "adverse recommendations" from ISS and Glass Lewis only to themselves. A1109, A1154, A1199. Equels testified that the information was "proprietary," "not for republication" and that he had to "have research done to disclose all of that." A1720. Stockholders learned none of it. A1720. Nor did the Board consider it. Equels alone received fourteen "withhold" recommendations in the prior twelve years, A1199, yet he was renominated every year since 2011. This information has no impact on stockholder choices at AIM. What *would* have an impact is *choice* in candidates.

Tailoring. The Questionnaire Provision is insufficiently tailored, as well as preclusive and coercive, by enabling the Board to significantly change the questionnaire after nominees request it. Appellees admit this to be "[t]rue," Br. 48, but attempt to restyle this point as going to the Provision's "application, not its adoption." Br. 48. But the five-day mischief-enabling window is a feature of the Provision's adoption. A Board that sets itself up for preclusive action, and then implements that action, should not be allowed to immunize this one-two punch from review on the presumption that it will not "misuse its power." *Williams*, 2021 WL 754593, at *39. This rationale "would excuse nearly any" self-enabled self-dealing

and "does not support a finding that" the Questionnaire Provision is "reasonable in relation to the threat posed." *Id.*

III. THE TRIAL COURT ERRONEOUSLY UPHELD THE REJECTION

The trial court committed multiple errors of law and fact in ratifying the Rejection. *See* Kellner Br. 33-45. Appellees respond to few of Kellner's arguments, and their tendered positions lack merit.

A. The AAU Basis of Rejection

1. The Trial Court Did Not Examine the AAU Disclosures

As Kellner explained (at 33-34), the trial court did not evaluate the six single-spaced pages of AAU disclosures in the Kellner Notice and made no findings concerning them. Appellees ignore this argument and waived a response. They simply state that "the Notice … did not satisfy" the AAU disclosure "requirement," Br. 61, but they fail to explain how anyone could know that without examining the Notice's AAU disclosures.

That failing caused the trial court to err, as the Notice disclosed what the Appellees insist should have been disclosed. Appellees' central theme is that AIM stockholders needed to learn of an association with the Kellner Slate and Xirinachs and Tudor. Br. 1, 9-14. Appellees neglect to mention that the names Xirinachs and Tudor appear 28 and 27 times in the Notice, respectively. A683-844. The AAU section acknowledges the Kellner Slate's "relationships with Mr. Tudor," that Kellner "communicated with Mr. Tudor on occasion with respect to the Company," that Chioini became involved at AIM because of Tudor, that Tudor recommended Chioini "as a nominee on the failed Lautz nomination attempt," that "Mr. Deutsch

and Mr. Tudor communicated regularly," and that Tudor "likely has some general awareness of Mr. Deutsch's activities with respect to the Company." A690-91. Also disclosed is Xirinachs's role in funding the Jorgl litigation, the outstanding fees, and the Kellner Slate's proposal to obtain reimbursement from AIM. *Compare* Br. 10 n.5 (suggesting effort to conceal this) *with* A691 (disclosing all of it).

The Notice denies that Xirinachs and Tudor are parties to the 2023 arrangement to nominate a competing slate, A690-91, and the trial court's findings are consistent with that disclosure, Op. 21-37.

2. The Trial Court Applied an Erroneous AAU Standard

Appellees state that "Kellner does not dispute the Court of Chancery's interpretation of the 2016 AAU provision." Br. 61. He does. Kellner Br. 35-36. Appellees again have waived a response.

Appellees' brief confirms the problems with the trial court's AAU standard. Appellees allege a continuous AAU involving Kellner, Deutsch, Tudor, and others going back to "early 2021," Br. 9, but what they describe amounts to "sending … information," *id.*, keeping "tabs on … efforts," Br. 11; *see also* Br. 12 ("All the while, Kellner kept tabs"), "request[ing] a call," Br. 14, being "very interested in working" together, Br. 15, and "mov[ing] the ball forward," Br. 19. Those things cannot amount to "arrangements or understandings … pursuant to which the nomination(s) are to be made." Op. 71 (quoting 2016 Bylaws § 1.4(c)).

Drawing on cross-cutting corporate and securities law concepts, a leading Court of Chancery decision held that an AAU provision would not embrace "such things as agreeing to talk or meet about a proxy contest, participating in forums or group calls discussing the candidates or grievances of the dissident, and having a regional or group meeting with other investors." *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 340 (Del. Ch. 2010) (cleaned up), *aff'd*, 15 A.3d 218 (Del. 2011) (unpublished); *see also* SEC, *Modernization of Beneficial Ownership Reporting*, 88 FR 76896, 76934 (Nov. 7, 2023) (explaining that stockholders can "communicate freely with each other" without forming a Section 13(d) "group," which is triggered by AAUs, and that a group is not "formed when two or more shareholders communicate with each other" or employ "a joint engagement strategy"). While the trial court acknowledged that "discussions or information sharing" are insufficient, Op. 72, it never found more than that, *see* Op. 74-75.

The muddled AAU standard caused further error below. Erroneously looking to the first-contact disclosures, the trial court said it was "false" for the Notice to state that "[b]efore July 2023 … no decision was made" for a proxy contest. Op. 73; *see* A693. Three pages later, the trial court admitted the statement was *true*, as "[i]t is possible that no formal decision was reached before then," Op. 76. Appellees do not address this jumble and supply no basis for affirmance.

3. The Trial Court Erred in Applying Enhanced Scrutiny

Kellner's brief explained that the trial court erred in evaluating his application claim under the *Unocal* standard. *See* Kellner Br. 36-37. Many of the principles articulated above, *see* § II.A and B, bear equally on this analysis. Assuming disclosure to be an important interest, the trial court failed to identify a threat to that interest from the Kellner Notice (which, again, it did not examine). To the extent stockholders needed to learn more about Tudor and Xirinachs than disclosed in *Jorgl*, the Notice disclosed them. Appellees ignore these points.

That leaves one basis for the trial court's ratification of the Rejection—that a July 2023 AAU commencement date should have been a few months earlier. But the Court could not state when. Neither the trial court nor Appellees attempted to explain why "a reasonable shareholder would consider" that difference "important in deciding how to vote." *Rosenblatt*, 493 A.2d at 944 (citation omitted). Nor is any plausible explanation available.

4. The Trial Court Clearly Erred in Its Fact-Finding

Kellner's opening brief dissects the errors in the trial court's finding that an undisclosed AAU existed before July 2023. Br. 38. Appellees do not challenge these contentions and waived any response.

Appellees' fact-bound arguments are misleading and legally problematic. While they repeatedly claim refuge in the findings below, *see, e.g.*, Br. 4, 9, and

present a lengthy (and error-laden) background section, Br. 9-26, they never discuss the legal significance of any facts under the 2016 AAU Provision. *See* Br. 57-63. That omission is fatal. The trial court found the 2016 AAU Provision narrower than the 2023 AAU provision, as the former "lack[s] a 24 month lookback," rendering only "the current effort," not the 2022 effort, relevant. Op. 73. That negates many of Appellees' assertions, *see, e.g.*, Br. 9-14, and knocks out various grounds of rejection, such as that the Notice (supposedly) "did not disclose AAUs related to Tudor's and Xirinachs's role in the Jorgl nomination," Br. 23. Kellner's evaluation of the facts under the 2016 AAU Provision is the only such analysis in briefing to this Court.

That aside, Appellees' freewheeling venting about AIM's shareholders (whom they are supposed serve) is too far-fetched in material respects to command adherence. Their grand narrative that this case is nothing but orchestration by "a felon convicted of insider trading" as "the ringleader" of "a foiled plot to take over" AIM, Br. 1, is implausible. Kellner is AIM's second-largest individual shareholder, *see* A1365, A1590, A1719-20, "a retired founder and portfolio manager of Fiduciary Management, Inc.," with about $15 billion under management, "a philanthropist, and a minority owner of the Milwaukee Bucks." Op. 9. It is implausible that Kellner is the puppet of Tudor, who owns a small stake in AIM, Op. 13, and suffered financial and professional ruin after his guilty plea, A1690. The present dispute

arises because AIM's share price has fallen 99%, Kellner lost large sums, Op. 3, and he wants a new board. Even when engaged in "deferential" review, this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

It bears repeating that, though Appellees make this case about "felon[s]," Br. 1, the trial court found no involvement of Tudor or Xirinachs in the 2023 effort. As to the 2022 effort, there is nothing nefarious about people "work[ing] together to bring Jorgl's nomination," Br. 13, and certainly nothing problematic about Kellner keeping "tabs" on the 2022 campaign, Br. 11, or considering (but never scheduling) "breakfast with Tudor, Jorgl, Chioini and Rice," Br. 13. Even assuming an effort to conceal something in 2022, it does not follow that Kellner's 2023 effort bears any such taint.

Meanwhile, Appellees' discussion of the 2023 effort proves the Notice accurately disclosed a July AAU commencement. Br. 19-21. A May 16 text-message string they cite shows Kellner asking Deutsch to "reach out to" Chioini "to hear what his plan and that of Teresa is regarding AIM." A524. No agreement, arrangement or understanding could have arisen where Kellner and Deutsch had not yet heard the plan. As of June 15, there was still only a "proposed approach," nothing sufficiently solid to merit disclosure. B272; *see* Br. 19. The next event

Appellees cite occurred in July, Br. 20, and is disclosed, A687-88. Embellishment aside, Appellees identify no falsehood or material omission in the Notice.[3]

B. The Additional Grounds for Rejection

Perhaps recognizing the many infirmities in the trial court's AAU analysis, Appellees emphasize the two other rationales the trial court offered, even though the trial court considered them subordinate. *Compare* Br. 53-56 *with* Op. 69-85. Those holdings are equally infirm.

1. Appellees' arguments under the Date of First Contact Provision only demonstrate how divorced it is from any legitimate interest. *See* Kellner Br. 44 (explaining that the issue "cannot be material").[4]

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[3] Additional factual assertions of Appellees are error-laden. Space constraints preclude a complete correction. It is not true, for example, that BakerHostetler "recommended Kellner shop for a sympathetic Vice Chancellor." Br. 20. The email Appellees cite does not say that. *See* B273. It likewise is incorrect that Lautz "worked with" BakerHostetler regarding any nomination. Br. 11. Lautz has no tie to BakerHostetler, and Appellees cite nothing to the contrary. AR208, 83:13-23. Nor did Tudor, and Plaintiffs' contrary assertion contravenes all probative evidence. AR264-66, 89:10-90:17, 92:3-6, 92:8-24, 96:3-97:24; AR264, 88:23-90:8; AR277, 139:19-22; AR323-25 ¶6. It is untrue that "Xirinachs's involvement was not publicly revealed" outside of "discovery." Br. 12 n.7. Xirinachs's role (and criminal plea) was disclosed in the Jorgl group's proxy statement filed with the SEC and distributed to AIM stockholders. Appellees miss that Xirinachs was not part of the Jorgl group as of the 2022 notice, but he subsequently joined and was properly disclosed under SEC rules. Appellees cite a June 2022 message that Tudor remained "all in" on AIM, Br. 11, but in trader parlance, "all in" means a long position.

[4] Appellees are again wrong in asserting that "Kellner does not … challenge the Court of Chancery's equitable analysis," Br. 54, and waive a response.

The Notice disclosed a date of first contact between Deutsch and Kellner as "early 2021" and the date of first contact between Kellner and Chioini as "late 2022." A693. Contrary to Appellees' odd syllogism, Kellner's position on his date of first contact with Deutsch is not made "by implication." Br. 56. The Notice discloses the early 2021 time-frame, A693, as the trial court recited, Op. 73 n.353, but somehow failed to appreciate in its legal analysis, *see* Op. 73.

Ironically, Kellner's Notice perfectly matches Appellees' own assertion that "*[i]n early 2021*, Kellner purchased AIM stock on the advice of Deutsch." Br. 9 (emphasis added). It is inscrutable how using that same language to reach the same conclusion could be "wrongdoing." Br. 56. Likewise, whereas Appellees accuse Kellner of the sin of having "frequently corresponded with both Deutsch and Chioini," Br. 56—which is just Appellees' denigration of democratic engagement—the Notice prominently discloses that "Mr. Chioini, Mr. Kellner, and Mr. Deutsch then communicated from time to time … regarding the Company." A693.

This case, then, turns on whether disclosure of "early 2021" and "late 2022" is too "fuzzy" to suffice (even as it suffices for Appellees' brief). Op. 77. Appellees do not defend the trial court's conclusion that more precision was required, *see* Br. 56, that conclusion conflicts with the principle that all doubts must be resolved in favor of the franchise, *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015), and the difference between an "early 2021" or "late 2022" date of first contact

and some more precise date is "nit-picking." *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 (2d Cir. 1978). "Fair accuracy, not perfection, is the appropriate standard." *Id.*; *see Klang v. Smith's Food & Drug Centers, Inc.*, 702 A.2d 150, 157 (Del. 1997).

2. Appellees' position under the Questionnaire Provision is also insubstantial. Their opening salvo declares that the Notice "lied about adverse recommendations," Br. 2, but the trial court did not find this, *see* Op. 77-78, and Appellees ultimately do not stand by that accusation, *see* Br. 55. The supposed error was not that Kellner, Deutsch, and Chioini *knew* of undisclosed withhold recommendations, but that they "could have explained that they were unaware of any adverse recommendations or that they lacked knowledge" and instead "affirmatively checked 'no.'" Br. 55 (quoting Op. 78).

But Appellees have no response to Kellner's opening brief, which explained that an assertion of unawareness was *built in* to that affirmative answer because the form built it in. Kellner Br. 44. The prompt asks nominees to make disclosures "to the extent known," A717, and the ultimate certification is made "to the best of my knowledge, information and belief," A748. Thus, in the strictest sense, Kellner, Deutsch, and Chioini *did* state "that they were unaware of any adverse recommendations." Br. 55. And, again, Appellees are silent as to why any reasonable stockholder would care about the difference, when stockholders learn

none of this information, or why other means for disclosure did not suffice. As noted, the incumbents knew of the withhold recommendations and could have presented them as they deemed appropriate.

IV. THE TRIAL COURT CORRECTLY HELD THAT FOUR BYLAW AMENDMENTS FAIL ENHANCED SCRUTINY

The trial court found itself compelled to conclude that four provisions of the 2023 Bylaws fail enhanced scrutiny, even under an erroneous standard isolating portions of a single defensive action, *see* § II.A, *supra*, and failing to scrutinize justification for, and purpose behind, defensive measures, *see* § II.B, *supra*. Appellees' cross-appeal contentions would (if ratified) upend "the allocation of power within a corporation," which "is dependent upon the stockholders' unimpeded right to vote effectively in an election of directors." *Liquid Audio*, 813 A.2d at 1127.

A. The Four Bylaw Amendments Are Subject to Enhanced Scrutiny as Adopted

Contrary to Appellees' arguments (Br. 27-34), the four Bylaw Amendments are properly subject to enhanced scrutiny as *adopted* because the Board promulgated them when "the skies were cloudy, and it was raining." *Coster II*, 300 A.3d at 664. Appellees' brief describes those circumstances, Br. 14-15, which confirm that enhanced scrutiny applies, *see* Op. 43-44.

Appellees do not deny that the established rainy-day standard was met as of March 2023.[5] Yet they erroneously argue that enhanced scrutiny does not reach a

[5] Their amicus appears to challenge either the trial court's finding or the rainy-day standard itself. *See* Amicus Br. 17-22. But arguments raised only by amici are not properly before the Court. *See Jarden LLC v. Ace Am. Ins. Co.*, 2021 WL 5296824, at *2 (Del. Nov. 10, 2021). Moreover, the amicus does not say why the

claim "under *Unocal* that the Board acted unreasonably in adopting" a bylaw and that Kellner should have shouldered the "burden." Br. 33. That argument died with *Schnell*, where this Court adjudicated a challenge to a board's "changing the by-law date," found that amendment triggered and failed heightened scrutiny, and ordered the trial court "to nullify" the amendment for all "stockholders." 285 A.2d at 439-40. The same framework applied three decades later in *Liquid Audio*, where this Court scrutinized a bylaw amendment under *Unocal* that added seats to a board "for the primary purpose of diminishing the influence of" dissident nominees and held it was not "permitted to stand." 813 A.2d at 1132. There are perhaps too many Delaware decisions adjudicating adoption claims to count, including *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 655 (Del. Ch. 1988); *see also Williams*, 2021 WL 754593, at *40.

To be sure, "Delaware courts have reserved space for equity to address the inequitable *application* of even validly-enacted advance notice bylaws." *Rosenbaum*, 2021 WL 4775140, at *15; *see also Hubbard v. Hollywood Park Realty Enterprises, Inc.*, 1991 WL 3151, at *4 (Del. Ch. Jan. 14, 1991). But that principle does not detract from adoption claims; it simply means that Delaware "corporate law is not static" and that *any* action "that interferes with the election of directors" is

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Court should overrule a standard it ratified last year. *See Coster II*, 300 A.3d at 664-73.

subject to *Unocal* review. *Coster II*, 300 A.3d at 672. The trial court correctly construed this case as involving both an "**Adoption Claim**" and an "**Application Claim**." Op. 43, 68. And it correctly applied enhanced scrutiny to both.

B. Appellees Misapply and Misconstrue the Facial/As-Applied Distinction

Appellees' effort to trick this Court into overruling *Blasius*, *Schnell*, and dozens of "iconic" precedents, *Coster II*, 300 A.3d at 666, suffers numerous legal deficiencies.

First, rather than address Kellner's adoption and application claim as the trial court correctly labeled them, Appellees invoke a "facial/as-applied" labeling system that is exogenous to the *Blasius* or *Unocal* lines of decision. Appellees restyle the adoption claim a "facial" claim, propose that a facial claim cannot turn on "circumstances," and conclude that the adoption claim was somehow improper. *See* Br. 27-30. But Appellees quote language out of context from cases that did not apply enhanced scrutiny. *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 135 (Del. 2020); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 941-42 (Del. Ch. (2013); *Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd.*, 924 A.2d 228, 243–44 (Del. Ch. 2007). These decisions did not undermine the settled principle that bylaws adopted in contravention of *Unocal* must "not be permitted to stand." *Liquid Audio*, 813 A.2d at 1132. If Appellees' preferred "facial" and "as

applied" terminology is somehow incompatible with that doctrine, the solution would not be to overrule decades of precedent, but to disregard that terminology.

Second, Appellees fail to see that a bylaw that fails the requisite standard of review (here, under *Unocal*) as adopted meets the standard of facial invalidity because it is "of no force and effect." *Black v. Hollinger Int'l Inc.*, 872 A.2d 559, 564, 567 (Del. 2005). A facial challenge contends that an act "is not valid under any set of circumstances," *Delaware Bd. of Med. Licensure & Discipline v. Grossinger*, 224 A.3d 939, 956 (Del. 2020), which is the correct relief for a successful adoption claim under *Unocal*. Appellees confuse matters in suggesting that a facial claim excludes a "context-specific review." Br. 31. This Court rejected that rationale in *Grossinger*, finding that a due-process claim was facial, not as-applied, even though the plaintiff "attempts to target only his particular situation," because a due-process deficiency in a regulation renders it "facially void." 224 A.2d at 956. Likewise, cases since *Schnell* have held that a bylaw that fails under *Unocal* is unenforceable.

Third, Appellees are incorrect insofar as they suggest a "facial" challenge cannot embrace questions of motive germane to the *Blasius*/*Unocal* framework. Again, their argument conflicts with that entire line of authority, which has recognized adoption claims from its genesis. And Appellees' error is more fundamental than that; they mangle the facial/as-applied distinction more generally. Settled precedent across legal disciplines makes clear that "laws passed with

discriminatory intent inflict a broader injury and cannot stand," even if that intent his hidden, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016), given that "[a]n official action … taken for the purpose of discriminating" on an invidious basis "has no legitimacy at all under our Constitution," *City of Richmond, Virginia v. United States*, 422 U.S. 358, 378 (1975). An act motivated by a suspect purpose is invalidated in all applications (if the requisite scrutiny is unsatisfied), even in cases where invidious intent is hidden. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 466 (1982); *Miller v. Johnson*, 515 U.S. 900, 905 (1995). In such cases, a plaintiff need not go further and make specific showings as to all possible applications—a requirement that would cripple many civil-rights legal regimes.

It was not anomalous for *Schnell* to hold that a bylaw amendment that triggered and failed heightened scrutiny under the circumstances of its adoption was void in every application. Under Appellees' contrary view, dozens of school-desegregation cases—which impact numerous non-parties—and dozens of redistricting cases—which impact numerous voters of all races—were wrongly decided. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (where race was the predominant hidden motive for electoral districts, holding that "any remedy of necessity must affect almost every district" in the plan, including voters of all races); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973) (finding

"affirmative duty to desegregate the entire system 'root and branch'" even though segregation occurred by hidden motive); *Belton v. Gebhart*, 87 A.2d 862, 864 (Del. Ch.), *aff'd*, 91 A.2d 137 (1952), *aff'd sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

Finally, Appellees contend that "label[s] do not control," Br. 29 (citation omitted), so the proper outcome here if the trial court mislabeled Kellner's adoption claim would be to label it an "as-applied" claim. He would still be entitled to another election and placement on AIM's ballot.

C. The Trial Court Employed Sound Legal Reasoning

Building on their flawed facial/as-applied framework, Appellees contend the trial court "impermissibly deployed 'hypothetical and imagined' scenarios" in applying *Unocal*. Br. 32. In fact, the trial court evaluated whether the Board "tailor[ed] its response to only what was necessary to counter [a cognizable] threat" and whether the response was "preclusive or coercive." *Coster II*, 300 A.3d at 672-73. That inquiry requires that courts test the metes and bounds of the challenged action to assess whether the action impedes the franchise or is insufficiently tailored to the cited goals. *Williams*, 2021 WL 754593, at *39 (examining "hypothetical" outcomes in this assessment); *see also Pell v. Kill*, 135 A.3d 764, 788 (Del. Ch. 2016) (evaluating the "possibility of [electoral] success" available under challenged bylaw).

That approach does not examine the purely "imagined." Br. 33 (citation omitted). The court evaluated the "requirements" the challenged Bylaw Amendments actually "impose[]." Op. 57. It found the Amendments create "a tripwire" that "suggests and intention to block the dissent's effort" to mount a proxy contest, Op. 54-56; are "draconian and would give the Board license to reject a notice based on a subjective interpretation of the provision's imprecise terms," Op. 58; "impede[] the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure," Op. 59; and bury any "justifiable objectives" "under dozens of dense lawyers of text" "to preclude a proxy contest for no good reason." Op. 64. Those findings show what the Amendments *do*, not what the trial court imagined them to do. If Appellees find those scenarios "extreme," Br. 36, that only proves their bylaws were not properly tailored. Tailoring was their duty, not the trial court's.

Appellees again challenge not only *Unocal*, but basic legal reasoning. The *Unocal* standard is one of many in law that test "the fit between means and ends." *Pell*, 135 A.3d at 787-88; *see* Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274 (2007) (describing various standards judging the "connection between" the "means" utilized "and they ends they are intended to promote"). Such standards call on courts to determine whether a challenged measure is "too narrow" or "too broad," and whether "its sheer breadth is so discontinuous

with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The type of reasoning the trial court employed is ubiquitous in cases applying various forms of heightened scrutiny. *See, e.g.*, *id.* at 631-35 (testing breadth of law under rational-basis standard); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 216 (2023) (finding strict scrutiny unmet because program was "overbroad," terms were "arbitrary or undefined," and "still other categories are underinclusive"); *Republican Party of Minnesota v. White*, 536 U.S. 765, 779-80 (2002) (finding First Amendment scrutiny unmet where plausible (but hypothetical) applications of law demonstrated it was "woefully underinclusive"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 642-43 (1974) (similar rationale under intermediate scrutiny governing sex-based distinctions); *see* Fallon, *supra*, at 1327-32 (discussing inquiries of over- and under-inclusiveness and proportionality).

To be sure, in cases where a challenged measure does not trigger a form of mean-ends scrutiny, but certain applications may in the future, courts typically do not address such possible applications in the abstract. *See Boilermakers*, 73 A.3d at 949. But that reluctance does not carry into cases like this, where means-ends testing is necessary (here, because of the rainy-day adoption). In such cases, as shown, courts routinely test the scope of challenged measures by evaluating their scope and scale.

D. The Invalidated Amendments Fail Enhanced Scrutiny as Adopted

The trial court had the best of reasons to find that four Bylaw Provisions are not properly tailored to a cognizable interest. Appellees' cross-appeal necessarily falls with their asserted transparency interest, but even if it were sufficiently important, their assertions would fail the tailoring inquiry.

2023 AAU Provision. The trial court found that the 2023 AAU Provision was designed to create "a tripwire" "ripe for subjective interpretation" and to promote—not a valid interest—but "an intention to block the dissident's effort." Op. 56. The court found that the SAP definition sends the AAU Provision "off the rails" by sweeping in "unending permutations." Op. 54-55. That holding is supported by unrebutted expert testimony that "[t]he requirement to provide all responsive information applicable to this ill-defined daisy chain of individuals inherently increases the likelihood of 'foot faults' in nomination notices and a basis for AIM to unfairly claim that a nomination is invalid." A1256-57. If that does not fail enhanced scrutiny, nothing does.

Appellees' criticism of the trial court's supposed "hypothetical scenarios" misses how valuable its rationale is in defeating Appellees' subsequent assertion that, under the 2023 AAU Provision, stockholders "are not required to disclose information they do not know or cannot obtain." Br. 36. Quite the opposite, the multiplication of SAP definition causes scenarios swept into the 2023 AAU

Provision "to multiply, forming an ill-defined web of disclosure requirements." Op. 54. That effect is preclusive, not imagined. The provision would require disclosure, for example, of "an oral arrangement between the brother of an affiliate of a beneficial holder of the stockholder and [] 'any other person,'" so the scope of disclosure cannot be ascertained. Op. 55.

Indeed, the trial court erred in Appellees' favor by ratifying (in principle) the bespoke "24-month lookback provision." Op. 52. The court found that the provision was tailored to "about 18 months of activity" by investors in prior years, Op. 53, but that does not prove why stockholders would need to know of such activity to be reasonably informed in 2023. The trial court should have found this feature improper.

The Known Supporter Provision. The trial court correctly read the Known Supporter Provision to "seek[] disclosure of any sort of support whatsoever, including that of other stockholders known by SAPs to support the nomination." Op. 58. Appellees do not meaningfully explain why this sweeping demand is tailored to an important interest.

Instead, they simply propose that, because a known-supporter provision was applied in *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. Oct. 13, 2021), it must be valid. Br. 40. But *CytoDyn* does not bind this Court, and it did not apply enhanced scrutiny. Moreover, the Known Supporter Provision "goes further" than

the provision in that case. Op. 58. In *CytoDyn*, it required disclosure of information about "stockholders … known by any of the Proposing Persons to support [the] nominations." 2021 WL 4775140, at *5. AIM's version requires information about "stockholders … known by a Holder *or Stockholder Associated Person* to support [the] Stockholder Proposal." A210 (emphasis added). Thus, the nominating stockholder must not only speak to personal knowledge, but also to what is known by an ill-defined daisy chain of persons, *see* A211. Appellees do not attempt to say how stockholders could know if their duty is satisfied or why stockholders need this expansive scope of information.

The Consultation/Nomination Provision. The first flaw the trial court identified in the Consultation/Nomination Provision is that it "suffers from the same problem as the AAU provision insofar as it includes SAPs." Op. 56-57. That holding is compelled by the fact that the Consultation/Nomination Provision is an AAU-disclosure provision structured like the 2023 AAU Provision. A205-06. The Consultation/Nomination Provision goes even further, however, in requiring disclosure as to an agreement "to consult or advise on any investment or potential investment in a publicly listed company" or "to nominate, submit or otherwise recommend the Stockholder Nominee" to any board "during the past ten (10) years." A205. That is "a lengthy term" subject to "ambiguous requirements." Op. 57. Appellees do not address this problem.

The provision is invalid by the terms Appellees use to defend it. They say the point is determine whether Kellner "previously supported his nominee's election to a different public board." Br. 39. But even if that is somehow informative—over a *10-year period*—that has nothing to do with the required disclosure of agreements about investment advice. As to that feature, Appellees just say the purpose is to disclose it, which is *ipse dixit*. Br. 38-39. The provision is not tailored. Appellees prove the point further in attempting to expose an error in the trial court's questioning whether "investment tips" related to Apple "nine years ago" between "the spouse or an associate of a nominee" and "the nominating stockholder" would be covered. Op. 57. Appellees answer "no" because the Provision "only covers AAUs involving the *nominee*." Br. 38. Perhaps, but an exchange of investment tips nine years ago between the spouse of the nominating stockholder and the nominee *would* be covered, even by their reasoning. Appellees do not say why the latter piece of information is critical to shareholders but not the former. The disclosure prompt is just a game.

The Ownership Provision. The trial court found that the Ownership Provision may "choke a horse" and "has certainly flummoxed this judge." Op. 62. It contains "1,099 words" in one run-on sentence "and 13 subparts." Op. 62. It "is indecipherable." Op. 62. Appellee Mitchell "testified that the bylaw was written in such a way that 'no one would read it' and that if the directors had started reading it

'line by line' during their March 2023 Board meeting, they 'would still be in the meeting.'" Op. 62. This "refreshingly candid" admission tells this Court what it needs to know about this case. *Williams*, 2021 WL 754593, at *26. No tenable tailoring defense can be made for this Provision.

Appellees defend it by flouting precedent. They propose "[t]he analysis should have stopped" when the trial court found the disclosure goal legitimate. Br. 39. But *Unocal* directs two steps, so the trial court correctly considered whether—and found that—it "sprawls wildly beyond this purpose." Op. 63. Appellees criticize the trial court for finding it inscrutable when "it could have" "relie[d] on dictionary definitions." Br. 40. But it was *Appellees*' burden to establish tailoring, and a dictionary does not assist anyone in interpreting an "indecipherable" provision that is a grammatical monstrosity. Op. 62. No amount of insistence that the provision somehow calls for "crucial information" can overcome the fact that Appellees did not draft it to call for information. They drafted it to preclude anyone from even "reading it," Op. 62, much less complying. If a Delaware judge cannot understand it, it fails any and every standard of review.

CONCLUSION

The Court should reverse the judgment below as to issues raised in Kellner's appeal and affirm as to those in Appellees' cross-appeal.

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