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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

APPELLEES/CROSS-APPELLANTS AIM IMMUNOTECH INC., ET AL.'S REPLY BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

NATURE OF PROCEEDINGS

The Court of Chancery misconstrued Kellner's as-applied adoption claim as a facial challenge. That error caused it to evaluate a purported facial challenge under enhanced scrutiny. But enhanced scrutiny is not a facial validity standard. Enhanced scrutiny is an as-applied standard that places the burden on the board to prove its actions were reasonable under the case's circumstances. Facial validity, by contrast, requires the stockholder to prove the challenged conduct is invalid under every circumstance. By applying enhanced scrutiny to a purported facial challenge, the Court of Chancery misallocated to AIM the burden to prove the Challenged Bylaws were *valid* under *every* circumstance—not just this case.[1] By misallocating the burden, the Court of Chancery disregarded the reasons why the AIM Board adopted the Challenged Bylaws. Instead, the Court of Chancery deployed hypotheticals and substituted its judgment for the Board's judgment, concluding that the remedy for a circumstantial finding of inequity is to nullify otherwise legitimate bylaws across the entire market. These cascading errors undermine the predictability and consistency that Delaware affords to its corporations. They require reversal.

All this is clear. Kellner's answering brief is not. Kellner hopelessly confuses the "well-understood" distinction between facial and as-applied challenges.

[1] Unless indicated, capitalized terms retain the meaning in AIM's opening brief on cross-appeal and answering brief on appeal.

Hazout v. Tsang Mun Ting, 134 A.3d 274, 287 (Del. 2016). Kellner concedes that he only alleged fiduciary duty claims based on the circumstances surrounding the Board's "adoption" and "application" of the Challenged Bylaws. But context-specific challenges "regarding the *adoption or application*" of corporate bylaws are "as-applied challenges," *not* facial challenges. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 135 (Del. 2020) (emphasis added). Kellner thus concedes that the Court of Chancery misconstrued his claims.

To resist this result, Kellner portrays enhanced scrutiny as a facial validity standard. That is wrong too. Facial challenges are purely legal challenges. They do not consider the factual context or subjective motive behind the decision to adopt a corporate bylaw. Enhanced scrutiny, by contrast, is all about context and motive. Indeed, enhanced scrutiny is an equitable "standard of review [that] requires a context-specific application" of fiduciary duties to "situationally specific" facts. *Coster v. UIP Cos.*, 300 A.3d 656, 671-72 (Del. 2023) ("*Coster.IV*"). By invoking enhanced scrutiny, Kellner confirms that he did not raise a facial challenge.

Kellner dismisses all this because, in his mind, the outcome is the same. But by misconstruing his case-specific claims—that is, as-applied claims—as facial challenges, the Court of Chancery granted sweeping relief that affects the entire market—not just AIM and Kellner. Kellner concededly did not prove that the Challenged Bylaws are invalid under every circumstance—as a facial challenger

must—and the Court of Chancery's contrary ruling destabilizes legitimate bylaws adopted by countless Delaware corporations, including AIM. That outcome is fundamentally inconsistent with Delaware precedent and policy. Kellner has no answer for it.

In fact, Kellner disregards Delaware law entirely. Kellner tries to analogize the adoption of the Challenged Bylaws to violations of federal "civil-rights legal regimes." But that rhetorical posturing is just a distraction. This case concerns a proxy contest involving an investor who submitted a knowingly false director nomination notice. It does not involve racial animus or discrimination. Evidently, Kellner is willing to say anything to defend his own wrongdoing.

But even under enhanced scrutiny, the Court of Chancery erred in invalidating the Challenged Bylaws. The Court of Chancery misinterpreted the Challenged Bylaws, and its reliance on hypothetical scenarios ignored AIM's real-world experience with clandestine takeover attempts. Properly contextualized, the Board adopted the Challenged Bylaws to ensure a fully informed stockholder vote. The Board's decision reflects a logical approach to preventing future manipulation of AIM's corporate elections. Proportionality requires nothing more.

For all these reasons, the Court of Chancery's judgment invalidating the Challenged Bylaws should be reversed.

ARGUMENT

Kellner's answering brief confirms that the Court of Chancery should not have facially invalidated the Challenged Bylaws under any standard.

I. KELLNER CONCEDES THAT HE DID NOT ACTUALLY RAISE A FACIAL CHALLENGE.

Kellner *only* alleged claims based on the Board's "adoption" and "application" of the Challenged Bylaws. B628-34.[2] Those are fiduciary duty claims. A/R.Br.33-38.[3] Fiduciary duty claims are as-applied challenges. O/A.Br.27-32.[4] So, Kellner concedes that he did not actually raise a facial challenge. That ends this cross-appeal.

Kellner says the "facial/as-applied" distinction does not apply to bylaw "adoption claims." A/R.Br.33-35. Precedent forecloses that theory. *E.g.*, *Salzberg*, 227 A.3d at 135. And Kellner waived it anyway. He argued below that his "adoption" claim "is a facial challenge." A1951-52; Op.2 (Kellner "lodged a facial

[2] Kellner does not address AIM's analysis of his duplicative declaratory claims in Counts I and III of his Complaint. O/A.Br.29-30. Any opposition is waived. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

[3] Citations to "A/R.Br.___" are to Kellner's answering brief on cross-appeal and reply brief on appeal.

[4] Citations to "O/A.Br.___" are to AIM's opening brief on cross-appeal and answering brief on appeal.

challenge").[5] It is too late for him to change his mind. *See Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997) (arguments raised "for the first time on appeal" are waived). If anything, Kellner's sudden attempt to disclaim his facial challenge confirms that the Court of Chancery should not have considered one in the first place.

Recognizing this, Kellner is forced to argue that his "context-specific" adoption claim really was a facial challenge. A/R.Br.36-37. This flouts the "well-understood" distinction between facial challenges—which do not consider context or motive—and as-applied challenges—which do. *Hazout*, 134 A.3d at 286-87 & nn.43-44. Under that settled distinction, his adoption claim is an as-applied challenge.

Facial challenges just ask whether a bylaw is "permissible under the DGCL." *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 559 (Del. 2014).[6] They do not consider the "contextual situation[] [surrounding] the *adoption or application*

[5] For this reason, AIM did not "restyle" Kellner's "adoption claim a [*sic*] facial claim." A/R.Br.35. He did that himself.

[6] *Accord Salzberg*, 227 A.3d at 113 ("In asserting [a] facial challenge, the plaintiff *must* show that the [bylaw]…'do[es] not address proper subject matters as defined by [the DGCL].'" (emphasis added) (quoting *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013))); *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 2024 WL 550750, at *16 (Del. Ch. 2024) ("*Moelis.I*") (facial challenge "enforces statutory requirements" under DGCL).

of" the bylaw under the circumstances of a particular case. *Salzberg*, 227 A.3d at 135 (emphasis added); *ATP*, 91 A.3d at 558 ("That, under some circumstances, a bylaw might…operate unlawfully[] is not a ground for finding it facially invalid."). Put differently, facial challenges concern *what* the bylaw says. *See Solak v. Sarowitz*, 153 A.3d 729, 740 (Del. Ch. 2016) (facial validity is a "pure question of law"). They do not concern *why* it says what it says. *See Salzberg*, 227 A.3d at 135 (a facial challenge does not consider any "inequitable purpose[s]" behind a bylaw's "adoption or application").[7]

As-applied challenges ask *why*. Unlike a facial challenge, an as-applied challenge is an equitable challenge that examines "the specific setting" in which a bylaw was adopted or applied to determine the motive behind it. *Moelis.II*, 2024 WL 747180, at *38 (citing *Del. Bd. of Med. Licensure & Discipline v. Grossinger*, 224 A.3d 939, 956 (Del. 2020)). An as-applied challenge thus contends that an "otherwise…facially valid" bylaw should not be "enforced" against the challenger

[7] *Accord Boilermakers*, 73 A.3d at 949 ("[T]he appropriate question [on a facial challenge] is simply whether the bylaws are valid under the DGCL."); *see Moelis.I*, 2024 WL 550750, at *15 (facial challenges do not consider "subjective mental state[s]" or "focus[] on what the directors knew, believed, and intended"); *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 2024 WL 747180, at *38 (Del. Ch. 2024) ("*Moelis.II*") (facial challenges do not "focus on who did what, when, and how in the specific scenario at issue"); *see also Del. State Sportsmen's Ass'n v. Garvin*, 196 A.3d 1254, 1274 (Del. Super. 2018) ("A facial challenge is an attack on [the act] itself.").

because it was "adopted" or later applied for an "inequitable purpose." *Salzberg*, 227 A.3d at 135. Accordingly, a breach of fiduciary duty claim based on the "case-specific" circumstances surrounding a bylaw's adoption is an as-applied challenge, not a facial challenge. *Boilermakers*, 73 A.3d at 949, 959; *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1125 (Del. Ch. 1990) ("[I]nquiries concerning fiduciary duties are inherently particularized and contextual."); O/A.Br.28-29.[8]

Kellner asked why. Kellner did not base his claims on the DGCL. O/A.Br.28-29. Nor could he have. The DGCL plainly permits corporations to enact advance notice bylaws to "govern the director nomination process." *Sternlicht v. Hernandez*, 2023 WL 3991642, at *13 (Del. Ch. 2023) (citing 8 *Del. C.* §§ 109(b), 211(b)). Instead, Kellner alleged that the Board breached its fiduciary duties by adopting the Challenged Bylaws to "target" him. O/A.Br.28-29; A/R.Br.33-34. By his own telling, Kellner's "adoption" claim was an as-applied challenge, not a facial challenge.

[8] *Accord Moelis.I*, 2024 WL 550750, at *16 (as-applied challenges "enforce[] fiduciary obligations"); *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 233-37 (Del. Ch. 2014) (distinguishing facial challenge to corporate bylaws' statutory validity from breach of fiduciary duty challenge to bylaws' "adoption"), *superseded on other grounds by* 8 *Del. C.* § 115; *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1077-82 (Del. Ch. 2004) (distinguishing facial challenge to bylaws alleging violation of DGCL from fiduciary duty challenge attacking circumstances surrounding bylaws' adoption), *aff'd*, 872 A.2d 559 (Del. 2005).

There is no "trick." A/R.Br.35. The Court of Chancery just misconstrued Kellner's as-applied adoption challenge as a facial challenge. This Court should reverse the judgment facially invalidating the Challenged Bylaws.

II. KELLNER CONCEDES THAT THE COURT OF CHANCERY IMPROPERLY FASHIONED FACIAL RELIEF FOR AN AS-APPLIED CLAIM.

Kellner did not prove facial invalidity anyway. "A facial challenge contends that an act 'is not valid under any set of circumstances.'" A/R.Br.36 (quoting *Grossinger*, 224 A.3d at 956). Kellner does not dispute that he did not meet this standard. *See Berlin*, 726 A.2d at 1224 ("Issues not briefed are deemed waived."); O/A.Br.31-33.[9] That independently ends this cross-appeal because judgment should have been entered for AIM. To avoid reversal, Kellner resorts to arguing that: (A) enhanced scrutiny is a "standard of facial invalidity"; and (B) facial invalidity "is the correct relief for a successful adoption claim under *Unocal*." A/R.Br.36. Both are wrong.

A. Enhanced Scrutiny Is Not A Facial Validity Standard.

Kellner calls enhanced scrutiny a "standard of facial invalidity." A/R.Br.36. It is not. Facial challenges do not consider the motives or context for a bylaw's adoption. Enhanced scrutiny does.

[9] Kellner misquotes AIM's burden of proof argument. A/R.Br.33-34. That argument concerned facial validity, not enhanced scrutiny, and Kellner did not respond to it. O/A.Br.31-32.

Enhanced scrutiny "is not intended as an abstract standard." *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del. 1989). Quite the opposite. Enhanced scrutiny is an equitable "standard of review [that] requires a context-specific application of the directors'" fiduciary duties to a particular case's "situationally" unique facts. *Coster.IV*, 300 A.3d at 671-72; *see Time*, 571 A.2d at 1153 ("The usefulness of *Unocal* as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios."). Enhanced scrutiny therefore "mandates" review of the board's "true motivation[s]" to "smoke out mere pretextual justifications" for adopting the bylaw. *In re Dollar Thrifty, Inc. S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010). Facial challenges do not. *See Boilermakers*, 73 A.3d at 948-49 (facial challenges eschew the "real human events underlying [the] case"; "the possibility that a…valid bylaw may operate inequitably in a particular scenario" is reserved for an as-applied challenge). By relying on enhanced scrutiny, Kellner concedes that his adoption claim is an as-applied challenge. *See In re Ebix, Inc. S'holder Litig.*, 2016 WL 208402, at *16 (Del. Ch. 2016) (applying enhanced scrutiny to advance notice bylaws because plaintiffs did "not challeng[e] the facial validity of the bylaws like in *Boilermakers*").

As a last resort, Kellner tells this Court to "disregard" *Salzberg* and *Boilermakers* because they "did not apply enhanced scrutiny." A/R.Br.35-36. Of course they did not. Both cases considered facial challenges based on statutory

violations, not as-applied challenges based on fiduciary violations. *Salzberg*, 227 A.3d at 113-20 (facial challenge under 8 *Del. C.* § 102(b)(1)); *Boilermakers*, 73 A.3d at 950-54 (facial challenge under 8 *Del. C.* § 109(b)). Kellner's disagreement with those decisions is no basis for overruling "decades of precedent" supporting them. A/R.Br.36.

B. *Unocal* Does Not Award Facial Relief.

Enhanced scrutiny is not a facial validity standard. Nevertheless, Kellner says facial invalidity "is the correct relief for a successful adoption claim under *Unocal*." A/R.Br.36 (citing no authority). This position enables Kellner to argue that, whether labeled "facial" or "as-applied," the result would be the same. A/R.Br.38. It would not. Kellner misreads authority and ignores the detrimental consequences that the Court of Chancery's "blanket judicial invalidation" of otherwise legitimate bylaws has had for Delaware corporations everywhere. *Hazout*, 134 A.3d at 286-87.

Unocal is "finely focused upon the particulars of the case." *Stahl v. Apple Bancorp, Inc.*, 1990 WL 114222, at *8 (Del. Ch. 1990). As a context-specific inquiry, *Unocal* "is, and always has been…a framework for evaluating whether an *injunction* should issue." *In re Edgio, Inc. S'holders Litig.*, 2023 WL 3167648, at *9 (Del. Ch. 2023) (emphasis added). On the other hand, "the relief that would follow" from a facial challenge "reach[es] beyond the particular circumstances" of the challenger. *Burroughs v. State*, 304 A.3d 530, 540 n.39 (Del. 2023) (quoting

John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010)). It "reach[es] everyone. *Id.* So, to obtain facial relief, a facial challenger must "satisfy" Delaware's "standards for a facial challenge to the extent of that reach." *Id.* Those standards require a facial challenger to prove that the bylaws cannot operate validly "*under any circumstances*." *Salzberg*, 227 A.3d at 113; *accord Boilermakers*, 73 A.3d at 949.

The Court of Chancery did not hold Kellner to that standard. Instead, it conducted a context-specific review of the Challenged Bylaws' adoption under *Unocal*,[10] Op.43, and—after (erroneously) determining the Challenged Bylaws were disproportionate to the threat posed by Kellner and his coconspirators, Op.46—declared the Challenged Bylaws facially invalid, Op.67. In effect, the Court of Chancery invalidated the Challenged Bylaws across the *entire market* based on its (wrong) conclusion that *AIM's* adoption of those Bylaws was inequitable. O/A.Br.30-34; *infra* III. That result contradicts *Unocal* and violates Delaware's "policy of seeking to promote stability and predictability in [its] corporate laws." *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 355 (Del. 2022).[11]

[10] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[11] The market-destabilizing effect of the result below is not hypothetical. At least eight lawsuits (and counting) have since been filed in the Court of Chancery challenging advance notice bylaws. *See* Br. *Amicus Curie*, Dkt.47, Ex.A, at 6, 10-12, 23-26 & n.74 (citing advanced notice bylaw challenges filed since December 2023); Reply *Amicus Curie* in Supp. Mot. for Leave, Dkt.50, at 4 & n.11; *Miller v. Allen*, C.A.No.2024-0234 (Del. Ch. 2024) (filed Mar. 11, 2024). Some of those

None of Kellner's cases granted the type of facial relief he received below. A/R.Br.34, 36. In *Hollinger*, the controller, Black, caused Hollinger to amend its bylaws. *Hollinger*, 844 A.2d at 1029. The amended bylaws "disable[d] [Hollinger's] independent directors" from blocking action taken by Black. *Id.* Hollinger brought both facial and as-applied challenges to the amended bylaws. *Id.* at 1077. The facial challenge alleged that one provision of the amended bylaws violated Section 141(c)(2) of the DGCL. *Id.* The as-applied challenge alleged that the amended bylaws were adopted with "inequitable motivations." *Id.*

The *Hollinger* court recognized the "venerable and useful" distinction between Hollinger's claims. *Id.* A facial challenge is "a legal claim, grounded in the argument that corporate action is improper because it violates a statute," while an as-applied claim "is an equitable claim, founded on the premise that the directors or officers have breached an equitable duty." *Id.* at 1077-78. So, the court reviewed Hollinger's facial and as-applied challenges separately. *Id.* at 1077-82.

Starting with Hollinger's facial challenge, the court reviewed that individual provision and determined that it "does not contravene § 141(c)(2)." *Id.* at 1079-80 (also recognizing "bylaws of a corporation are presumed to be valid").[12] With the

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lawsuits even cite the Court of Chancery's opinion below. Br. *Amicus Curie*, Dkt.47, Ex.A, at 24 & n.74.

[12] Consistent with the approach endorsed by Delaware courts for both facial and as-applied challenges, the *Hollinger* court analyzed the challenged bylaw

facial challenge resolved, the question became "whether that and the other Bylaw Amendments are impermissible because they were adopted for an inequitable purpose." *Id.* 1080. Based on "the unique facts of the case before the court," the court answered "yes." *Id.* at 1081 & n.137 (quoting *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *1, *4 (Del. Ch. 1991)). It ordered "remedial action…proportionate to the injury inflicted on [Hollinger] by Black" and enjoined the amended bylaws to "prevent [Black] from inequitably disabling the [Hollinger] board from taking effective action at the board level." *Id.* at 1082. As this Court later recognized, the amended bylaws were therefore of "no force and effect" for Hollinger, but not facially invalid. *Black*, 872 A.2d at 564 ("Although the Court of Chancery determined that the ByLaw Amendments were not *per se* invalid…it did hold that the ByLaw Amendments were invalid in equity and of no force and effect."); *see also id.* at 565 (describing relief as "permanently enjoin[ing] Black" from interfering with Hollinger's board).

Kellner's other cases confirm that facial invalidation is not the proper relief for an as-applied adoption challenge. *Liquid Audio* involved a bylaw amendment to

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provision individually. *Id.*; *see also, e.g.*, *Moelis.II*, 2024 WL 747180, at *46-53 (evaluating challenged bylaw provisions individually under facial validity standard); *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *12-14 (Del. Ch. 2023) (evaluating challenged bylaw provisions individually for reasonableness under *Unocal*); *accord* Op.67-68 & n.331.

expand the size of Liquid Audio's board. *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1121 (Del. 2003). This Court held that the bylaw's adoption was inequitable. *Id.* at 1132. But this Court emphasized that MM's challenge to the bylaw was not a facial challenge: "At issue in this case is not the validity generally of…a bylaw that permits a board of directors to expand the size of its membership." *Id.* So, it held the bylaw as adopted by Liquid Audio was invalid. *Id.*

Similarly, in *Schnell*, this Court fashioned as-applied relief, remanding "with instruction to nullify the December 8 date as a meeting date for stockholders" and "reinstate" the original annual meeting date. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 440 (Del. 1971); *see also id.* at 438 (recognizing Schnell sought "*injunctive relief* to prevent management from advancing the date of the annual stockholders' meeting" (emphasis added)). The relief in *Blasius* was, likewise, to enjoin Atlas's bylaw increasing the size of the board. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988). And in *Williams Companies*, the Court of Chancery determined that a shareholder rights plan was unreasonable under *Unocal*, "declar[ed] the Plan unenforceable[,] and permanently enjoin[ed] the continued operation of the Plan" by Williams Companies. *Williams Cos. S'holder Litig.*, 2021 WL 754593, at *40 (Del. Ch. 2021), *aff'd sub nom. Williams Cos. v. Wolosky*, 264 A.3d 641 (Del. 2021).

Delaware courts rightly do not facially invalidate bylaws or defensive measures because they fail to withstand scrutiny in as-applied adoption challenges. *E.g.*, *Chesapeake Corp. v. Shore*, 771 A.2d 293, 354 (Del. Ch. 2000) (enjoining bylaw for failing *Unocal* scrutiny); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 915 (Del. Ch. 1980) (enjoining bylaw). When Kellner says that facial invalidation is "the correct relief for a successful adoption claim under *Unocal*," he suggests that case-specific outcomes can and should dictate universal changes in corporate governance law. A/R.Br.36. But that is not how Delaware law works. For good reason. If Kellner were correct, no Delaware corporation could amend its bylaws to eliminate a committee because a bylaw amendment to eliminate a committee was inequitably adopted in *Hollinger*. And if Kellner were correct, no Delaware corporation could amend its bylaws to add board seats because bylaw amendments to add board seats were inequitably adopted in *Liquid Audio* and *Blasius*. Decisions to advance an annual meeting date (*Schnell*) or implement a poison pill (*Williams Companies*) would meet the same fate.

But Kellner is not satisfied with his unworkable rule. He also says that "adoption" and "application" claims reviewed under the same as-applied standard of *Unocal* necessarily result in different relief. A/R.Br.34-35. Kellner agrees that as-applied "adoption" and "application" claims are both reviewed under *Unocal*. A/R.Br.35. And he agrees that facial relief is not available for application claims.

A/R.Br.34. But he contends that facial relief is available for adoption claims. A/R.Br.36. So, according to Kellner, facial invalidation is the remedy when the circumstances of a bylaw's adoption are challenged and reviewed under *Unocal*, but not when the circumstances of a bylaw's application are challenged and reviewed under the exact same standard. Kellner knows there is no principled basis for that inconsistency so, he proposes a new rule instead. A/R.Br.34 ("Delaware 'corporate law is not static.'"). Neither of the two watershed changes in Delaware law that Kellner envisions can be reconciled with "[t]he policies underlying [Delaware law] includ[ing] certainty and predictability [and] uniformity…[in] corporate disputes." *Salzberg*, 227 A.3d at 137; *accord Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 451 (Del. Ch. 2007) ("Delaware courts have long asserted that this state has a compelling interest in the efficient and consistent application of its laws governing business entities.").

Kellner tries to distract from his crabbed presentation of Delaware corporate law with off-base allusions to racial animus and discrimination cases. A/R.Br.36-40. But his stunning attempt to equate a self-created predicament with racial voting discrimination and school segregation is flawed at best. "Although linguistically reminiscent" of enhanced scrutiny under *Unocal*, "the type of review given to suspect classifications under the federal constitution" is irrelevant here. *Pell v. Kill*,

135 A.3d 764, 787 (Del. Ch. 2016); *see also InterMune, Inc. v. Harkonen*, 2023 WL 3337212, at *1 (Del. Ch. 2023) (corporate rights are not "[b]asic civil rights").

Unocal does not ask whether a bylaw was passed with "discriminatory intent," A/R.Br.37, or require the compelling justification demanded by constitutional strict scrutiny, *Pell*, 135 A.3d at 787. All *Unocal* asks is whether bylaws are reasonable and proportionate to a corporate threat. *Coster.IV*, 300 A.3d at 672. Properly construed, any remedy available under *Unocal* "of necessity" could only "affect" the particular corporation facing scrutiny. A/R.Br.37.[13] By (incorrectly) answering *Unocal*'s question "no," *infra* III, the Court of Chancery concluded only that the Challenged Bylaws exceeded what was reasonably proportionate to protect AIM's information-gathering interest from the particular threat posed by persons like Kellner and his coconspirators. So, the Court of Chancery erred by fashioning broad facial relief under *Unocal*'s as-applied standard. That error is compounded by Kellner's (admitted) failure to meet his burden to prove invalidity in every circumstance. *Salzberg*, 227 A.3d at 113. Kellner's sidetrack down the garden path of federal equal protection law does not help him on either front.

[13] Kellner's effort to shoehorn Delaware corporate law into federal constitutional analyses is largely based on his nonsensical reading of *Schnell* as voiding Chris-Craft's decision to advance its annual meeting "in every application." A/R.Br.37; *see also supra* p.14.

III. THE COURT OF CHANCERY ERRED BY INVALIDATING THE CHALLENGED BYLAWS UNDER ENHANCED SCRUTINY.

Unocal's proportionality requirement demands only that a board's response fall within a "range of reasonableness." *Unitrin Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 (Del. 1995) (citing *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994)). A reasonable response reflects "a logical and reasoned approach [to] advancing a proper objective" under the circumstances. *Dollar Thrifty*, 14 A.3d at 598. This standard accommodates the board's need for "latitude in discharging its fiduciary duties to the corporation and its shareholders when defending against perceived threats." *Unitrin*, 651 A.2d at 1388. So, even if "not a *perfect* decision," courts cannot "substitute their business judgment for that of the directors" and "second guess" a reasonable board response. *Id.* at 1385 (quoting *QVC*, 637 A.2d at 45-46). The Court of Chancery's focus on hypothetical scenarios, untethered from the Challenged Bylaws' plain language, obscured the real-world circumstances of the Bylaws' adoption and caused it to do just that.

When properly situated in the reality of AIM's prior experience with multiple clandestine takeover attempts, the Challenged Bylaws reflect a "logical approach" to a proper corporate objective—namely, ensuring that nominators disclose material facts needed for the Board to ensure a fully informed stockholder vote. *Dollar Thrifty*, 14 A.3d at 598. Kellner does not meaningfully dispute that the Challenged

Bylaws serve proper corporate objectives. Op.46-48.[14] Nor does he dispute that the Board reasonably relied on counsel to draft the Challenged Bylaws. Op.47-48. He instead argues that none of the Challenged Bylaws are "properly tailored." A/R.Br.41-45. But that disregards the "situationally specific" facts and circumstances that led AIM to adopt the Challenged Bylaws in the first place. *Coster.IV*, 300 A.3d at 672; *see also* Op.48.[15] In the circumstances, the Challenged Bylaws were a reasonable response to the threat posed by persons like Kellner and his coconspirators.

A. The 2023 AAU Provision Is Proportional.

Kellner does not dispute that the 2023 AAU Provision "protect[s] AIM and its stockholders against potentially abusive and deceptive practices by activists," and

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[14] Kellner suggests that information gathering is not a legitimate corporate objective. A/R.Br.15. Settled precedent contradicts him. *E.g.*, *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 980 (Del. 2020) ("[T]he purpose of advance notice bylaws" is "to permit orderly meetings and election contests." (quoting *Openwave Sys., Inc. v. Harbinger Cap. P'rs Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007))); *accord Paragon*, 2023 WL 8269200, at *7; *Sternlicht*, 2023 WL 3991642, at *14; *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *9 (Del. Ch. 2022) (advance notice bylaws "serve[] an important disclosure function, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed votes"); Op.47; O/A.Br.47-48.

[15] Kellner incorrectly asserts that AIM amended its advance notice bylaws in response to a mere "electoral campaign." A/R.Br.14. In reality, the Board amended those bylaws after enduring takeover attempts by felons and other non-stockholders who sought to affirmatively mislead AIM and its stockholders regarding who was orchestrating and financing the plot.

that the provision was tied to AIM's past "experience in the 2022 proxy contest where a nominating stockholder…evaded disclosure requirements." Op.51-52. Nor could he; he was a party to that attempt to mislead stockholders. Op.13-14. Against that background, the 2023 AAU Provision simply required Kellner to disclose his AAUs. Kellner lied instead. Op.73. Kellner's decision to submit false information does not mean the 2023 AAU Provision is a "tripwire," A/R.Br.39, or that he could not understand how to comply with it, Op.82 ("nothing…prevent[ed] Kellner from complying" with the AAU requirement). It simply means the provision served its "logical" purpose. That is, it defeated efforts to obscure and evade disclosure of known multi-level relationships involving the nominator and their nominees—*e.g.*, secretly orchestrating or financing nomination efforts. *Dollar Thrifty*, 14 A.3d at 598, 600 ("[W]hen the record reveals no basis to question the board's good faith desire to attain the proper end, the court will be more likely to defer to the board's judgment about the means to get there.").

To blunt the facts, Kellner joins the Court of Chancery in hypotheticals. A/R.Br.41-42. But again, *Unocal* is not an "abstract standard." *Time*, 571 A.2d at 1153. It is "finely focused upon the particulars of the case." *Stahl*, 1990 WL 114222, at *8. In this particular case, the Board adopted the 2023 AAU Provision with the advice of sophisticated counsel to combat a real-world effort to subvert its corporate elections. *See Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062,

at *12 (Del. Ch. 2010) (reliance on advice of counsel "materially enhance[s]" reasonableness of board action), *aff'd*, 5 A.3d 586 (Del. 2010). Kellner might want to downplay his decision to "omit[] and misrepresent[]" AAUs, Op.76, but that does not change the provision's "reasonableness" under the "context-specific" circumstances, *Coster.IV*, 300 A.3d at 671-72.

B. The Consulting/Nomination Provision Is Proportional.

Kellner agrees that the Consulting/Nomination Provision is tailored to the "nominee" only. A/R.Br.44. He just complains about its length. But length does not equate to ambiguity. Indeed, Kellner does not explain why disclosing whether he previously supported his nominee's election to a different public board would preclude him from nominating that same candidate to AIM's board. Nor does he explain why stockholders would find a nominator's serial nomination arrangements to be immaterial. As explained, his hypothetical is incorrect, and ultimately no substitute for the real-world analysis that *Unocal* requires. O/A.Br.33-34.

C. The Ownership Provision Is Proportional.

Kellner does not dispute that bylaws requiring disclosure of ownership beyond beneficial ownership are "very common," "perfectly legitimate," and "a means to close loopholes in Section 13(d) [of the Exchange Act] involving synthetic equity." Op.63. And Kellner does not dispute that ownership in a principal

competitor is crucial information in the activist setting. A/R.Br.44.[16] Instead, Kellner repeats inapplicable hypotheticals to conclude that the provision "sprawls wildly beyond this purpose." A/R.Br.45 (citing Op.63). This again ignores AIM's context-specific circumstances.

The Board adopted the Ownership Provision based on AIM's experience with the Jorgl nomination attempt, "where a nominating stockholder...evaded disclosure requirements." Op.51-52. Indeed, the Jorgl nomination involved felons who had been convicted for illegal trading activity. With that context, the Board logically determined to adopt a bylaw designed to uncover trading information—*i.e.*, derivative, synthetic, or hedging ownership or instruments. Just because synthetic equity is complex does not mean nominators who own synthetic equity are precluded from disclosing that they do. O/A.Br.39-40.

Beyond that, there is no evidence that the Ownership Provision confused Kellner or his counsel. To the contrary, Kellner purported to provide the requested information, including for the "principal competitors," he now claims was impossible to understand. AIM had publicly identified and disclosed those

[16] Kellner cherry-picks Dr. Mitchell's deposition testimony, A/R.Br.44-45, but read in its entirety, that testimony merely concerns the Ownership Provision's length, BR1, 73-74. Again, length does not equate to ambiguity.

competitors in its 10-K, and Kellner referenced and incorporated them in his notice. A698-99. All this confirms the provision was unambiguous and proportional.

D. The Known Supporter Provision Is Proportional.

Finally, the Known Supporter Provision was tailored and proportional to AIM's specific circumstances. The Board adopted the provision in direct response to the Jorgl group's "efforts to conceal who was supporting and who was funding the nomination efforts and to conceal the group's plans for the Company." Op.25. That was a "reasonable" way to address AIM's past experience with "a façade concealing the identities of individuals responsible for the [nomination] effort." Op.47.

Moreover, the Known Supporter Provision is virtually identical to the provision validated in *CytoDyn*. O/A.Br.40-41. Kellner does not dispute that the Court of Chancery misread the provision in *CytoDyn* to concern only "financial supporters." He instead dismisses *CytoDyn* as "not bind[ing]." A/R.Br.42-43. That observation does not make the Known Supporter Provision any less "commonplace." *Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140, at *14 (Del. Ch. 2021). And Kellner's attempt to "purposefully...hide who was behind the scenes supporting [his nomination] efforts" demonstrates that the Board "reasonably" adopted the provision. *Id.* at *18.

As a last resort, Kellner attacks the SAP definition. A/R.Br.42-43. But he ignores that the definition is anchored to a Nominating Stockholder's *own nomination efforts*. SAPs include those acting in concert with the Nominating Stockholder with respect to the nomination efforts, controlling persons, and immediate family members. Making that straightforward disclosure does not involve a "daisy chain" concept or ask for the identity of persons whom the Nominating Stockholder could not possibly know. In fact, it aligns with AIM's case-specific circumstances. The Jorgl group—which included Kellner, Op.19-20 & n.116—intentionally concealed that two felons—Tudor and Xirinachs—respectively orchestrated and funded its takeover attempt, Op.11, 17 & n.104. Accordingly, the inclusion of SAPs in the Known Supporter Provision sought to prevent such manipulation and concealment from happening again by requiring disclosure of both supporters known by the Nominating Stockholder and by a SAP. B111-12.

All the Challenged Bylaws are proportional. The judgment below concerning their validity should be reversed.

CONCLUSION

This Court should reverse the Court of Chancery's judgment concerning the validity of the Challenged Bylaws and otherwise affirm.

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