EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

This Court has recognized that advance notice bylaws are "commonplace" provisions that "are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations."[1] Advance notice bylaws also "serve[] an important disclosure function, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed votes."[2] Although advance notice bylaws have generated increased attention since the Securities and Exchange Commission ("SEC") adopted rules

[1] *BlackRock Credit Allocation Income Tr. v. Saba Capital Master Fund, Ltd.*, 224 A.3d 964, 980 (Del. 2020). All internal citations, quotations, and alterations are omitted unless otherwise noted.

[2] *Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc.*, 2022 WL 453607, at *9 (Del. Ch. Feb. 14, 2022).

requiring universal proxy cards in contested elections, these bylaws do not present a meaningful impediment to qualified stockholder nominees.

This is the first case before this Court to address an advance notice bylaw since the decision in *Coster v. UIP Companies, Inc.*, 300 A.3d 656, 672 (Del. 2023), which clarified that "*Schnell* and *Blasius* review"—standards previously held applicable to advance notice bylaws—are to be "folded into *Unocal* review" going forward. *Coster* simplified Delaware law by consolidating three previously extant standards of review, but the Court of Chancery's opinion below injects uncertainty into Delaware law. By entertaining various hypotheticals that could render the bylaws at issue ambiguous, but which were not applicable in this case, the trial court conflated a facial validity challenge with an equitable adoption or as-applied challenge. The trial court also invoked enhanced scrutiny as the standard of review based on its conclusion that the bylaws were adopted on an "overcast" rather than a "clear" day. But enhanced scrutiny does not apply to facial challenges, and the trial court's standard is unworkable even for as-applied challenges.

The opinion below also is likely to encourage troublesome litigation for other Delaware corporations. First, the opinion incentivizes activist stockholders to attempt to circumvent advance notice bylaws by mounting facial challenges to them, jeopardizing the benefits these provisions achieve for stockholders. Second, it allows opportunistic counsel to identify an ongoing proxy contest and seek to strike

advance notice bylaws that are not at issue, with the hope of using another person's proxy contest to justify a fee award. Third, the opinion invites rent-seeking demand letters and lawsuits challenging bylaws that could allegedly be ambiguous in some hypothetical scenarios, even in the absence of a proxy contest, further burdening Delaware corporations and courts.

Thus, it is critical to the Chamber's many members for this Court to clarify the approach by which Delaware courts are to review advance notice bylaws.

SUMMARY OF ARGUMENT

Advance notice bylaws serve a critical role in facilitating orderly and informed stockholder votes. For that reason, they are virtually ubiquitous among public companies and are consistently upheld and enforced by Delaware courts. This case—in which a group that included two "white collar criminals" attempted to gain control of the board, while concealing the involvement of those two individuals and their past convictions for crimes related to securities fraud—is a prime example of the necessity of advance notice bylaws, and the Court of Chancery's ruling presents a troubling exception to Delaware's approach to evaluating such bylaws.

The Court of Chancery erred by conflating a facial challenge to advance notice bylaws with an as-applied challenge regarding the circumstances of those bylaws' adoption. Delaware law draws a clear distinction between these types of challenges. Bylaws are facially invalid only if there are no circumstances in which they could operate legally or equitably. But that does not give board the right to manipulate bylaws to disenfranchise stockholders. For decades, Delaware courts have enjoined enforcement of, or excused noncompliance with, otherwise-valid bylaws that were adopted or applied inequitably through as-applied challenges. But no matter the challenge, Delaware courts have refused to issue advisory opinions regarding hypothetical abuses of bylaws.

Here, however, the Court of Chancery did not find that the stockholders successfully pled an as-applied challenge, but rather held that four provisions within the bylaws were facially invalid because in certain far-fetched, hypothetical circumstances, they could be difficult to interpret. But that is not the correct standard for a facial challenge. It is not enough for a stockholder to show that there exists some hypothetical situation where the bylaw could be wrongfully applied. Instead, the stockholder must show that there are *no* circumstances in which the bylaw could be lawfully or equitably applied.

The Court of Chancery also erred by applying enhanced scrutiny simply because it concluded the skies were "overcast" in light of past and theoretical future proxy contests. Enhanced scrutiny is the wrong standard for a facial challenge. Even for as-applied challenges, Delaware courts have traditionally used enhanced scrutiny only when there is evidence of interference with or manipulation of the stockholder franchise. Indeed, part of the problem with *Blasius* was that it applied even to actions taken in good faith. It is error to assume that the mere possibility of stockholder activism or a proxy contest—an unworkable standard for boards of directors in today's dynamic markets—necessitates enhanced scrutiny absent evidence of manipulative conduct. In this very case, the board sought to increase the information available to stockholders after learning that two "white collar criminals" attempted to conceal their involvement in a nomination.

The Court of Chancery's approach would penalize boards for updating their bylaws to enable a more informed exercise of the stockholder franchise—and invite a host of similar lawsuits by activist stockholders seeking to avoid disclosing potentially material information to a company's stockholders by casting aside advance notice bylaws in their entirety. In addition, even now lawsuits are being filed by stockholders who have not nominated a director, but whose entrepreneurial counsel now stand to gain by litigating hypothetical scenarios in which valid advance notice bylaws *could* be abused. These costs have no corresponding marginal benefits to stockholders, who have long had the ability to bring as-applied challenges to bylaws that have been actually and inequitably used against them. These outcomes undermine rather than advance the orderly and informed exercise of the stockholder franchise.

ARGUMENT

I. Advance notice bylaws are common because they facilitate orderly elections and the informed exercise of stockholder voting rights.

In *Coster*, this Court reaffirmed that "the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[3] Advance notice bylaws serve a critical role in the exercise of that franchise. Although the SEC's adoption of the universal proxy rules in November 2021 changed how contested board elections are conducted, the federal securities laws do not establish a mechanism for the nomination of directors or the disclosure of information about nominees until a proxy statement is filed. Rule 14a-19 promulgated under the Securities Exchange Act of 1934 (the "Exchange Act") does not itself enforce the obligations it places on stockholders.[4] Even the disclosure obligations of Section 13(d) of the Exchange Act apply only to stockholders owning more than 5% of a company's shares.[5] At the state level, the DGCL "is nearly silent on how a stockholder should nominate a director candidate for election."[6]

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[3] *Coster*, 300 A.3d at 667 (quoting *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)).

[4] 17 C.F.R. § 240.14a-19; *see also* JX0973 (Expert Report of Edward Rock) ¶¶ 39, 42.

[5] 17 C.F.R. § 240.13d-1; *see also CSX Corp. v. Children's Inv. Fund Management (UK) LLP*, 654 F.3d 276, 280 (2d Cir. 2011) (affirming denial of voting injunction even when a hedge fund "disperse[d] its swaps" to avoid "trigger[ing] disclosure under the Williams Act").

[6] *Kellner v. AIM ImmunoTech Inc.*, --- A.3d ----, 2023 WL 9002424, at *14 (Del. Ch. Dec. 28, 2023) (hereinafter the "Trial Court Opinion").

Advance notice bylaws have long filled this critical gap. Although it does not provide specific requirements for director nominations, the DGCL nonetheless provides "immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise," which is one reason why "Delaware's corporate statute is widely regarded as the most flexible in the nation."[7] To that end, the DGCL provides that "bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[8]

In accordance with that statutory authority, advance notice bylaws have been "commonplace" for at least 25 years.[9] These bylaws "are often construed and frequently upheld as valid by Delaware courts"[10] because they "serve an indisputably

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[7] *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020); *see also Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) ("our Supreme Court has long noted that bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders").

[8] 8 *Del. C.* § 109(b).

[9] *See Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 42 (Del. Ch.), *aff'd sub nom. Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998); *see also Stroud v. Grace*, 606 A.2d 75, 94 (Del. 1992) (upholding an advance notice bylaw).

[10] *Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007); *Stroud*, 606 A.2d at 95; *Accipiter Life Scis. Fund, L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006).

legitimate purpose."[11] Advance notice bylaws function "to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations."[12] Perhaps more importantly, advance notice bylaws also serve vital "information-gathering and disclosure functions, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed votes."[13] Just as "the legitimacy of directorial power" rests on the stockholder franchise,[14] the legitimacy of the stockholder franchise rests on access to "all material facts . . . that would have a significant effect upon a stockholder vote."[15]

This case underscores the critical nature of these "information-gathering and disclosure functions." As the Court of Chancery found after trial, the notice at issue "followed a proxy contest where [another person] became an AIM stockholder solely to front a nomination and shield undisclosed persons behind the scenes," which "included two white collar criminals."[16] In the trial court's words, "[i]t would

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[11] *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *14 (Del. Ch. Oct. 13, 2021).

[12] *Saba*, 224 A.3d at 980; *see also Openwave*, 924 A.2d at 239 (same); *Sternlicht v. Hernandez*, No. 2023 WL 3991642, at *26, n.287 (Del. Ch. June 14, 2023) (same).

[13] *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *7 (Del. Ch. Nov. 30, 2023).

[14] *Coster*, 300 A.3d at 667.

[15] *See, e.g.*, *Stroud*, 606 A.2d at 85.

[16] *Trial Court Opinion*, 2023 WL 9002424, at *32.

have been obvious to the Board that the new nomination behind Kellner carried over from the prior year. . . . The threat to return 'guns blazing' in 2023 came to fruition."[17] The board appropriately took action to protect the stockholder franchise.

Data confirm that advance notice bylaws are fulfilling their laudatory purposes largely without incident. Advance notice bylaws are nearly universal among public companies. In fact, 99% of S&P 500 companies have advance notice requirements.[18] These bylaws have not prevented activist campaigns: at least 136 were launched in the United States in 2023.[19] Nor have they kept activists from winning board seats: activists secured 30% more board seats in 2023 than in the prior year.[20] The data suggest that advance notice bylaws are functioning appropriately to bring order and information to stockholder voting and, as discussed below,

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[17] *Id.*

[18] WilmerHale, *2023 M&A Report*, at p. 6, https://www.wilmerhale.com/insights/publications/2023-manda-report; *see also Kellner v. AIM ImmunoTech, Inc.*, No. 2023-0879-LWW, Nov. 1, 2023 Trial Tr. Vol. III at 862:12–16 (estimate of plaintiff's expert in this case that 90 to 95 percent of public companies have advance notice bylaws). Deal Point Data, which gathers and summarizes publicly available information regarding, among other things, advance notice bylaw provisions, indicates that only three S&P 500 companies lack advance notice bylaws. Of those three companies, one is incorporated in Switzerland, one restricts nomination rights to a particular stockholder, and one is a trust.

[19] Barclays, *Barclays 2023 Review of Shareholder Activism*, at 2. Barclays limits its review to companies with market capitalizations greater than $500 million, so the number of campaigns is likely even higher. *See id*. at 1.

[20] *Id*.; *see also id.* at 16 (noting that activists won 106 board seats in the U.S. in 2023).

remedies already exist in the event that a board misuses an advance notice bylaw to manipulate a stockholder vote.

II. The Court of Chancery erroneously conflated a facial challenge with an as-applied challenge to the bylaws' adoption.

The Court of Chancery's decision to invalidate certain provisions of the advance notice bylaws was erroneous. The trial court focused primarily on Appellant's as-applied "adoption claim," which alleged that the directors breached their fiduciary duties by adopting amended bylaws "for the inequitable purpose of thwarting stockholders' ability to run a competing slate of director nominees."[21] But the trial court mixed that analysis with a purported "assess[ment of] whether the Amended Bylaws at issue are facially valid."[22] Under that novel hybrid analysis, the trial court held that four provisions were "invalid," "run afoul of Delaware law," and "are of no force and effect," based largely on a series of extreme hypothetical situations in which the bylaws might be ambiguous or difficult to apply.[23] In reaching this conclusion, the trial court applied enhanced scrutiny because the skies were "overcast" at the time the board amended the bylaws.[24] If affirmed, the trial court's judgment would cast doubt upon long-settled Delaware law regarding bylaw challenges, giving rise to uncertainty and increased litigation and inhibiting innovation in corporate governance.

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[21] *Trial Court Opinion*, 2023 WL 9002424, at *16.

[22] *Id.* at *13.

[23] *Id.* at *26, *28 (citing, *inter alia*, 8 *Del. C.* § 109(b) and *Blasius*, 564 A.2d at 659).

[24] *Id.* at *16.

A. The Court of Chancery erred by relying on hypothetical inequities to find advance notice bylaws facially invalid.

The Court of Chancery erred by conflating a challenge to the facial validity of the bylaws with an as-applied challenge to whether the board of directors acted inequitably in adopting the bylaws.[25] As Vice Chancellor Fioravanti recently explained, a "stockholder challenge to the application of an advance notice bylaw presents a series of questions. First, is the bylaw valid on its face? Second, did the stockholder's nomination comply with the terms of the bylaws? Third, if the first two criteria are met, is there some basis in equity to excuse strict compliance with the bylaw?"[26] This framework comports with the bedrock principle of Delaware law that "director actions are 'twice-tested,' first for legal authorization, and second for equity."[27]

Facial invalidity and as-applied equitable review "invoke different principles and do different things."[28] A bylaw is facially valid if it is "authorized by the [DGCL], consistent with the corporation's certificate of incorporation, and its

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[25] *See id.* at *17 (evaluating the facial validity of advance notice bylaws in "a context-specific review").

[26] *Sternlicht*, 2023 WL 3991642, at *14.

[27] *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 96 (Del. 2021).

[28] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, --- A.3d ----, 2024 WL 550750, at *16 (Del. Ch. Feb. 12, 2024); *see also Salzberg*, 227 A.3d at 134 ("The question of enforceability is a separate, subsequent analysis that should not drive the initial facial validity inquiry.").

enactment [is not] otherwise prohibited."[29] Bylaws are "presumed to be valid" on their face.[30]

To succeed on a facial challenge, a plaintiff must show that bylaws "cannot operate lawfully or equitably *under any circumstances*."[31] "That, under some circumstances, a bylaw might conflict with a statute, or operate unlawfully, is not a ground for finding it facially invalid."[32] In other words, Plaintiffs "may not avoid their obligation to show that the bylaws are invalid in all circumstances by imagining circumstances in which the bylaws might not operate in a situationally reasonable manner."[33] In an as-applied challenge, a court must weigh the "situationally specific" circumstances before it.[34] These principles avoid unnecessary advisory opinions and recognize the practical reality that "every valid by-law is always

[29] *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557 (Del. 2014); *see also Salzberg*, 227 A.3d at 113 (to succeed on a facial challenge, "Plaintiffs must demonstrate that the charter provisions do not address proper subject matters as defined by statute, and can never operate consistently with law"); *Moelis*, 2024 WL 550750, at *13 ("A facial challenge contends that an act is invalid under any set of circumstances. It does not require factual development; it presents a pure question of law."); *Chevron*, 73 A.3d at 939 ("[T]he forum selection bylaws are also not inconsistent with the law. For these reasons, the forum selection bylaws are not facially invalid as a matter of statutory law.").

[30] *ATP Tour*, 91 A.3d at 557; *see also Chevron*, 73 A.3d at 940 ("there is a presumption that bylaws are valid").

[31] *Salzberg*, 227 A.3d at 113 (emphasis in original).

[32] *ATP Tour*, 91 A.3d at 558.

[33] *Chevron*, 73 A.3d at 941.

[34] *Coster*, 300 A.3d at 672; *CytoDyn*, 2021 WL 4775140, at *15.

susceptible to potential misuse."[35] The Court of Chancery erred by not applying this clear standard.

Instead of applying these principles to what was described as Appellant's "facial challenge to a set of amended advance notice bylaws,"[36] the Court of Chancery entertained a series of extreme hypotheticals that were neither alleged nor proven at trial:

- "[I]f the mother of an associate of a beneficial holder had an agreement with the estranged sister of a nominee to finance the nomination of a third-party nominee to the Board (who is unknown to both the nominating stockholder and the nominee), then the nominating stockholder would (arguably) be required to mention it in the notice."[37]

- "Would a notice need to reveal if the spouse of an associate of a nominee had an understanding with the nominating stockholder nine years ago that they would exchange investment tips and was told that Apple shares were a good buy, but the investment was not pursued?"[38]

- "[I]f Kellner had posted on social media that he was running a proxy contest and an AIM stockholder liked his post, would Kellner be required to mention it in his notice?"[39]

- "[W]ould Kellner need to disclose if his associate's mother ([a "Stockholder Associated Person"]) learned that an AIM stockholder who attends her church offered prayers for the proxy contest to succeed?"[40]

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[35] *Stroud*, 606 A.2d at 96.
[36] *Trial Court Opinion*, 2023 WL 9002424, at *1.
[37] *Id.* at *21.
[38] *Id*. at *22.
[39] *Id*. at *23.
[40] *Id*.

- "[W]ould a nominating stockholder be required to disclose the entitlement of her mother's second cousin to such fees?"[41]

The trial court did not engage in other hypotheticals where these bylaws would clearly require disclosure of important information. But at a threshold level, "Delaware law does not permit challenges to bylaws based on hypothetical abuses."[42] By invalidating the bylaws based on hypothetical scenarios not at issue in this case, the trial court incorrectly asked whether the bylaws could be inequitable in *any* circumstances, even though it was neither alleged nor proven that they would be unlawful or inequitable in *all* circumstances—or even in the actual circumstances at issue.

Invalidating a bylaw is an extraordinary and unnecessary step. Delaware courts have declined to grant even the less extreme "extraordinary relief of enjoining a Company's facially valid advance notice bylaw on the basis of hypothetical future events."[43] In the event of an ambiguity, Delaware law already provides a solution by "resolv[ing] any doubt in favor of the stockholder's electoral rights."[44] If further equitable remedies are needed in the event of a successful as-applied challenge based

[41] *Id*. at *25.

[42] *Openwave*, 924 A.2d at 240; *see also Stroud*, 606 A.2d at 95; *Chevron*, 73 A.3d at 940.

[43] *AB Value Partners, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *7 (Del. Ch. Dec. 16, 2014).

[44] *Saba*, 224 A.3d at 977.

on the actual circumstances, the Court of Chancery remains empowered to enjoin the enforcement of the offending provisions.

Applying the appropriate tests for facial and as-applied challenges would not allow corporations to abuse advance notice bylaws, a concern that appears to have influenced the Court of Chancery. It is well established that "bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose."[45] For decades, Delaware courts have recognized the option of "enjoining an advance notice bylaw . . . where a board, aware of an imminent proxy contest, imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult."[46] The Court of Chancery's reliance on hypothetical inequities to invalidate advance notice bylaws on grounds of facial validity was error.

B. The Court of Chancery erred by applying enhanced scrutiny based on a mere finding of "overcast" skies.

The Court of Chancery also erred by suggesting that enhanced scrutiny was the applicable standard of review because "[t]he skies were overcast . . . with storm clouds of a proxy contest gathering on the horizon."[47] There is no support for

[45] *Salzberg*, 227 A.3d at 135; *see also CytoDyn*, 2021 WL 4775140, at *15 ("Delaware courts have reserved space for equity to address the inequitable application of even validly-enacted advance notice bylaws.").

[46] *AB Value*, 2014 WL 7150465, at *3.

[47] *Trial Court Opinion*, 2023 WL 9002424, at *16.

applying enhanced scrutiny in evaluating the facial validity of bylaws. What is more, even though the "cloudy day" analogy has become increasingly prevalent in as-applied challenges,[48] the facts and circumstances surrounding the adoption of bylaws can be as varied and unpredictable as an evening weather report. A *per se* rule requiring the application of enhanced scrutiny whenever there are clouds therefore makes little sense even in the context of an as-applied challenge, and it is especially inappropriate in the context of a facial challenge.

Although *Coster* clarified that *Schnell* and *Blasius* are now "folded into *Unocal* review," it did not expand the scope of cases in which enhanced scrutiny would apply, much less extend enhanced scrutiny to facial challenges. On the contrary, *Coster* made clear that review under enhanced scrutiny would "accomplish the same ends" and "be applied with the sensitivity *Blasius* review brings to protect the fundamental interests at stake."[49] Historically, however, there has been a "healthy inclination on the part of the judiciary to employ the *Schnell* principle of 'legal but inequitable' only sparingly" in situations where "inequitable conduct has

[48] *See, e.g., Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *21 (Del. Ch. May 31, 2022); *Lee Enterprises*, 2022 WL 453607, at *16; *CytoDyn*, 2021 WL 4775140, at *2; *In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402, at *16 (Del. Ch. Jan. 15, 2016).

[49] *Coster*, 300 A.3d at 672; *see also Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000) ("it may be optimal simply for Delaware courts to infuse our *Unocal* analyses with the spirit animating *Blasius*").

occurred but is not plainly remediable under conventional fiduciary doctrines."[50] Likewise, Delaware courts applied *Blasius* only "rarely"[51] in instances when boards acted "for the sole or primary purpose of thwarting a shareholder vote"[52] or "deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote."[53] As this Court confirmed just four years ago, a plaintiff must do "more than merely laying out the timeline of Defendants' conduct and speculating about bad intent or purpose."[54]

There is no basis to replace established law—which invokes enhanced scrutiny only in as-applied challenges and only upon evidence of interference or manipulation—with a *per se* rule that enhanced scrutiny applies to both facial and as-applied challenges any time a board of directors is concerned about the potential for an activist stockholder or a proxy contest. Under the trial court's ruling, enhanced scrutiny could attach whenever a board of directors has reason to believe that an activist owns shares of the company's stock or that the company is theoretically vulnerable to an activist attack. Enhanced scrutiny could even apply to

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[50] *In re WeWork Litig.*, 250 A.3d 976, 996 (Del. Ch. 2020).

[51] *Williams v. Geier*, 671 A.2d 1368, 1376 (Del. 1996); *see also Chesapeake*, 771 A.2d at 319–20 ("Because the [*Blasius*] test is so exacting—akin to that used to determine whether racial classifications are constitutional—whether it applies comes close to being outcome-determinative in and of itself.").

[52] *CytoDyn*, 2021 WL 4775140, at *14.

[53] *Coster*, 300 A.3d at 666–67.

[54] *Saba*, 224 A.3d at 981.

the 94% of public companies that have an action plan in place to respond to activists.[55] Although a potential proxy contest could involve "manipulative conduct" justifying enhanced scrutiny,[56] this is not invariably so. It is the presence of manipulative conduct that must determine whether enhanced scrutiny should apply, not merely the allegation of a "cloudy day." After all, it is not clear why an advance notice bylaw that is valid on a clear day should be invalid on a cloudy day unless the board weaponized the bylaw by applying it in an inequitable way to thwart a stockholder nomination.

Given the critical role advance notice bylaws play in "permit[ting] orderly meetings and election contests"[57] and "ensuring that stockholders cast well-informed votes,"[58] it is entirely consistent with a board's fiduciary duties to ensure stockholders enjoy the benefits of state-of-the-art bylaws, especially if they believe a proxy contest looms. Whether the skies are "clear" or "cloudy" is a relevant, but

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[55] Spencer Stuart, *Spencer Stuart Director Pulse Survey: Activism Preparedness* (March 2003), available at https://www.spencerstuart.com/research-and-insight/spencer-stuart-director-pulse-survey-activism-preparedness.

[56] *See Coster*, 300 A.3d at 666 n.55 (citing, *inter alia*, *Linton v. Everett*, 1997 WL 441189, at *10 (Del. Ch. July 31, 1997) and *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987)).

[57] *Saba*, 224 A.3d at 980.

[58] *Lee Enterprises*, 2022 WL 453607, at *9.

not dispositive, factor in determining whether to apply enhanced scrutiny to an as-applied challenge to a bylaw.[59] It is not a relevant factor to a facial challenge.

This case, perhaps better than any other, illustrates why enhanced scrutiny is not warranted simply because there may be "storm clouds of a proxy contest gathering on the horizon."[60] The board's adoption of the challenged bylaws followed an attempted proxy contest the previous year that had been "orchestrated by a felon,"[61] culminating in a notice that "was—at best—misleading."[62] The board, after consultation with experienced counsel, adopted the amended bylaws currently at issue.[63] And in the present contest, it was *Appellant*, and not the board, who was

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[59] *See Stroud*, 606 A.2d at 92 n.3 ("Board action interfering with the exercise of the franchise often arose during a hostile contest for control where an acquiror launched both a proxy fight and a tender offer."); *see also City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 241 (Del. Ch. 2014) ("That the Board adopted [a bylaw] on an allegedly 'cloudy' day when it entered into the merger agreement with FC South rather than on a 'clear' day is immaterial given the lack of any well-pled allegations . . . demonstrating any impropriety in this timing"), *abrogated by statute on other grounds*. The "cloudy day" analogy has also proven a source of confusion for courts in other states applying Delaware law, at least in the context of exclusive forum bylaws. *See, e.g., Roberts v. Triquint Semiconductor, Inc.*, 2014 WL 4147465, at *5 (Or. Cir. Ct. Aug. 14, 2014) (invoking *Schnell* and refusing to enforce a Delaware exclusive forum bylaw based in part on "the closeness of the timing of the bylaw amendment to the board's alleged wrongdoing"), *rev'd*, 364 P.3d 328 (Or. 2015) (citing *First Citizens*); *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1171 (N.D. Cal. 2011) (refusing to enforce a Delaware exclusive forum bylaw adopted "after the alleged wrongdoing took place").

[60] *See Trial Court Opinion*, 2023 WL 9002424, at *16.

[61] *Id.* at *1, *2, *4.

[62] *See Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834, at *1 (Del. Ch. Oct. 28, 2022).

[63] *Trial Court Opinion*, 2023 WL 9002424, at *9.

found to be "engaging in manipulative conduct"—the *sine qua non* of enhanced scrutiny in this context.[64] It is difficult to imagine a clearer scenario in which board action was necessary to facilitate an informed vote by stockholders. And yet the board confronted a more demanding standard of review when defending its bylaws than if "two white collar criminals" had never set their sights on the company.[65] Delaware law does not compel that result.

[64] *Id.* at *33.
[65] *Id*. at *32.

III. The Court of Chancery's opinion will invite further unnecessary litigation of advance notice bylaws.

Left unaddressed by this Court, the opinion below is certain to attract further litigation of advance notice bylaws, even when they are neither facially invalid nor applied inequitably. This new wave of lawsuits will needlessly burden both the Chamber's members and Delaware courts.[66]

The trial court's opinion will attract facial challenges to advance notice bylaws because a win may enable an activist to avoid having to comply with those bylaws entirely. This case demonstrates the incentive. The Court of Chancery found that the board validly rejected nominations from a group that "included two white collar criminals," yet it struck several of the company's bylaws—and Appellant claims the trial court erred by not striking them all.[67] The road map is all too clear. Search for potential ambiguities in the bylaws, regardless of whether they might be implicated.[68] Meanwhile, ensure the skies are "cloudy," perhaps by indicating a willingness to mount a proxy contest, or perhaps by disclosing an interest in the company, to trigger enhanced scrutiny and shift the burden to the board to demonstrate reasonableness.[69] Then, as Appellant advocates on appeal, seek an "all

[66] *See id*. at *1 ("This post-trial decision . . . hints at what coming activism disputes may bring.").

[67] *Id.* at *32.

[68] *See id.* at *17.

[69] *See id.* at *16.

or nothing" invalidation of not just the allegedly offending provisions, but the entire suite of advance notice provisions, even those that Delaware courts have repeatedly upheld.[70]

The Court of Chancery's opinion will also encourage less meritorious lawsuits and demand letters by opportunistic lawyers representing stockholders who have no intention of nominating a director.[71] Some opportunistic lawyers will identify an ongoing proxy contest and seek to strike advance notice bylaws that are not at issue, hoping to use another person's proxy contest to justify a fee award.[72] Others will seek to strike down advance notice bylaws even in the absence of a contested election. This Court is well-acquainted with the risks and costs that strike suits impose on Delaware corporations.[73] If the trial court's opinion stands, stockholders need only posit hypotheticals in which bylaws would be confusing or cite to the trial court's opinion as evidence that such bylaws are unlawful *per se* under Delaware law. In fact, complaints have already been filed taking this exact approach and, in some instances, citing the opinion below.[74] Litigating over hypotheticals "serves no

[70] *See id.* at *27; Appellant's Opening Br. at 18–27.

[71] *See Moelis*, 2024 WL 550750, at *6 (noting the tendency of plaintiffs' counsel to "prioritize reliable legal theories" and "trendy topics").

[72] *See, e.g., Crispo v. Musk*, 304 A.3d 567, 570 (Del. Ch. 2023) (concluding that a stockholder seeking a mootness fee for filing a lawsuit in connection with litigation between a buyer and target pursuant to a merger agreement did not have a meritorious claim).

[73] *See In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 892 (Del. Ch. 2016).

[74] *See Garfield v. Citrino*, C.A. No. 2024-0158 (filed Feb. 21, 2024); *Golla v.*

useful purpose for stockholders," particularly where the bylaw is not invalid in all scenarios.[75] Such challenges will serve only "to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints."[76] Against all of these costs, there is no corresponding benefit to stockholders because Delaware law already allows courts to excuse noncompliance with, or to enjoin inequitable application of, advance notice bylaws.[77] In short, Delaware courts should not be in the business of "encouraging plaintiffs' counsel to pursue meritless claims."[78]

The coming "flood of cases"[79] will also have a chilling effect on the "freedom for businesses to adopt the most appropriate terms for the . . . governance of their enterprise."[80] As the trial court noted, case law drives the development of advance notice bylaws.[81] The approach adopted below encourages courts in Delaware (and

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Short, C.A. No. 2024-0100 (filed Feb. 6, 2024); *Kogut v. Bejar*, C.A. No. 2024-0055-MTZ (filed Jan. 25, 2024); *see also* Ronald Oral, *Activists Challenge 'Acting in Concert' Bylaws*, THE DEAL, Jan. 4, 2024, https://pipeline.thedeal.com/article/0000018c-a7b3-da8c-a78c-bfff22a60001/deal-news/features-and-commentary/activists-challenge-acting-in-concert-bylaws.

[75] *Trulia*, 129 A.3d at 892.

[76] *Id.*

[77] *See Salzberg*, 227 A.3d at 135; *CytoDyn*, 2021 WL 4775140, at *15.

[78] *Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023).

[79] *See, e.g.*, Mike Leonard, *Activist Investors Confront "Weaponized" Board Nomination Bylaws*, BLOOMBERG LAW, Feb. 12, 2024, https://news.bloomberglaw.com/esg/activist-investors-confront-weaponized-board-nomination-bylaws.

[80] *Salzberg*, 227 A.3d at 116.

[81] *See Trial Court Opinion*, 2023 WL 9002424, at *14 ("The scope of typical

likely in other states too) to *invalidate*—not just enjoin—entire categories of useful and common bylaws merely because there are hypothetical scenarios in which they could be misused. Uncertainty and potential legal liability may also cause corporations to repeal existing advance notice bylaws or abandon plans to adopt new ones. Corporations will also have limited flexibility to adapt advance notice bylaws regarding future situations that may arise. In any case, corporations and their stockholders stand to lose the recognized benefits of order and disclosure that advance notice bylaws confer.[82] That would undermine the very stockholder franchise that Delaware law is crafted to protect.

advance notice bylaws continues to develop through an iterative process as new case law, rules, and regulations emerge."); *see also* JX0973 (Expert Report of Edward Rock) ¶ 25 ("Bylaws develop through an iterative process as new regulations, new issues, and new cases emerge.").

[82] *Saba*, 224 A.3d at 980; *see also Openwave*, 924 A.2d at 239; *Sternlicht*, 2023 WL 3991642, at *14.

CONCLUSION

The Chamber respectfully submits that the Court should reverse the Court of Chancery's judgment as to the four invalidated advance notice bylaws for the reasons set forth above.

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