

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS DREW RUTLEDGE,	:	
	:	
Plaintiff Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
CLEARWAY ENERGY GROUP LLC, and	:	C.A. No. 248, 2025
CHRISTOPHER SOTOS,	:	
	:	
Defendants Below,	:	Court below:
Appellees,	:	Court of Chancery
	:	C.A. No. 2025-0499-LWW
	:	
and	:	
	:	
CLEARWAY ENERGY, INC.,	:	
	:	
Nominal Defendant Below,	:	
Appellee.	:	

APPELLANT'S OPENING BRIEF

Gregory V. Varallo (Bar No. 2242)
Andrew E. Blumberg (Bar No. 6744)
Daniel E. Meyer (Bar No. 6876)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 365-3600
greg.varallo@blbglaw.com
andrew.blumberg@blbglaw.com
daniel.meyer@blbglaw.com

Counsel for Plaintiff-Appellant Thomas Drew Rutledge

Dated: July 31, 2025

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NATURE OF PROCEEDING

“[T]he foundation upon which our constitutional jurisprudence is built is the principle that ‘the constitution controls any legislative act repugnant to it.’”¹ In evaluating constitutional claims, the Court does not evaluate whether a statute adopted by the General Assembly is good policy or bad policy. Rather, “the Court’s role—indeed, [its] duty—is to hold the challenged statutory enactments up to the light of our Constitution and determine whether they are consonant or discordant with it.”² In this case, the Court has agreed to hold Senate Bill 21 up to the light of the Constitution and to answer two certified questions:

1. Does Section 1 of Senate Bill 21,³ codified as 8 *Del. C.* § 144—eliminating the Court of Chancery’s ability to award “equitable relief” or “damages” where the Safe Harbor Provisions are satisfied—violate the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of its equitable jurisdiction?
2. Does Section 3 of Senate Bill 21⁴—applying the Safe Harbor Provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that Senate Bill 21 was enacted—violate the Delaware Constitution of 1897 by purporting to eliminate causes of action that had already accrued or vested?

The answer to both questions is yes. The Safe Harbor Provisions violate

¹ *Albence v. Higgin*, 295 A.3d 1065, 1089 (Del. 2022) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

² *Id.* at 1097.

³ The “Safe Harbor Provisions.”

⁴ The “Retroactivity Provision.”

Article IV, Section 10 of the Constitution because they reduce the Court of Chancery's equitable jurisdiction below the constitutionally guaranteed minimum, as measured by the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of colonies, without substituting an adequate remedy in another tribunal. The Retroactivity Provision violates Article I, Section 9 of the Constitution because it seeks to abrogate causes of action that had already accrued at the time Senate Bill 21 was enacted.

SUMMARY OF ARGUMENT

I. “It is a fundamental principle that the Court of Chancery may not be deprived of its inherent equity jurisdiction conferred by *Del. Const.* art. IV, § 10 unless the substituted remedy is both adequate and exclusive.”⁵ As then-Vice Chancellor Seitz recognized in *DuPont I*—which this Court affirmed in *DuPont II*—Article IV, Section 10 imposes a “constitutional limitation that the [Court of Chancery’s] constitutional jurisdiction may be cut down only by the substitution of an adequate remedy in some other tribunal.”⁶ The Court of Chancery is constitutionally guaranteed to have “all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies,” except “where a sufficient remedy exists at law.”⁷

Section 1 of Senate Bill 21 rewrote Section 144 of the Delaware General Corporation Law to create “safe harbors” for certain conflict transactions and to eliminate the Court of Chancery’s ability to provide “equitable relief” or “an award of damages” if the statutory criteria are satisfied.⁸ By stripping the Court of Chancery of jurisdiction to grant “equitable relief” or award “damages” without providing an

⁵ *Douglas v. Thrasher*, 489 A.2d 422, 426 (Del. 1985).

⁶ *DuPont v. DuPont* (“*DuPont I*”), 79 A.2d 680, 682 (Del. Ch. 1951), *aff’d DuPont v. DuPont* (“*DuPont II*”), 85 A.2d 724 (Del. 1951).

⁷ *DuPont II*, 85 A.2d at 727.

⁸ 8 Del. C. § 144(a)-(c).

alternate remedy, the Safe Harbor Provisions impermissibly reduce the Court of Chancery's equity jurisdiction below the constitutional minimum. The Safe Harbor Provisions are unconstitutional.

II. Article I, Section 9 of the Delaware Constitution guarantees that “[a]ll courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law...” “All state courts interpreting remedy provisions agree on a seemingly straightforward rule: if a remedy exists when a plaintiff's common law cause of action accrues, no subsequent law may abrogate that remedy.”⁹ So too here. “[D]ue process preserves a right of action which has accrued or vested before the effective date of the statute.”¹⁰ “The law in Delaware is crystal clear” that a breach of fiduciary duty claim “accrues as soon as the wrongful act occurs.”¹¹ Here, the wrongful acts occurred long before Senate Bill 21 was enacted. Yet Senate Bill 21's Retroactivity Provision provides that the Safe Harbor Provisions apply retroactively to Plaintiff's claim. The Retroactivity Provision is unconstitutional.

⁹ Shannon M. Roesler, *The Kansas Remedy by Due Course of Law Provision: Defining A Right to A Remedy*, 47 U. KAN. L. REV. 655, 660 (1999) (collecting cases).

¹⁰ *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.* (“Cheswold II”), 489 A.2d 413, 418 (Del. 1984).

¹¹ *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Defendants Engage In An Unfair, Conflicted-Controller Transaction

This is a derivative action challenging a \$117 million asset purchase signed in 2023 and consummated in April 2024.¹² The buyer was the nominal defendant, Clearway Energy, Inc.¹³ The seller was Clearway’s controller, Clearway Energy Group LLC,¹⁴ a joint venture of Global Infrastructure Partners and TotalEnergies.

The sale was approved, at a price of \$107 million, by a committee comprised of Clearway directors whom its majority-conflicted Board deemed independent.¹⁵ The final, \$117 million purchase price was—for reasons unexplained by the existing record—\$10 million more than the price that the committee approved,¹⁶ \$21 million more than CEG’s initial proposal,¹⁷ and tens of millions of dollars more than the value calculated by the committee’s financial advisor.¹⁸ The sale was not approved by minority stockholders.¹⁹

¹² The action below is captioned *Rutledge v. Clearway Energy Group LLC*, C.A. No. 2025-0499-LWW (Del. Ch.). Dkt. __ citations are to the docket in the Court of Chancery. ¶__ citations are to the Verified Derivative Complaint, Dkt. 1.

¹³ “Clearway” or the “Company.” ¶2.

¹⁴ “CEG.”

¹⁵ ¶¶36, 45.

¹⁶ ¶¶3, 45, 47.

¹⁷ ¶37.

¹⁸ ¶¶43-44.

¹⁹ ¶48.

II. Plaintiff Uses The Tools At Hand

Appellant, a Clearway stockholder, retained counsel in May 2024. Weeks earlier, this Court had reaffirmed that all conflicted-controller transactions are subject to entire fairness review unless approved through *MFW*'s dual-cleansing process.²⁰ Because there was no minority stockholder vote and because a majority of Clearway's directors were dual fiduciaries, Appellant could have filed plenary fiduciary claims without fearing a dispositive motion.²¹

But derivative plaintiffs are fiduciaries to the corporation.²² For decades, "this Court has repeatedly admonished plaintiffs:" don't rush into court; do your homework; use the "tools at hand."²³ Plaintiff took heed. He served a books-and-records demand and obtained internal documents. When Clearway refused to produce more, Plaintiff filed suit to enforce his demand.²⁴ Shortly before Plaintiff's opening pretrial brief was due, the Company agreed to produce more documents and the parties settled the books-and-records action.²⁵ Six days later, Senate Bill 21 was announced.

²⁰ *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 451 (Del. 2024).

²¹ ¶49.

²² *OptimisCorp v. Atkins*, 2021 WL 2961482, at *6 (Del. Ch. July 15, 2021).

²³ *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 839 (Del. 2018) (collecting cases).

²⁴ *Rutledge v. Clearway Energy, Inc.*, C.A. No. 2024-1324-SEM (Del Ch.).

²⁵ Trans. ID 75614768.

III. The General Assembly Passes Senate Bill 21

On February 17, 2025, Senate Majority Leader Bryan Townsend introduced Senate Bill 21, which contained Safe Harbor Provisions substantially similar to those in the final bill.²⁶ In a break with decades of practice,²⁷ the bill was neither drafted nor approved by the Corporation Law Council before it was introduced.²⁸

Observers immediately recognized that the law “would mark the most significant single-year revision of Delaware’s corporate code since at least 1967,”²⁹ and represented both “a wholesale repudiation of Delaware’s common law approach to [corporate] lawmaking,”³⁰ and a “wholesale rejection [of] the Delaware Supreme

²⁶ Senate Bill 21, <https://legis.delaware.gov/BillDetail?LegislationId=141857> (A0008-A0016).

²⁷ Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1754–55 (2006) (“[F]or decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed” by the Corporation Law Council).

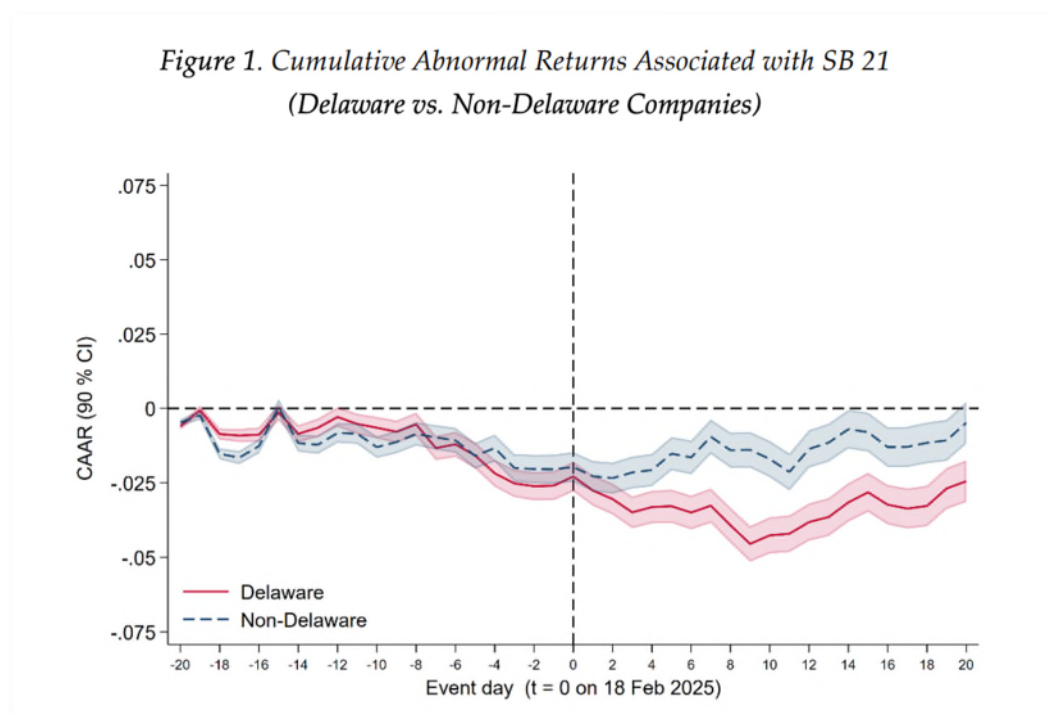
²⁸ The Corporation Law Council was later given the opportunity to comment but was told that it “was not allowed to consider changes that would have protected the Delaware [c]ourts’ role in the development of corporate law.” Michael Barry, *A Member of Corporation Law Council's Statement In Opposition to SB 21*, LINKEDIN (Mar. 3, 2025), <https://www.linkedin.com/pulse/member-corporation-law-councils-statement-opposition-sb-michael-barry-vqfme/> (A0056–A0057).

²⁹ Eric Talley, Sarath Sanga, and Gabriel Rauterberg, *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/> (A0029–A0036).

³⁰ Ann Lipton, *Delaware Decides Delaware Law Has No Value*, BUSINESS LAW PROF BLOG (Feb. 17, 2025),

Court’s work[.]”³¹

Public investors were alarmed. “Around the date of SB 21’s announcement, Delaware companies experienced abnormal negative returns, resulting in a loss of “approximately \$700 billion” of value for the 1,000 largest publicly traded Delaware corporations.”³²

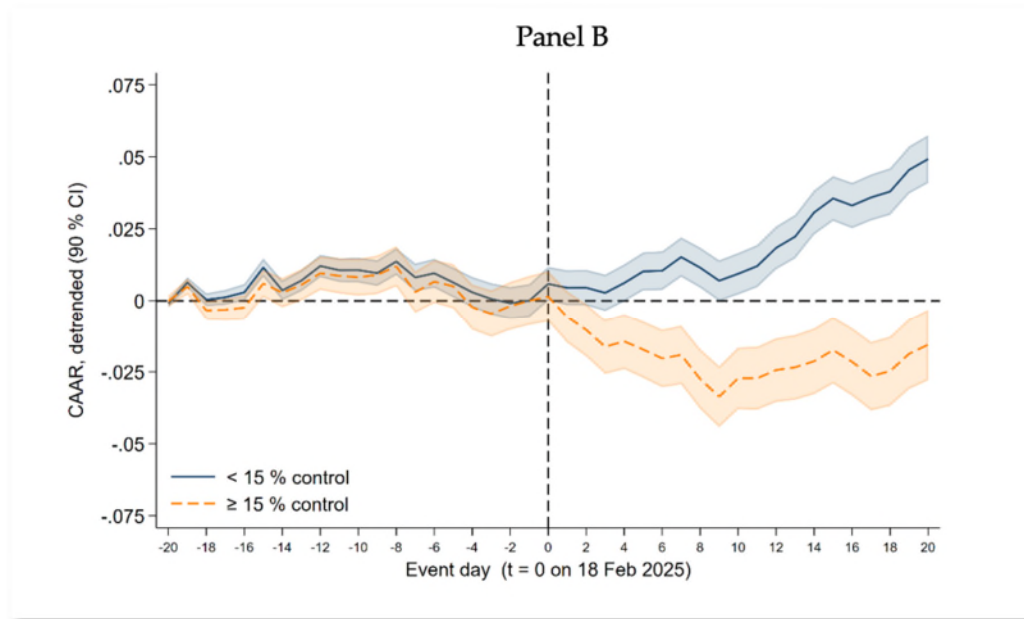


<https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/> (A0017–A0021).

³¹ Brian JM Quinn, *Just a little adjustment?*, M&A LAW PROF BLOG (Feb. 28, 2025), <https://lawprofessors.typepad.com/mergers/2025/02/just-a-little-adjustment.html> (A0055).

³² Kenneth Khoo and Roberto Tallarita, *The Price of Delaware Corporate Law Reform* (June 24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318203 at 5, 6, 39 (A0106–A0187).

“[C]ompanies with more powerful major shareholders performed [even] worse than other Delaware companies ... consistent with the ... view that Delaware’s choice to relax the rules on controller transactions was detrimental to investors as a whole.”³³



In its original form, Senate Bill 21 was silent as to retroactivity,³⁴ which raised public concerns that the bill was intended to affect Elon Musk’s appeal in *Tornetta*.³⁵ In a February 21 interview, Senator Townsend—Senate Bill 21’s primary sponsor—

³³ *Id.* at 42, 43.

³⁴ Senate Bill 21, <https://legis.delaware.gov/BillDetail?LegislationId=141857> (A0008–A0016).

³⁵ See, e.g., Jacob Owens and Karl Baker, *Landmark Delaware corporate law changes aim to stem exits*, SPOTLIGHT DELAWARE (Feb. 19, 2025), <https://spotlightdelaware.org/2025/02/19/delaware-corporate-law-change-sb-21/> (A0029–A0036).

explained that the bill was *not* retroactive because “retroactive legislation faces an exceptionally high constitutional bar”:

When bills don’t have effective dates listed in them, which is quite common for them not to, they then are by default effective only upon the signature of the governor — so it goes into effect the minute the governor signs it. **Legislation is essentially never retroactive.** I think on any topic, **retroactive legislation faces an exceptionally high constitutional bar** as to why you would make a law apply retroactively — not just corporate law, but I think literally just about anything. But it’s certainly corporate law. Every year, we make it very clear this is not retroactive.³⁶

Three weeks later, Senator Townsend introduced Senate Substitute 1 for Senate Bill 21.³⁷ The substitute version included a new Section 3—the Retroactivity Provision—making the Safe Harbor Provisions fully retroactive “to all acts and transactions, whether occurring before, on, or after the enactment of this Act” except in the case of a plenary action already pending as of February 17, 2025.³⁸

As soon as Senate Bill 21 was announced, law professors raised concerns that it was unconstitutional.³⁹ On March 10, 2025, Prickett, Jones & Elliott, P.A.

³⁶ Jordan Howell, *Delaware Call Interviews Sen. Bryan Townsend About SB21*, DELAWARE CALL (Feb. 21, 2025), <https://delawarecall.com/2025/02/21/delaware-call-interviews-sen-bryan-townsend-about-sb21/> (emphasis added) (A0038–A0050).

³⁷ Senate Substitute 1 for Senate Bill 21, <https://legis.delaware.gov/BillDetail/141930> (A0058–A0067).

³⁸ Laws of Delaware, Vol. 85 Ch. 6 (2025) (session law adopting Senate Bill 21) § 3 (A0085–A0090).

³⁹ See Eric Talley, *Is The Proposed Delaware Amendment To DGCL § 144 Unconstitutional?*, LINKEDIN (Feb. 19, 2025), <https://www.linkedin.com/posts/eric->

(“Prickett”) sent a letter to the Governor, Senator Majority Leader Townsend, and House Majority Leader Kerri Evelyn Harris, which explained that Senate Bill 21, if enacted, would violate the Delaware Constitution. The letter attached a 26-page memorandum explaining the firm’s basis for that determination and urging the General Assembly and the Governor to seek this Court’s guidance as to Senate Bill 21’s constitutionality. The Governor and the General Assembly declined to do so.

On March 18, the NEWS JOURNAL published an op-ed from Prickett attorney Michael Hanrahan, warning that “SB 21 is an unconstitutional attempt to deprive the Court of Chancery of its equity jurisdiction and power to grant equitable remedies.”⁴⁰ A week later, sixty-four corporate law professors sent a letter to the General Assembly, suggesting that the bill be amended to require that companies “opt in” to the Safe Harbor Provisions via charter amendments.⁴¹ The professors noted that an opt-in approach could help avoid “thorny” constitutional “questions about separation of powers and legal validity” created by Senate Bill 21’s “broad, mandatory

talley-808b52b_microsoft-word-johnson-activity-7298088871081201664-3yo5 (A0037).

⁴⁰ Michael Hanrahan, *SB 21 changes, not restores, longstanding Delaware law of fiduciary duty*, THE NEWS JOURNAL (Mar. 18, 2025), <https://www.delawareonline.com/story/opinion/2025/03/18/sb-21changes-not-restoresdelaware-law-of-fiduciary-duty-opinion/82513815007/> (A0068–A0069).

⁴¹ Dkt. 10, Ex. A (A0080–A0084).

limitation” on the Court of Chancery’s “vested equitable powers[.]”⁴²

Rejecting these concerns, the House of Representatives voted down an opt-in amendment proposed by Representative Sophie Phillips⁴³ and passed Senate Substitute 1 for Senate Bill 21 on the evening of March 25, 2025. Late that night, Governor Meyer signed it.⁴⁴

IV. This Court Accepts Certification Of The Constitutional Questions

Plaintiff filed his plenary complaint on May 6, 2025, then moved to certify the two certified questions to this Court. The Court of Chancery granted his motion⁴⁵ and this Court accepted certification. The Court of Chancery then granted Governor Meyer’s motion to intervene.⁴⁶

⁴² *Id.* at 2.

⁴³ House Amendment 1 to Senate Substitute 1 for Senate Bill 21, [https://legis.delaware.gov/BillDetail?legislationId=141964#:~:text=Bill%20Progress,Original%20Text:\(A0070-A0079\)](https://legis.delaware.gov/BillDetail?legislationId=141964#:~:text=Bill%20Progress,Original%20Text:(A0070-A0079)).

⁴⁴ Katie Tabeling, *Meyer signs corporate law bill after ‘Dexit’ debate in the House*, DELAWARE BUSINESS TIMES (Mar. 26, 2025), <https://delawarebusinesstimes.com/news/meyer-signs-corporate-law-bill-after-dexit-debate-in-the-house/> (A0091–A0094).

⁴⁵ Dkt. 19 (A0099–A0103).

⁴⁶ Dkt. 23 (A0104–A0105).

ARGUMENT

I. Senate Bill 21’s Safe Harbor Provisions Are Unconstitutional

a. Question Presented

Does Section 1 of Senate Bill 21, codified as 8 *Del. C.* § 144—eliminating the Court of Chancery’s ability to award “equitable relief” or “damages” where the Safe Harbor Provisions are satisfied—violate the Delaware Constitution of 1897 by purporting to divest the Court of Chancery of its equitable jurisdiction?

b. Scope of Review

This Court reviews certified questions of law *de novo*.⁴⁷ “An act of the legislature repugnant to the constitution is void.”⁴⁸

c. Merits of Argument

As this Court has reiterated in *Glanding v. Industrial Trust Co.*,⁴⁹ *DuPont II*,⁵⁰ *Thrasher*,⁵¹ *In re Arzuaga-Guevara*,⁵² *CML V, LLC v. Bax*,⁵³ and other decisions, the General Assembly may not enact legislation that reduces the Court of Chancery’s equitable powers below the general equity jurisdiction of the High Court of

⁴⁷ *Baker v. Croda, Inc.*, 304 A.3d 191, 194 (Del. 2023).

⁴⁸ *Albence*, 295 A.3d at 1089.

⁴⁹ 45 A.2d 553 (Del. 1945).

⁵⁰ 85 A.2d 724.

⁵¹ 489 A.2d at 426.

⁵² 794 A.2d 579 (Del. 2001).

⁵³ 28 A.3d 1037 (Del. 2011).

Chancery of Great Britain as it existed prior to the separation of colonies unless the General Assembly expressly states its intention to do so *and* creates an adequate alternate remedy. Senate Bill 21 violates that guarantee.

i. *The Constitution of 1897 Protects The Court of Chancery's Equitable Jurisdiction From The Vagaries Of Legislative Whim*

“The historical origins of Article IV, Section 10 are found in the Colonial Act of 1726-1736 (‘Gordon Act’).”⁵⁴ Section 21 of the Gordon Act provided that the County Courts of Common Pleas were to hold a court of equity with the full power to hear and decree all causes of equity, “observing, as near as may be, the rules and practice of the High Court of Chancery in Great Britain[.]”⁵⁵ Section 25 provided that equity jurisdiction would not exist if there was a sufficient remedy in another tribunal.⁵⁶

Delaware’s first Constitution of 1776 carried forward equity jurisdiction “as heretofore” (*i.e.*, as established by the Gordon Act),⁵⁷ thereby expressly adopting the

⁵⁴ *Arzuaga-Guevara*, 794 A.2d at 584.

⁵⁵ *Glanding*, 45 A.2d at 555.

⁵⁶ *Id.* at 556.

⁵⁷ Donald Wolfe & Michael Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2.02[b] (2024) (“The adoption of this initial constitution in 1776 ... carried forward the equitable jurisdiction originally established by the Gordon Act, thereby elevating that seminal enactment to constitutional dimension.”).

same broad equitable powers.⁵⁸ That jurisdiction was coextensive with the jurisdiction of the High Court of Chancery of Great Britain as it then existed, subject to the limitation in Section 25.⁵⁹

Article VI, Section 14 of the Delaware Constitution of 1792 established a separate Court of Chancery and vested equity jurisdiction in that Court.⁶⁰ As Wolfe and Pittenger explain, “[t]he Constitution of 1792 ‘did not create, but continued the jurisdiction of the Court of Chancery,’⁶¹ which was ‘as extensive, and was in fact the same’⁶² as that previously in existence, but for the fact that ‘this jurisdiction was no longer to depend upon the will of the Legislature’⁶³ and could not be disturbed by legislative enactment.”⁶⁴ Delaware’s constitutions of 1831 and 1897 maintained the constitutional guarantee of the Court of Chancery’s exclusive equitable jurisdiction.⁶⁵

⁵⁸ *Handler Const., Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356, 362 (Del. 1993).

⁵⁹ *Glanding*, 45 A.2d at 556–57; *DuPont II*, 85 A.2d at 727.

⁶⁰ *Glanding*, 45 A.2d at 556; *Handler*, 633 A.2d at 362.

⁶¹ *Glanding*, 45 A.2d at 560.

⁶² *Fox*, Del. Ch. at 223.

⁶³ *Id.*

⁶⁴ Wolfe & Pittenger, CORPORATE AND COMMERCIAL PRACTICE § 2.02[b] (2024) (citing *DuPont II*, 85 A.2d at 728).

⁶⁵ *DuPont II*, 85 A.2d at 728–29; see also 1 Victor B. Woolley, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 56, at 35 (1906) (“Each constitution promulgated since the Constitution of 1792, vested in the Court of Chancery a portion of the judicial powers of the State and referred in

Article IV, Section 10 of the Delaware Constitution of 1897 provides that the Court of Chancery “shall have all the jurisdiction and powers vested by the laws of this State in the Court of Chancery.”⁶⁶ This means that the Court of Chancery is constitutionally guaranteed to have “all the general equity jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies,” except “where a sufficient remedy exists at law.”⁶⁷ And this Court has held that the General Assembly *cannot* enact legislation that reduces the Court of Chancery’s equity jurisdiction below the jurisdiction of the High Court of Chancery of Great Britain as it existed prior to the separation of the colonies except where a sufficient alternate remedy exists.⁶⁸ Any other reading of Article IV, Section 10 “would permit the practical abolition of all courts by the action of one Legislature.”⁶⁹

As this Court explained in *DuPont II*, Article IV, Section 10 guarantees the people of Delaware, as an “irreducible minimum,” a tribunal to administer the

doing so to the preceding constitution.”).

⁶⁶ Del. Const. art. IV, § 10.

⁶⁷ *DuPont II*, 85 A.2d at 727; *see also Arzuaga-Guevara*, 794 A.2d at 585 (Chancery’s historical equity jurisdiction “cannot be divested simply by the legislative enactment of a new statute addressing the same subject matter.”); *Hollis v. Kinney*, 120 A. 356, 358 (Del. Ch. 1923) (“even if it be admitted ... that a remedy at law may oust the Court of Chancery of its heretofore conceded jurisdiction, ... such would not be the case unless the remedy at law be full and complete.”).

⁶⁸ *DuPont II*, 85 A.2d at 729.

⁶⁹ *Id.*

remedies and principles of equity “removed from the vagaries of legislative whim”:

We think the Constitutions of 1792, 1831 and 1897 intended to establish for the benefit of the people of the state a tribunal to administer the remedies and principles of equity. They secured them for the relief of the people. This conclusion is in complete harmony with the underlying theory of written constitutions. Its result is to establish by the Judiciary Article of the Constitution **the irreducible minimum** of the judiciary. It secures for the protection of the people an adequate judicial system and removes it from the vagaries of legislative whim.⁷⁰

In *Arzuaga-Guevara*, Justice Holland reaffirmed that Section 10 prohibits the General Assembly from enacting legislation that reduces the Court of Chancery’s equity jurisdiction below the jurisdiction of the High Court of Chancery of Great Britain unless a sufficient remedy at law exists.⁷¹

Commentators agree. As Wolfe and Pittenger explain, the Delaware Constitution of 1897 prohibits the General Assembly from curtailing the Court of Chancery’s equity jurisdiction unless it (1) does so expressly and (2) provides an adequate alternate remedy at law:

[S]everal basic principles emerge regarding the extent of the legislative prerogative to infringe upon the traditional equitable jurisdiction of the Court of Chancery. First, the Delaware Constitution has never conferred a power on the Delaware General Assembly to abridge the jurisdiction of the Court of Chancery except with respect to special and additional jurisdiction conferred by that body on the Court of Chancery subsequent to 1792. Second, the General Assembly possesses a limited power to infringe on the traditional equitable jurisdiction of the Court, which may only be invoked by expressly stating its intention to do so and simultaneously creating an equivalent and adequate remedy in

⁷⁰ *DuPont II*, 85 A.2d at 729 (emphasis added).

⁷¹ 794 A.2d at 584-86.

another forum. While the Delaware Constitution of 1897 does not guarantee that all equitable powers and jurisdiction will perpetually reside in the Court of Chancery, it does ensure that the irreducible minimum of its traditional equitable subject matter jurisdiction will at all times remain available.⁷²

The bottom line: “the Delaware General Assembly is constitutionally prohibited from preventing the judges of the Delaware Court of Chancery from applying fiduciary duties as those judges think best.”⁷³ That constitutional guarantee—Delaware’s commitment to equity removed from the vagaries of legislative whim—is at the core of the “Delaware brand”:

The reason for Delaware's lead in corporate law is neither a ‘race to the top’ nor a ‘race to the bottom,’ but a race to equity. In fact, [until 2025,] even when Delaware law evolve[d] outside of the courts—through the legislature and the bar ...—those actors not only d[id] not challenge, but emphasize[d], equity’s superior position in the hierarchy of legal norms.⁷⁴

Appellees may rely on *Bax*,⁷⁵ but it doesn’t help them. In *Bax*, the appellant argued that 6 *Del. C.* § 18-1002 of the Limited Liability Company Act imposed unconstitutional limits on derivative standing.⁷⁶ Chief Justice Steele, writing for a unanimous Court, again reiterated that “[t]he Delaware Constitution prohibits the

⁷² Wolfe & Pittenger, *CORPORATE AND COMMERCIAL PRACTICE* 2.02[c] (2024).

⁷³ Lyman Johnson, *Delaware’s Non-Waivable Duties*, 91 B.U.L. REV. 701, 702 (2011).

⁷⁴ Asaf Raz, *The Original Meaning of Equity*, 102 WASH. U.L. REV. 541, 579 (2024).

⁷⁵ 28 A.3d 1037.

⁷⁶ *Id.* at 1043.

General Assembly from limiting the equity jurisdiction of the Court of Chancery to less than the general equity jurisdiction of the High Court of Chancery of Great Britain existing at the time of our separation from the Mother Country”⁷⁷ and that, accordingly, “the Delaware Constitution prohibits the General Assembly from limiting the Court of Chancery’s jurisdiction over the extension of **corporate** derivative standing in the interests of justice.”⁷⁸ The *Bax* court held that 6 *Del. C.* § 18-1002 was constitutional only because LLCs did not exist in 1792 and because the Legislature provided an adequate remedy at law.⁷⁹ Neither of those distinguishing factors is present here.

ii. *The Court of Chancery’s Irreducible Equity Jurisdiction Includes the Ability to Grant Equitable Relief for Breaches of Fiduciary Duty*

As this Court has explained, the Court of Chancery’s equity jurisdiction is not limited to fashioning relief that “was available in 1776. On the contrary, the very essence of our system of equity, is to render the jurisprudence as a whole adequate to the social needs ... [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age. ... That means that the absence of

⁷⁷ *Id.* at 1044 (citing *DuPont II*, 85 A.2d at 729; *see also Bax*, 28 A.3d at 1045 n.32 (quoting *DuPont II*, 85 A.3d at 729).

⁷⁸ *Bax*, 28 A.3d at 1045 (emphasis added).

⁷⁹ 28 A.3d at 1045-46; *see also In re Carlisle Etcetera LLC*, 114 A.3d 592, 604 (Del. Ch. 2015) (explaining, in the context of distinguishing *Bax*, that creditors have ample remedies available at law).

precedent is no bar to the award of appropriate relief.”⁸⁰ “[E]quity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”⁸¹

This Court made the same point in *Schoon*: “‘equity jurisdiction has taken its shape and its substance from the perceived inadequacies of the common law and the changing demands of a developing nation.’”⁸² The *Schoon* Court then quoted Pomeroy’s *Equity Jurisprudence* for the proposition that “the very nature of equity” is constant evolution:

The true function of precedents is that of illustrating principles; they are examples of the manner and extent to which principles have been applied; they are the landmarks by which the court determines the course and direction in which principles have been carried. But with all this guiding, limiting, and restraining efficacy of prior decisions, the Chancellor always has had, and always must have, a certain power and freedom of action, not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new

⁸⁰ *Severns v. Wilmington Med. Ctr., Inc.*, 421 A.2d 1334, 1348 (Del. 1980) (cleaned up) (quoting 1 POMEROY’S EQUITY JURISPRUDENCE (5 ed.) § 67.); *see also* Raz, 102 WASH. U. L. REV. at 592–93 (“equitable remedies, and the modes of primary inequitable behavior, do not and cannot remain frozen in time... This is how the equity guaranteed by Delaware’s 1792 Constitution works today[.]”).

⁸¹ *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 300 (1955).

⁸² *Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008) (quoting Donald Wolfe and Michael Pittenger, 1 CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2–2[a], at 2–2 (1st ed. 2006)); *see also* 1 STORY’S EQUITY JURISPRUDENCE 27–49 at 19 (Isaac F. Redfield, ed., 9th ed. 1866) (“Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a court of common law.”).

relations, and shape his remedies to new circumstances, if the relations and circumstances come within the principles of equity, where a court of law in analogous cases would be powerless to give any relief.⁸³

The *Schoon* Court also quoted Justice Story for the similar proposition that equity:

has an expansive power, to meet new exigencies; and the sole question, applicable to the point of jurisdiction, must from time to time be[] whether such rights and wrongs do exist, and whether the remedies [therefore] in other courts, and especially in the courts of common law, are full, and adequate to redress.⁸⁴

Thus, “[i]t is the ‘complete system’ of equity that [the Court of Chancery] inherited and administers, not the temporally specific subject matter of eighteenth century cases.”⁸⁵ That complete system of equity includes the ability to fashion appropriate relief for breaches of fiduciary duty, which have been described as

⁸³ *Schoon*, 953 A.2d at 204-05 (quoting 1 POMEROY’S EQUITY JURISPRUDENCE § 60, at 77–78 (5th ed. 1941)); see also Wolfe & Pittenger, CORPORATE AND COMMERCIAL PRACTICE § 2.02[b] (2024) (“This prescription necessarily offers little precision, not unimportantly because the jurisdiction of the High court was itself a fluid concept. Indeed, the jurisdiction of that English court of equity mimicked the tide’s ebb and flow against the inconsistent shoreline of the common law, its contours delineated only by the degree of its displacement. ... [T]he British High Court of Chancery had the inherent capacity to expand its own jurisdiction as necessary to meet changing societal needs, a power that it has been said the Delaware Court of Chancery continues to enjoy.”); Henry L. McClintock, HANDBOOK OF THE PRINCIPLES OF EQUITY § 4, at 10 (2d ed. 1948) (“[T]he chancellors could adapt their system to meet changing needs without resorting to the fiction that they were merely interpreting and applying former rules, but the tendency to follow the path laid out by former chancellors was strong.”) (citations omitted).

⁸⁴ *Schoon*, 953 A.2d at 206 (citation omitted).

⁸⁵ *Carlisle*, 114 A.3d at 602; see also *Glanding*, 45 A.2d at 558-59 (“It cannot be said too forcefully that the general powers of the Court of Chancery refers to that *complete system* of equity as administered by the High Court of Chancery of Great Britain.”) (emphasis added).

“perhaps *the* quintessential equitable claim.”⁸⁶ “Given the equitable nature of fiduciary duty claims, jurisdiction lies exclusively within the Chancery Court even where the relief sought is purely monetary.”⁸⁷

Recognizing that the Court of Chancery’s equity jurisdiction is evolving and not static is consistent with basic principles of equity. “[H]aving arisen largely to compensate for the common law’s inability to provide full, fair, and just relief in all instances, equity has evolved as a broad and flexible concept, designed to employ judicial principles and tools creatively so as to effect justice in any given circumstance.”⁸⁸ As Pomeroy stated, equity must maintain such flexibility to address ever-evolving wrongdoing:

Equitable remedies ... are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural

⁸⁶ *QC Commc’s v. Quartarone*, 2013 WL 1970069, at *1 (Del. Ch. May 14, 2013) (emphasis in original).

⁸⁷ *Prospect St. Energy, LLC v. Bhargava*, 2016 WL 446202, at *4 (Del. Supr. Jan. 27, 2016).

⁸⁸ Wolfe & Pittenger, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 12.01[a], at 12-2 (2017); *see also* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792-1992*, 18 DEL. J. CORP. L. 819, 820 (1993) (“Delaware’s Court of Chancery has never become so bound by procedural technicalities and restrictive legal doctrines that it has failed the fundamental purpose of an equity court—to provide relief suited to the circumstances when no adequate remedy is available at law. The historical roots are deep but the Delaware bloom remains fresh.”); *Taylor v. Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 25, 2006) (noting the Court of Chancery’s “historical readiness to adapt to the circumstances of each case and craft appropriate remedies, in contrast to the perhaps more rigid application of law in jurisdictions without similar traditions”) (citation omitted).

rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and reshaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.⁸⁹

But even under the most narrow view of our Court of Chancery's equity jurisdiction, there is no dispute that the British High Court of Chancery's equitable powers in 1792 included the ability to fashion equitable relief for breaches of directors' fiduciary duties. As Justice Holland explained, this has been a core component of equity ever since, in *The Charitable Corporation v. Sutton*, 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742), Lord Hardwicke held that "corporate directors were both agents and trustees required to act with 'fidelity and reasonable diligence.' Ever since the *Sutton* decision, courts have consistently stated that directors of corporations are fiduciaries who must comply with the duties of care (described as reasonable diligence in the *Sutton* decision) and loyalty (described as fidelity in *Sutton*)."⁹⁰ Indeed, in *Sutton*, the Lord Chancellor found directors and officers liable both for breach of the duties of loyalty and care and directed the case to the Master to determine the specific amount of damages as to each. Other decisions and authorities likewise establish that the High Court of Chancery's equitable powers in 1792 included fashioning relief for breaches of fiduciary duty:

⁸⁹ John Norton Pomeroy, EQUITY JURISPRUDENCE § 109, at 141 (5th ed. 1941).

⁹⁰ Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. Pa. J. Bus. L. 675, 678–79 (2009).

- “The alleged corporate rights sought to be enforced by the complainants are based on the fraudulent breach of a fiduciary relation, whereby the defendants reaped material and unfair benefits and profits, at the expense of the corporation, which is now insolvent, and, therefore, largely at the expense of its creditors. ... It has frequently been pointed out that, since the days of Lord Hardwicke [(Lord Chancellor 1737 – 1756)], equity has assumed jurisdiction in cases of this nature.”⁹¹
- “In England, the ‘possibility of abuse of [the corporation’s] concentration of managerial power had been recognized and corrective efforts of a legal nature had appeared’ as early as 1307. ... [By the time of the founding,] courts of equity granted equitable standing to stockholders to sue on behalf of the corporation for managerial abuse in economic units which by their nature deprived some participants of an effective voice in their administration. ... Today, the result of this judicially-created doctrine is known as the stockholder derivative action.”⁹²
- The law of fiduciary duties “of corporate directors has its origins in English common law of both trusts and agency from over 200 years ago. One of the earliest reported English cases on director duty of care, *Charitable Corp. v. Sutton*, decided in 1742, contains what has been characterized as a ‘remarkably modern formulation.’”⁹³
- “Among the most ancient of headings under which chancery’s jurisdiction falls is that of fiduciary relationships. . . . Chancery takes jurisdiction over ‘fiduciary’ relationships because equity, not law, is the source of the right asserted.”⁹⁴
- “Prior to any legislation, English courts imposed a duty of loyalty on corporate

⁹¹ *Bovay v. H. M. Byllesby & Co.*, 12 A.2d 178, 188 (Del. Ch. 1940) (collecting cases).

⁹² *Schoon*, 953 A.2d at 201 (Del. 2008) (cleaned up); see also *id.* at 201 n. 5 (“Prunty also traces the modern doctrine that ‘all corporate managers were to be held to the fiduciary responsibilities of trustees and that appropriate enforcement procedures would be devised’ to the case of *The Charitable Corporation v. Sutton*...”).

⁹³ Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 973 (1994).

⁹⁴ *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987) (Allen, C.).

officers.”⁹⁵

In sum, it cannot reasonably be disputed that the Court of Chancery’s irreducible equity jurisdiction includes the ability to fashion equitable relief for breaches of fiduciary duty.

iii. *Section 144 Violates the Delaware Constitution By Eliminating the Court of Chancery’s Ability to Fashion Relief for Breaches of Fiduciary Duty Where the Safe Harbor Provisions are Satisfied*

Section 144 reduces the Court of Chancery’s equity jurisdiction without substituting a remedy that is either adequate or exclusive. The term “equity jurisdiction” means the ability to grant equitable relief:

The term ‘equity jurisdiction’ is often misunderstood. The term ‘jurisdiction of a court’ usually is used to mean the power conferred upon a court by the sovereign authority to consider and determine controversies and to enforce its decisions. The term ‘equity jurisdiction,’ however, correctly means something else, *i.e.*, the aggregate of the controversies in which the Court of Chancery may properly exercise its power to grant equitable relief.⁹⁶

Any other reading of “equity jurisdiction” would enable the General Assembly to accomplish what Section 10 prohibits simply by removing the Court of Chancery’s ability to fashion a remedy. Carried to its logical conclusion, that would

⁹⁵ Yifat Naftali Ben Zion, *Cleaning Up the Corporate Opportunity Doctrine Mess: A First Principles Approach*, 80 WASH. & LEE L. REV. 1609, 1634 (2023).

⁹⁶ *Clark v. Teveen Holding Co., Inc.*, 625 A.2d 869, 876 (Del. Ch. 1992) (citing *McClintock*, EQUITY § 40 (West Pub. Co. 2d ed. 1948)).

“permit the practical abolition of all courts by the action of one Legislature”⁹⁷ thereby “destroy[ing] the constitutional equipoise among the three branches of government.”⁹⁸

Before Senate Bill 21 was adopted, Section 144 “offer[ed] a limited safe harbor for directors from incurable voidness for conflict transactions. It [was] not concerned with equitable review.”⁹⁹ The Safe Harbor Provisions make “sweeping” changes to that structure.¹⁰⁰ Their check-the-box approach to cleansing conflict transactions overrules decades of equitable precedents and expressly strips the Court of Chancery of its ability to provide either “equitable relief” or “an award of damages” where the statutory criteria are satisfied.¹⁰¹

Most relevant here, Section 144(b)(1) provides that “[a] controlling stockholder transaction (other than any going private transaction) may not be the subject of equitable relief, or give rise to an award of damages” if approved in good faith and without gross negligence by a fully informed committee of directors “each

⁹⁷ *DuPont II*, 85 A.2d at 729.

⁹⁸ Wolfe & Pittenger, CORPORATE AND COMMERCIAL PRACTICE § 2.02[b] (2024) at 12.

⁹⁹ *Match*, 315 A.3d at 463 n.115.

¹⁰⁰ Lawrence Hamermesh and Henry T.C. Hu, *Reconceptualizing Stockholder “Disinterestedness”: Transformative Institutional Investor Changes and Motivational Misalignments in Voting*, 80:2 BUS. LAWYER 1, 32 (Spring 2025) (“As a whole, the SB 21 changes are sweeping[.]”).

¹⁰¹ 8 Del. C. § 144(a)-(c).

of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction.”¹⁰² That rule would overturn this Court’s application of equity in *Match*¹⁰³ and was intended to do so.¹⁰⁴

As Senate Bill 21’s authors acknowledge, the Safe Harbor Provisions’ statutory override of the Court of Chancery’s jurisdiction is unprecedented.¹⁰⁵ Because the Court of Chancery has exclusive jurisdiction over breach of fiduciary duty claims,¹⁰⁶ there is not another tribunal with jurisdiction to hear the claims, much less with the ability to provide an adequate alternate remedy.

The Safe Harbor Provisions unconstitutionally eliminate “the historic powers”

¹⁰² 8 *Del. C.* § 144(b)(1).

¹⁰³ *Match*, 315 A.3d at 451 (“If the controlling stockholder wants to secure the benefits of business judgment review, it must follow all *MFV*’s requirements.”).

¹⁰⁴ Testimony of Amy Simmerman, Esq., before House Judiciary Committee (Mar. 19, 2025), <https://sg001-harmony.sliq.net/00329/Harmony/en/PowerBrowser/PowerBrowserV2/20250313/222/4931> at 10:58 (“There are many [cases] on the list that will be overturned and they’re the *Match*, controlling stockholder line of cases and, quite honestly, that is part of the point of the legislation that we need a systemic fix to those issues.”).

¹⁰⁵ Wilson Sonsini Goodrich & Rosati, *Delaware Legislators and Governor Propose Landmark Legislation* (Feb. 18, 2025), <https://www.wsgr.com/en/insights/delaware-legislators-and-governor-propose-landmark-legislation.html> (“[T]he Delaware statute will, *for the first time*, address issues that have previously been left to the case law.”) (emphasis added) (A0026–A0028); Richards Layton & Finger P.A., *A Message From RLF President Lisa Schmidt* (Feb. 25, 2025), <https://www.rlf.com/a-message-from-rlf-president-lisa-schmidt/> (“The legislation *for the first time* provides statutory guidance on director independence...”) (emphasis added) (A0051–A0054).

¹⁰⁶ *E.g.*, *Reybold Venture Grp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *2 (Del. Super. Jan. 20, 2009) (citing *McMahon*, 532 A.2d at 604).

of the Court of Chancery “to fashion any form of equitable and monetary relief as may be appropriate” for breaches of fiduciary duty.¹⁰⁷ Their check-the-box approach is antithetical to the flexible and ever-evolving nature of equity. “Equity is meant to ‘protect the regular or formal law’ against both accidents and intentional abuses. This is evident in every corner of corporate law.”¹⁰⁸ The Safe Harbor Provisions foreclose the Court of Chancery’s ability to adapt, abandoning the principle that corporate acts are “‘twice-tested,’—first for legal authorization, and second by equity.”¹⁰⁹

¹⁰⁷ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983).

¹⁰⁸ *Raz*, 102 Wash. U.L. Rev. at 585 (collecting cases) (citations omitted).

¹⁰⁹ *In re Invs. Bancorp., Inc. S’holder Litig.*, 177 A.3d 1208, 1222 (Del. 2017) (citing *Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007)).

II. The Retroactivity Provision Is Unconstitutional

a. Question Presented

Does Section 3 of Senate Bill 21—applying the Safe Harbor Provisions to plenary breach of fiduciary claims arising from acts or transactions that occurred before the date that Senate Bill 21 was enacted—violate the Delaware Constitution of 1897 by purporting to eliminate causes of action that had already accrued or vested?

b. Scope of Review

This Court reviews certified questions of law *de novo*.¹¹⁰ “An act of the legislature repugnant to the constitution is void.”¹¹¹

c. Merits of Argument

i. *Plaintiff’s Cause Of Action Accrued Or Vested Before Senate Bill 21 Was Enacted*

“[W]hile no one has a vested interest in a rule of the common law, due process preserves a right of action which has accrued or vested before the effective date of the statute.”¹¹² Here, Plaintiff’s claim had accrued or vested before Senate Bill 21 was enacted. In *Rennick*, the federal court determined that the “cause of action vested

¹¹⁰ *Croda*, 304 A.3d at 194.

¹¹¹ *Albence*, 295 A.3d at 1089 (cleaned up).

¹¹² *Cheswold II*, 489 A.2d at 418.

or accrued at the time of the occurrence of the accident[.]”¹¹³ Here, Plaintiff’s “claim for breach of fiduciary duty accrue[d] at the time of the wrongful act.”¹¹⁴ As in *Rennick*, “[t]he rights of opposing parties came into being or vested at that time and therefore any alterations of the then effective [corporation law] statute after the [breach of fiduciary duty occurred] could not affect plaintiff[’s] cause of action for better or worse or otherwise change the substantive rights of the defendants.”¹¹⁵

Consider a close parallel. In *A.W. Financial Services*, this Court declined to interpret an amendment to the escheatment statute as retroactive because “if applied retroactively, it would divest pre-amendment stockholders of Delaware corporations of a property right by government action without affording them prior notice and an opportunity to be heard. Stated differently, retroactive application would facilitate the taking of property without due process, which is a substantive right.”¹¹⁶

The same logic applies here. “A cause of action is a species of property[.]”¹¹⁷ “The rule that a vested right of action is property just as tangible things are, and is protected from arbitrary legislation, applies to those rights of action which spring

¹¹³ *Rennick v. Glasgow Realty, Inc.*, 510 F. Supp. 638, 642 (D. Del. 1981).

¹¹⁴ *Sutherland v. Sutherland*, 2010 WL 1838968, at *8 (Del. Ch. May 3, 2010) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (claim accrues at the time of the wrongful act)).

¹¹⁵ *Rennick*, 510 F. Supp. at 642.

¹¹⁶ *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009).

¹¹⁷ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

from contracts or the common law.”¹¹⁸ Delaware courts have long recognized that a stockholder’s fiduciary duty claim is a core property right.¹¹⁹ “Modern corporate law recognizes that stockholders have three fundamental, substantive rights: to vote, to sell, and to sue.”¹²⁰ The “right to assert [a] claim and benefit from any recovery is a property right associated with the shares ... that ... travels with the shares.”¹²¹ That right is a valuable one. In the recent Endeavor-Silver Lake cash-out merger, for example, Endeavor shares traded at a meaningful premium to the deal price through closing; the premium reflected the expected value of future litigation recoveries.¹²²

¹¹⁸ *Hazzard v. Alexander*, 173 A. 517, 519 (Del. Super. Ct. 1934) (citing *Collins v. E. Tennessee, V. & G. R. Co.*, 1874 WL 6468, at *2 (Tenn. Sept. 1874) (“a vested right of action is property, just as tangible things are, and is protected from any arbitrary interference by the Legislature[.]”); *Butler v. Palmer*, 1841 WL 3966 (N.Y. Sup. Ct. 1841) (“Strong expressions may be found in the books against legislative interference with vested rights[.]”)).

¹¹⁹ *In re Digex, Inc.*, 2002 WL 749184, at *3 (Del. Ch. Apr. 16, 2002) (“[O]ne of the bundle of rights associated with stock ownership ... is an ongoing inchoate legal right to receive compensation that may mature into an actual legal right to receive compensation upon the entry of an order and final judgment by a competent court.”).

¹²⁰ *Strougo v. Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) (citing William T. Allen, et al., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 177 (2d ed. 2007) (observing that scholars have “summarized the default powers of shareholders as three: the right to vote, the right to sell, and the right to sue”)).

¹²¹ *In re Activision Blizzard, Inc. S’holder Litig.*, 124 A.3d 1025, 1044 (Del. Ch. 2015); see also *Urdan v. WR Cap. Partners, LLC*, 244 A.3d 668, 679 (Del. 2020) (“With the sale of E3 stock went the rights to continue to pursue dilution claims.”).

¹²² Winston Cho, *Endeavor’s Take-Private Sparks Hedge Fund Face-Off With Silver Lake Over Buyout Price*, THE HOLLYWOOD REPORTER (Apr. 3, 2025), <https://www.hollywoodreporter.com/business/business-news/endeavor-take-private-fuels-hedge-fund-face-off-silver-lake-1236181231/> (A0095–A0098).

ii. *Article I, Section 9 Forbids Retroactive Alterations To A Cause Of Action That Has Already Accrued Or Vested*

Senate Bill 21 transgresses Article I, Section 9 of the Constitution of 1897 by retroactively depriving Plaintiff and other stockholders of their property rights, *i.e.*, causes of actions that accrued before Senate Bill 21 was enacted. Courts across the country are hostile to retroactive laws with this effect. In many states, “[a]nti-retroactivity has ... been given effect in state constitutions through provisions that are commonly referred to as ‘open courts’ or ‘right to remedy’ clauses. ... With constitutional origins that date back to the Magna Carta,^[123] the first state constitutional appearance of one of these measures was in the Delaware Constitution of 1776.”¹²⁴ Other states followed. “Open courts or right to remedy provisions are

¹²³ See, *e.g.*, William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 350 (1997) (translating Magna Carta from Latin; “No provisions of the Charter of King John would have more impact on later American constitutions than Chapters 39 and 40. In Chapter 39, King John agreed that ‘(n)o freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.’ Similarly, King John agreed in Chapter 40 that: ‘To no one will we sell, to no one will we refuse or delay, right or justice.’”) (internal citations omitted).

¹²⁴ Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 90 (2013); Del. Decl. of Rights and Fundamental Rules of 1776 § 12 (“That every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without

now found in at least thirty-eight state constitutions. Approximately two-thirds of Americans live in a state with a state constitution that contains such a provision.”¹²⁵

Delaware’s open-courts/remedy-for-injury provision (also sometimes called its “due process” provision)¹²⁶ carried through the Constitutions of 1792, 1831, and 1897. It now resides in Article I, Section 9 of the Constitution of 1897:

All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.

“Of all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important.”¹²⁷ “[F]or purposes of constitutionally restraining retroactive civil legislation, the reach of open courts and right to remedy provisions has been interpreted as protecting a cause of action upon accrual against retroactive

Delay, according to the Law of the Land.”).

¹²⁵ Usman, *Constitutional Constraints*, 14 NEV. L.J. at 90; see also *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173, 177 (Del. 1996) (“Section 9 is a version of the ‘open courts’ or ‘remedies’ clauses appearing in at least thirty-seven state constitutions.”).

¹²⁶ *Cheswold II*, 489 A.2d at 418 (“due process preserves a right of action which has accrued or vested before the effective date of the statute.”).

¹²⁷ Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U.L. REV. 1309, 1309 (2003).

elimination and, additionally, often safeguarding the right to the remedies accompanying that cause of action.”¹²⁸

Other state courts—usually applying parallel open-courts/remedy-for-injury/due-process provisions in their own state constitutions—have consistently recognized that a state legislature may not retroactively eliminate a cause of action that has accrued or vested:

- **Alabama:** “Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred.”¹²⁹
- **Arizona:** “[L]egislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events.”¹³⁰
- **Iowa:** “[P]laintiff had a vested property right in her cause of action ... and ... the retroactive application of the 1986 amendment destroyed that right in violation of due process[.]”¹³¹
- **Kansas:** “Substantive laws affecting vested rights cannot be made retroactive without violating due process.”¹³²
- **Michigan:** “[R]etrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.”¹³³

¹²⁸ Usman, *Constitutional Constraints*, 14 NEV. L.J. at 90-91 (collecting cases).

¹²⁹ *Pickett v. Matthews*, 192 So. 261, 264 (Ala. 1939).

¹³⁰ *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 189 (Ariz. 1999).

¹³¹ *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 463 (Iowa 1989).

¹³² *Resolution Tr. Corp. v. Fleischer*, 892 P.2d 497, 506 (Kan. 1995).

¹³³ *In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit*, 331

- **Montana:** “[T]he Legislature cannot destroy vested rights. Where an injury has already occurred for which the injured person has a right of action, the Legislature cannot deny him a remedy.”¹³⁴
- **Nebraska:** “A statutory bar and an accrued cause of action are vested rights. Like other vested rights, they cannot be impaired by a subsequent legislative act.”¹³⁵
- **New Jersey:** “The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.”¹³⁶
- **Oklahoma:** “[T]he right of access to the courts protects only those substantive rights which have vested[.]”¹³⁷
- **Pennsylvania:** “[A]n accrued cause of action is a vested right which legislation may not extinguish.”¹³⁸
- **Utah:** “[O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person’s interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.”¹³⁹
- **Wisconsin:** “Legislation enacted after the fact ... cannot be interpreted to bar, limit or terminate a party's vested right in an accrued cause of

N.W.2d 456, 463 (Mich. 1982) (cleaned up).

¹³⁴ *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 650 (Mont. 1976) (quoting *Shea v. N.-Butte Mining Co.*, 179 P. 499, 503 (Mont. 1919)).

¹³⁵ *Schendt v. Dewey*, 520 N.W.2d 541, 546 (Neb. 1994) (internal citations omitted).

¹³⁶ *Rosenberg v. Town of N. Bergen*, 293 A.2d 662, 667 (N.J. 1972).

¹³⁷ *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 920 (Okla. 1989).

¹³⁸ *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 927 (Pa. 2004).

¹³⁹ *Berry By & Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985).

action.”¹⁴⁰

This is a consistent rule. While “no court has adopted a rule of absolute deference to legislatures[,] even the most radical courts recognize that lawmakers cannot deprive plaintiffs of vested rights.”¹⁴¹

As the citations above suggest, state-constitutional challenges on remedy-for-injury/open-courts/due-process grounds became particularly popular in the 1970s and 1980s in response to a legislative trend of states adopting statutes of repose for torts.¹⁴² Delaware followed the rule of other states.

There is a particularly clear explanation in *Cheswold*, which involved a constitutional challenge to the statute of repose for construction-related claims in 10 Del. C. § 8127.¹⁴³ There, the Superior Court rejected the plaintiff’s constitutional challenge *because* “only a right of action which had accrued or vested before the effective date of the statute was eligible for constitutional protection.”¹⁴⁴ On appeal, this Court agreed: the plaintiff’s challenge failed because its cause of action had not

¹⁴⁰ *Hunter v. Sch. Dist. of Gale-Ettrick-Trempealeau*, 293 N.W.2d 515, 521 (Wis. 1980).

¹⁴¹ David Schuman, *The Right to A Remedy*, 65 TEMP. L. REV. 1197, 1208 (1992).

¹⁴² See generally Susan C. Randall, *Due Process Challenges to Statutes of Repose*, 40 Sw. L.J. 997, 998 (1986).

¹⁴³ *Cheswold II*, 489 A.2d at 415.

¹⁴⁴ *Cheswold Volunteer Fire Co. v. Lambertson Const. Co.* (“*Cheswold I*”), 462 A.2d 416, 422 (Del. Super. Ct. 1983), *aff’d*, 489 A.2d 413 (Del. 1984).

accrued at the time of enactment; “[t]he construction of the plaintiff’s building was completed in 1972; the effective date of § 8127 was 1970.”¹⁴⁵

Critically, both the Superior Court in *Cheswold I* and this Court in *Cheswold II* recognized that the outcome would be reversed if, as here, the plaintiff’s cause of action had already accrued when the statute was enacted. The trial court acknowledged that “the remedy for injury by the due process clause of Article I, § 9 protects ... vested rights from abolition by legislative enactments.”¹⁴⁶ This Court concurred. “[W]hile no one has a vested interest in a rule of the common law, due process preserves a right of action which has accrued or vested before the effective date of the statute.”¹⁴⁷

Contemporaneous Delaware authorities are in accord. In *Artesian Water*, the Court of Chancery explained that “vested rights of action” are “clearly insulated from revocation or substantive alteration, even by legislation clearly designed to be applied retroactively[.]”¹⁴⁸ In *Rennick*, the United States District Court for the

¹⁴⁵ *Cheswold II*, 489 A.2d at 418.

¹⁴⁶ *Cheswold I*, 462 A.2d at 421. *Cheswold I* cited favorably to *Reeves*, 551 P.2d at 650, a Montana case stating the same rule.

¹⁴⁷ *Cheswold II*, 489 A.2d at 418.

¹⁴⁸ *Artesian Water Co. v. Gov’t of New Castle Cnty.*, 1983 WL 17986, at *12 (Del. Ch. Aug. 4, 1983).

The Court of Chancery went on to explain that “[v]ested rights are not mere expectancies based on a statute but tangible rights, not dependent on legislation, but springing from contract or common law.” *Id.*

District of Delaware invoked the canon of constitutional avoidance to construe a statute as non-retroactive, observing that the “Plaintiffs’ cause of action ... vested or accrued at the time of the occurrence of the accident[.] The rights of opposing parties came into being or vested at that time and therefore any alterations of the then effective premises guest statute after the accident could not affect plaintiffs’ cause of action for better or worse or otherwise change the substantive rights of the defendants.”¹⁴⁹ Shortly before that, the Superior Court had held—and this Court affirmed—in *Dunn* that “the General Assembly has the power to create new rights and abolish old ones *so long as they are not vested*.”¹⁵⁰

This rule also ensures fairness to defendants. In *Monacelli*, this Court considered a statutory change that “create[d] the right to subject a non-resident to a judgment *in personam* in a jurisdiction where he ha[d] not been personally served.”¹⁵¹ The Court explained that “such a statute cannot be construed to apply to an accident happening before its passage, since such a construction would confer upon the plaintiff a legal right where none before existed.”¹⁵² Conversely, here, Senate Bill 21 cannot retroactively deprive Plaintiff of a legal right that had accrued

¹⁴⁹ 510 F. Supp. at 642.

¹⁵⁰ *Dunn v. Felt*, 379 A.2d 1140, 1141 (Del. Super. Ct. 1977) (emphasis added), *aff’d sub nom. Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77 (Del. 1979).

¹⁵¹ *Monacelli v. Grimes*, 99 A.2d 255, 267 (Del. 1953).

¹⁵² *Id.* (cleaned up).

when the statute was enacted.

Finally, permitting the Retroactivity Provision to stand would allow for stockholders, like Appellant, to be punished for following existing law and obeying this Court’s admonishments to investigate derivative claims before filing suit. Section 3 of Senate Bill 21 purports to do just that. It provides that the Safe Harbor Provisions apply “to all acts and transactions, whether occurring before, on, or after the enactment of this Act” except in the case of a plenary fiduciary duty action that was already pending as of February 17, 2025.¹⁵³ The statute thus punishes Plaintiff and other stockholders for heeding this Court’s advice and conducting a books-and-records investigation rather than rushing into court with a plenary complaint as soon as their claim accrued.¹⁵⁴ The Retroactivity Provision cannot survive constitutional scrutiny.

¹⁵³ Laws of Delaware, Vol. 85 Ch. 6 (2025) (session law adopting Senate Bill 21) § 3 (A0085–A0090).

¹⁵⁴ Notably, Plaintiff could not even protect himself by rushing to file a plenary complaint after Senate Bill 21 was announced; only complaints that were pending as of the date that Senate Bill 21 was *announced* were grandfathered in.

CONCLUSION

The Safe Harbor Provisions and Retroactivity Provision violate the Delaware Constitution.

Dated: July 31, 2025

Of Counsel:

Jeroen van Kwawegen
Edward G. Timlin
Christopher J. Orrico
Thomas James

**BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP**
1251 Avenue of the Americas
New York, New York 10020
(212) 554-1400

Joel Fleming
Lauren Godles Milgroom
EQUITY LITIGATION GROUP LLP
1 Washington Mall #1307
Boston, Massachusetts 02108
(617) 468-8602

Aaron Morris
Leo Kandinov
MORRIS KANDINOV LLP
550 West B Street
4th Floor
San Diego, CA 92101
(619) 780-3993

**BERNSTEIN LITOWITZ
BERGER & GROSSMANN LLP**

/s/ Gregory V. Varallo
Gregory V. Varallo (Bar No. 2242)
Andrew E. Blumberg (Bar No. 6744)
Daniel E. Meyer (Bar No. 6876)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 365-3600
greg.varallo@blbglaw.com
andrew.blumberg@blbglaw.com
daniel.meyer@blbglaw.com

*Counsel for Plaintiff-Appellant
Thomas Drew Rutledge*