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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF *AMICI CURIAE* CORPORATE LAW ACADEMICS IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICI CURIAE*

Amici curiae are law professors and other legal academics who teach and write about corporate law.

- **Anat Alon-Beck** is a Professor of Law at Case Western Reserve University School of Law and a Visiting Scholar at Harvard Law School.
- **James An** is a Teaching Fellow in the LL.M. Program in Corporate Governance and Practice, and Lecturer in Law at Stanford Law School.
- **Charles M. Elson** is the retired Edgar S. Woolard Chair in Corporate Governance and the Founding Director of the Weinberg Center for Corporate Governance at the University of Delaware.
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Amici share a deep interest in the development of Delaware's corporate law and submit this brief in support of Appellant Thomas Drew Rutledge ("Appellant").

Amici have no financial interests in the outcome of either this appeal or the underlying action.[1]

Amici agree with—but do not seek to rehash—Appellant's arguments that Section 1 of Senate Bill 21 ("SB 21"), codified as 8 *Del. C.* § 144, violates the Delaware Constitution by purporting to eliminate the Court of Chancery's ability to award "equitable relief" or "damages" if certain "safe harbor" provisions are satisfied. *Amici* instead wish to provide the Court with additional perspectives regarding the function and value of the Court of Chancery's equity jurisdiction and its importance to the development and application of Delaware corporate law.

[1] As a general matter, *Amici*'s undersigned counsel at Labaton Keller Sucharow LLP are counsel to stockholders in books and records investigations and stockholder representative plaintiffs in actions that may be impacted by SB 21 and the outcome of this appeal.

CERTIFICATION PURSUANT TO RULE 28(C)(4)

No party or party's counsel authored the brief in whole or in substantial part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*'s counsel—contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

I. THE COURT OF CHANCERY'S EQUITY POWERS ARE CRITICAL TO THE FUNCTIONING OF DELAWARE CORPORATE LAW

> *[T]he equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality [of the law]. And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality.*[2]

There can be no law without equity, the idea of which dates back to antiquity.[3] Under medieval English common law, the rigid system of the forms of action gave rise to repeated injustices. As legal historian Frederic Maitland wrote, "[v]ery often the petitioner . . . complains that for some reason or another he can not get a remedy in the ordinary course of justice and yet he is entitled to a remedy."[4] The Court of Chancery was the solution to this problem: "[Chancellors] were administering the law but they were administering it in cases which escaped the meshes of the ordinary

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[2] ARISTOTLE, NICOMACHEAN ETHICS, at 141-42 (Martin Ostwald trans., Bobbs-Merrill Co., Inc. 1962) (c. 384 B.C.E.).

[3] *Id.; see also, e.g.*, Henry E. Smith, *Equity as Meta-Law*, 130 YALE L. J. 1050, 1077 n.100 (Mar. 2021) ("[E]quity . . . is a type of law that . . . protect[s] the regular or formal law."); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 486 (1938) ("That the law in the broad sense is and always has been made up of law and equity combined cannot reasonably be denied.").

[4] F.W. Maitland, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW, at 4 (A.H. Chaytor & W.J. Whittaker eds., 1909).

courts," and the law they were administering came to be known as "the rules of equity and good conscience."[5]

This substantive understanding of equity as a mode of rectifying the injustices that might escape a too-rigid reading of common or statutory law continues to characterize English law to this day,[6] and it is what came to the American colonies, including Delaware. As Justice Victor Woolley wrote, "the whole body of equity principles, both of right and remedy, was brought hither by our ancestors, together with the common law, on their emigration from England, as a part of their heritage of liberty."[7]

Since the founding era, Delaware corporate law has excelled in recognizing the inherent primacy of equity over other legal authorities, including statutes and contracts.[8] This recognition is most importantly captured in the irreducible equity power granted to the Court of Chancery under the Delaware Constitutions of 1792,

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[5] *Id*. at 6-8.

[6] *See, e.g.*, DAVID FOSTER & CHARLES MITCHELL, ESSAYS ON THE HISTORY OF EQUITY (forthcoming 2026); Dennis Klimchuk, *Aristotle at the Foundations of the Law of Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 32 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020); John Tasioulas, *The Paradox of Equity*, 55 CAMBRIDGE L. J. 456, 461 n.10 (1996).

[7] 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 56, at 35 (1906).

[8] *See, e.g.*, *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 924 (Del. 2023); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 116-35 (Del. 2020).

1831, and 1897.[9] The interplay between equity and the interpretation of the Delaware Constitution raises two closely related questions. First, what does "equity" require the Court of Chancery, and the entirety of Delaware corporate law, to be able to do? Second, how does the Delaware Constitution enable the Delaware legal system to achieve this mission?

Through a series of important legal episodes in the twentieth and twenty-first centuries, the Delaware courts have answered each of these questions consistently: the *role* of equity is a substantive and evolving one,[10] meant to ameliorate the abuses and accidents that would flow from an overly formalistic application of "first-order"[11] legal text; and the constitutional protection granted to equity is absolute, defending equity against usurpations or invalid "waivers" by both the legislature and

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[9] DEL. CONST. art. IV, § 10; DEL. CONST. of 1792 art. VI, § 14; DEL. CONST. of 1831 art. VI, § 5; 1 VICTOR B. WOOLLEY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE § 56, at 35 ("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 doing so to the preceding constitution.").

[10] *See, e.g.*, 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.").

[11] Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 60 (Harv. Pub. L. Working Paper No. 15-13, 2015).

private parties.[12] Thus, as set forth in Appellant's opening brief, Delaware courts, including this Court, have consistently (and correctly) preserved the Court of Chancery's equity powers by rejecting legislative efforts to curtail them.[13]

From our perspective, those decisions—and Delaware's commitment to substantive equity and the Court of Chancery's equitable powers—has been enormously beneficial to the development of corporate law. There is a natural nexus between corporate law and equity or, put differently, equity is a necessary component of well-functioning corporate law. Equity's role as "second-order" or "meta-law"[14] and its power to resolve "grievances" rather than "causes of action,"[15] is a necessary response to conflicts of interest and agency problems that naturally

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[12] *See, e.g.*, Lyman Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701 (2011).

[13] *See* Appellant's Opening Br. at 13-19, discussing, *e.g.*, *Glanding v. Indus. Tr. Co.*, 45 A.2d 533 (Del. 1945); *DuPont v. DuPont*, 79 A.2d 680 (Del. Ch. 1951); *Douglas v. Thrasher*, 489 A.2d 422 (Del. 1985); *In re Arzuaga-Guevara*, 794 A.2d 579 (Del. 2001); and *CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011). *See also Martin v. D. B. Martin Co.*, 88 A. 612 (Del. Ch. 1913) ("[i]t is well settled that a court of equity may disregard formalities and break through the shell of fictions in order to prevent, or undo, fraud, where the formalities and fictions have been used to accomplish a fraud"); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923) ("[I]f it should appear that [statutory] power is used in such a way that it violates any of those fundamental principles which it is the special province of equity to assert and protect, its restraining processes will unhesitatingly issue.").

[14] Smith, *Equity as Meta-Law*, 130 YALE L. J. at 1050 & *passim*.

[15] Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 NOTRE DAME L. REV. 1763 (2022).

arise in the corporate context.[16] Equity is also a necessary tool in the enforcement of fiduciary duties, which are themselves equitable in nature.

That is, corporate law's role in the enforcement of fiduciary duties—if it is to be functional, dependable, and predictable—must revolve around the balance between endowing corporate fiduciaries with the freedom to manage a corporation's affairs, and policing that freedom so that it is applied to its intended goal of advancing the corporation's purpose. Delaware corporate law "must be flexible enough to recognize that the contours of a duty of loyalty will be affected by the specific factual context in which it is claimed to arise."[17] The Court of Chancery's equitable powers squarely address that need.

The flexibility of equity has tremendous value. "Equity tempers the extreme ease with which the corporation or its managers . . . can circumvent, in ways that are entirely unforeseeable to anyone other than themselves, any ex ante rules meant to

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[16] *Id.* at 1780 ("[E]quity ameliorates the damaging effects of opportunism on the integrity of first-order law, responding to exceptional instances of abuse or misuse of legal rights and powers."); Charles K. Whitehead, *Delaware's Agency Problem* 18-19 (Aug. 4, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5380168 ("By serving as a check, and introducing safeguards—such as reasoned decision-making and evidentiary standards—courts [of equity] can help identify and mitigate the effects of laws that reflect second-order agency problems. As such, they function as a moderating force in corporate lawmaking."); *see also* Anat Alon-Beck, *Delaware Beware*, 2025 U. ILL. L. REV. 363, 384 (2025).

[17] *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *8 n.14 (Del. Ch. Mar. 2, 1989).

constrain them."[18] It has also been "vital to the continued development of [Delaware's] system of corporate law."[19] As former Chief Justice Strine opined:

> The self-discipline of separating the inquiry into whether the challenged conduct is lawful, in the sense of being prohibited by statute or governing instrument, from the inquiry into whether the challenged conduct is equitable in the particular circumstances before the court, promotes better decision making and makes more credible the judiciary's exercise of its common law making powers.[20]

This Court's 1971 decision in *Schnell v. Chris-Craft Industries, Inc.*[21] demonstrates the valuable interplay between equity and first-order law. *Schnell* dealt with the hierarchy between equity and statute and came only four years after the passage of the 1967 revision to the Delaware General Corporation Law. In *Schnell*, "management ha[d] seized on a relatively new section of the Delaware Corporation Law for the purpose of cutting down on the amount of time which would otherwise have been available to plaintiffs and others for the waging of a proxy battle."[22]

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[18] Asaf Raz, *The Original Meaning of Equity*, 102 WASH. U. L. REV. 541, 576 (2024).

[19] Leo E. Strine, Jr., *If Corporate Action is Lawful, Presumably There Are Circumstances in Which it is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft*, 60 BUS. LAW. 877, 906 (2005).

[20] *Id.; see also Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007) ("Delaware law uses equity, in the form of principles of fiduciary duty, to ensure that directors do not injure their corporations. Corporate acts thus must be 'twice-tested'—once by the law and again by equity."

[21] 285 A.2d 437 (Del. 1971).

[22] *Schnell*, 285 A.2d at 439 (emphasis added).

Schnell rebuked management's actions, holding that "inequitable action does not become permissible simply because it is legally possible."[23] The lesson is clear: regardless of how the legislative wind happens to blow, the Delaware courts retain an equitable power that enables them to achieve fairness and predictability in new situations.

An additional and more recent line of cases further serves to illustrate just how fundamental equity—indeed, constitutional equity—is to the Delaware system of corporate and business law. These three cases—*In re Carlisle Etcetera LLC*,[24] *Holifield v. XRI Investment Holdings LLC*,[25] and *Cantor Fitzgerald, L.P. v. Ainslie*[26]—all arise in the alternative entity context. As this Court often stresses, LLCs and other alternative entities are "creatures of contract."[27] Yet, equity continues to hold sway even in this corner of the law.

In *Carlisle Etcetera*, the petitioner, an assignee of an LLC membership interest, reached a deadlock with the entity's other member. This deadlock

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[23] *Id.*

[24] 114 A.3d 592 (Del. Ch. 2015).

[25] 304 A.3d 896 (Del. 2023).

[26] 312 A.3d 674 (Del. 2024). These cases also post-date and reaffirm the central conclusion of this Court's holding in *Bax*, 28 A.3d at 1045-46, which Appellant ably addresses. *See* Appellant's Br. at 18-19.

[27] *See, e.g.*, Mohsen Manesh, *Creatures of Contract: A Half-Truth About LLCs*, 42 DEL. J. CORP. L. 391 (2018).

prevented both the proper functioning of the business, and any straightforward attempts at dissolving it, since an assignee has no statutory standing to pursue dissolution under the Delaware LLC Act.[28] As the Court of Chancery found, "[t]his case presents the type of situation anticipated in [*Huatuco v. Satellite Healthcare & Satellite Dialysis of Tracy, LLC*[29]] where equity should intervene."[30] More pointedly, relying on *DuPont* and related sources, *Carlisle Etcetera* held that "[i]f [the LLC statute] . . . purport[ed] to . . . override a significant portion of this court's traditional equitable jurisdiction, then the validity of that aspect of the provision would raise serious constitutional questions."[31] The court then denied the motion to dismiss the dissolution petition.[32]

Equity's primacy, even in the alternative entity context, has recently been confirmed by this Court as well. In *Holifield*, this Court held that "there are limits to private ordering and that Delaware courts retain an inherent measure of authority and equitable power with respect to limited liability companies."[33] And last year, this Court offered in *Ainslie* that "it is conceivable that a public-policy interest or

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[28] *See Carlisle Etcetera*, 114 A.3d at 594-97.

[29] 2013 WL 6460898 (Del. Ch. Dec. 9, 2013).

[30] *Carlisle Etcetera*, 114 A.3d at 606.

[31] *Id.* at 602.

[32] *See id.* at 607.

[33] *Holifield*, 304 A.3d at 924.

inequitable outcome could, under some circumstances, outweigh the interest in freedom of contract enshrined in [the Delaware Revised Uniform Limited Partnership Act]."[34]

It logically follows that because equity may overcome statutes and contractual terms in the alternative entity area, it necessarily must do so in regard to corporations, where officer and director fiduciary duties are based in equity, not contract.[35]

[34] *Ainslie*, 312 A.3d at 692.

[35] *See, e.g.*, *Salzberg*, 227 A.3d at 116-35; *Sample*, 914 A.2d at 664.

II. CONTRARY TO ITS PROPONENTS' ASSERTIONS, SB 21 UNDERMINES PREDICTABILITY AND VALUE-MAXIMIZATION

The goal of maximizing corporations' economic value for the benefit of their stockholders has long been paramount in guiding the development of Delaware corporate law. As discussed above, the Court of Chancery's traditional equity jurisdiction empowers the judiciary to pursue this goal in ways that the legislature cannot, *i.e.*, through the flexible application of equity to unanticipated circumstances implicating fiduciary duties and investor expectations. SB 21 appears to do the opposite, both conceptually and empirically. First, compliance with and enforcement of fiduciary duties under SB 21 will become *less* predictable than the status quo ante, a factor that directly undermines economic value maximization. In addition, available market-based empirical evidence suggests that SB 21 has actually *destroyed* economic value for Delaware corporations, thereby undermining the central policy goal of Delaware corporate law.

One of the key arguments advanced by SB 21's proponents is that the Court of Chancery's exercise of equitable jurisdiction has undermined the predictability of Delaware corporate law and that SB 21 restores that predictability.[36] We take issue

[36] *See*, *e.g.*, *Governor Meyer Signs SB 21 Strengthening Delaware Corporate Law*, OFFICE OF THE GOVERNOR, https://news.delaware.gov/ 2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law/ (SB 21 "'ensure[s] clarity and predictability,' . . . said Governor Matt Meyer."); *Legal Initiative-SB 21*, 153 General Assembly (Del. Mar. 12, 2025) (statement of Senator Bryan Townsend) (SB 21 "brings clarity and predictability to the DGCL"); Client Alert, *Delaware Enacts*

with SB 21 proponents' understanding of "predictability." SB 21's proponents narrowly understand predictability to mean whether fiduciary conduct surrounding a transaction will receive judicial deference if transactional planners comply with a set of formalistic rules. The primary problem with such an understanding is that Delaware corporate law has historically and consistently rejected the concept that a corporate action is permissible simply because it has satisfied a set of formalisms.[37] The satisfaction of formalities has not historically been, and should not be, the determinative factor of whether this or any business court validates a transaction as fair or in keeping with fiduciary duties.

Rather, the Court of Chancery's equitable powers *add* to predictability. True predictability—and the predictability that Delaware corporate law has historically fostered—arises through the application of equity to unique or unpredictable circumstances. The predictability of Delaware corporate law has and should turn on the question of how the courts will treat practices that may differ in legal form but are alike in economic substance. In other words, can managers *and* investors know

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Landmark Corporate Law Amendments, WILSON SONSINI GOODRICH & ROSATI LLP (Mar. 26, 2025), https://www.wsgr.com/print/v2/content/49045217/Delaware-Enacts-Landmark-Corporate-Law-Amendments-.pdf (SB 21 "should, in our view, restore the stability, predictability, and balance that long characterized Delaware law").

[37] *See Schnell*, 285 A.2d at 439 ("[I]nequitable action does not become permissible simply because it is legally possible.").

that Delaware law will predictably reject unfair and exploitative practices while upholding legitimate exercises of corporate power? Equity provides that assurance: "Stockholders can entrust directors with broad legal authority precisely because they know that that authority *must* be exercised consistently with equitable principles."[38]

The predictability of Delaware corporate law in that sense is much more meaningful and important. Through its application of equity, the Delaware Court of Chancery can fairly deal with unique and specific circumstances, including new developments and practices in corporate transactions. There are many ways in which different transactional forms can result in the same substantive outcome. Treating these forms differently in accordance with rigid, formalistic rules may result in more "predictability" for transactional planners,[39] but that sort of predictability comes at the expense of substantive equity, fairness, and enforcement of fiduciary duties. The "primary non-ballot box legal constraint on [corporate managers] is the enforcement of their equitable fiduciary duties,"[40] and the Court of Chancery's equity jurisdiction is the source of its power to enforce fiduciary duties.

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[38] *Sample*, 914 A.2d at 664 (emphasis added).

[39] We do not share the view that SB 21 necessarily provides more predictability even to transaction planners. SB 21's revisions to DGCL Section 144 made that section significantly longer and more complex (from ~280 words to ~2,200 words), and added new terminologies, many of which are undefined and will need to be interpreted by the courts.

[40] Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L. J. 629, 641 (2010).

The Court of Chancery's equity powers are also valuable to corporate managers, investors, and the development of corporate law.[41] The separate inquiries of whether conduct is statutorily permitted and whether conduct "is equitable in the particular circumstances before the court[] promotes better decision making and makes more credible the judiciary's exercise of its common law making powers."[42] Equity gives courts their "expansive power to meet new exigencies" in a way that is consistent with past rulings "without resorting to the fiction that they were merely interpreting and applying former rules."[43] Equity "means the stability and efficiency in knowing that courts will properly respond to what is truly unpredictable: the numerous abuses and accidents that managers' and other actors' open-ended powers make possible."[44] By limiting parties' ability to conduct end-runs around the invariably limited nature of generally written ex ante rules, equity thus protects "the regular or formal law."[45]

Examples abound of how equity has functioned to create value through both protection of stockholders and guidance to corporate fiduciaries. In *Schnell*, a

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[41] *See* Nizan Geslevich Packin & Anat Alon-Beck, *Board Observers,* ILL. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4745278.

[42] Strine, Jr., *If Corporate Action is Lawful*, 60 BUS. LAW. at 906.

[43] *Carlisle Etcetera*, 114 A.3d at 603 (citation modified).

[44] Raz, *The Original Meaning of Equity*, 102 WASH. U. L. REV. at 578.

[45] Smith, *Equity as Meta-Law*, 130 YALE L. J. at 1077 n.100.

corporation's board sought to modify the date of a stockholder meeting to deprive stockholders of their power to replace management.[46] This Court rejected that attempt, instead ensuring that managers could not misuse their statutory right to set stockholder meetings.

In *Southern Peru*, the controlling stockholder proposed that the corporation purchase the controller's non-public mining company for $3.1 billion.[47] A special committee—later determined to be independent and disinterested—"took strenuous efforts to justify a transaction at the level originally demanded by the controller."[48] Then-Chancellor Strine applied equity to award damages of $1.26 billion plus interest, noting that a "controlled mindset . . . too often afflicts even good faith fiduciaries trying to address a controller."[49] Thus, judicial scrutiny and the application of equity corrected for a substantively unfair conflict transaction and provided valuable guidance for deal planners and fiduciaries.

The decision in *Southern Peru* likely would not have been reached if SB 21 had been in place. SB 21's "safe harbor" under DGCL § 144(b) presumably would have defeated the *Southern Peru* plaintiff's claims, likely at the pleading stage, based

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[46] *Schnell*, 285 A.2d at 438-39.

[47] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011), *aff'd, Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

[48] *Id.* at 764.

[49] *Id.* at 763-64.

solely on the approval of a committee of independent and disinterested directors.[50] Stripped of the ability to award damages or equitable relief, the Court would have no basis to further scrutinize whether the committee was well-functioning or exercised arm's-length bargaining power, or the fairness of the transaction price. Setting aside the injustice of that outcome, the incentives that follow from it are even more problematic—and create *more*, not less unpredictability. The focus for deal planners and fiduciaries becomes merely how a committee is "set up,"[51] instead of the committee's substantive work, which will be shielded from discovery or judicial scrutiny, opening the door to less predictable outcomes (and undiscoverable, unredressable unfairness).

By way of another example, the *CytoDyn* case provides an ominous warning of what may lie ahead if SB 21 is upheld.[52] There, in "a case of unmitigated greed,"[53] executives removed several independent directors and replaced the general counsel before obtaining unanimous board approval of spring-loaded stock options

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[50] *See* 8 *Del. C.* § 144(a)(1).

[51] *See S. Peru*, 52 A.3d at 789 (for purposes of assessing whether a burden shift is appropriate, "the inquiry must focus on how the special committee actually negotiated the deal—was it well-functioning—rather than just how the committee was set up") (citation modified).

[52] *Alpha Venture Cap. P'rs LP v. Pourhassan*, C.A. No. 2020-0307-PAF (Del. Ch. Apr. 19, 2021) (TRANSCRIPT) (Trans. ID 66565001).

[53] *Id.* at 28.

comprising approximately 40% of the company's equity.[54] The litigants quickly reached a settlement that rescinded approximately 80% of the challenged stock awards. Had SB 21 been in place, such unfaithful fiduciaries would be incentivized to add a single independent and disinterested director to the board and obtain his or her approval, thereby insulating the transaction from judicial scrutiny or recourse. We respectfully submit that Delaware corporate law's value is meaningfully reduced if it cannot protect stockholders from such unfaithful behavior, or if simple structural ploys can eliminate the Court's oversight and enforcement function.

Absent courts' power to use equity to remedy these sorts of wrongs and other wrongs yet to be imagined, Delaware corporate law is made less, not more, predictable.[55] Without a court's power to do equity, investors in Delaware corporations will find themselves subject to the whims of controlling stockholders and managers. Absent equity, the outcome of a stockholder's investment will turn not on longstanding principles of fairness, but whether a stockholder was lucky

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[54] *Pourhassan*, C.A. No. 2020-0307-PAF (Del. Ch. Apr. 19, 2021) (TRANSCRIPT).

[55] *See*, *e.g.*, Jared A. Ellias & Robert J. Stark, *Bankruptcy Hardball*, 108 CAL. L. REV. 745, 745, 750 (2020) (noting that Delaware's shift away from providing equitable remedies to creditors has led to "a level of chaos and rent-seeking unchecked by norms that formerly restrained managerial opportunism. . . . [I]n the vacuous space that now exists, remarkable instances of control opportunism are observable and increasingly commonplace.") (citing *N. Am. Catholic Educ. Programming Found. v. Gheewalla*, 903 A.2d 92 (Del. 2007)).

enough to have invested in a firm with beneficent managers and whether those managers continue to be beneficent.

Equity is further valuable because market forces alone are ill-equipped to ensure that managers and controllers will predictably act in the interests of stockholders that the formal law charges them with protecting. Markets are not unalloyed magic; market failure can and does exist absent credible rules that ensure that participants are armed with the tools they need to navigate the market. Among other things, the decisions of Delaware courts tell stockholders which managers can be trusted and which managers are liable to engage in self-dealing.[56] This information not only makes markets more effective, but preserving the Delaware courts' equity powers to police fiduciary misconduct also ensures that corporate fiduciaries cannot easily break their commitments, in turn protecting the market value of those commitments.

Our suppositions find support in empirical evidence that suggests SB 21 actually *reduced* the predictability and value of Delaware corporate law. As Appellant notes, a recent event study shows that that the largest 1,000 Delaware corporations suffered a collective loss of over $700 billion in value in the immediate

[56] *See*, *e.g.*, George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970).

wake of SB 21's announcement.[57] We note that, by contrast, there was no significant change in stock prices after this Court announced its decision in *Match*,[58] a fact that is consistent with this Court's position that *Match* did not change Delaware law.[59] Although we—like the authors of the study—readily acknowledge that the causal link between the loss in market value and SB 21 is not definitive,[60] the magnitude of the loss is something that should give this Court and all corporate stakeholders pause.

In sum, predictability in Delaware corporate law requires more than just that transactional planners can ensure that their deals will escape judicial scrutiny. It requires that all parties to the corporate contract—including investors—can have reliable and consistent expectations of the standards to which every party will be held and how the courts will respond if another party violates those expectations.

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[57] Kenneth Khoo & Roberto Tallarita, *The Price of Delaware Corporate Law Reform* 6, 40 (June 25, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318203.

[58] *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446 (Del. 2024).

[59] *Id.* at 463-64.

[60] Khoo & Tallarita, *supra* note 57, at 53.

CONCLUSION

This Court should reaffirm its historically consistent position that the Court of Chancery's equity jurisdiction cannot be curtailed by legislative statute and deem SB 21 unconstitutional.

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Dated: August 13, 2025

CERTIFICATE OF SERVICE

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