EFiled: Dec 10 2024 02:03PM EST
Filing ID 75175247
Case Number 340,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MOELIS & COMPANY, Defendant Below/Appellant, v. WEST PALM BEACH FIREFIGHTERS' PENSION FUND, on behalf of itself and all other similarly situated Class A stockholders of MOELIS & COMPANY, Plaintiff Below/Appellee.	Case No. 340, 2024 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2023-0309-JTL

CORRECTED *AMICI CURIAE* BRIEF OF FOURTEEN LEGAL ACADEMICS IN SUPPORT OF APPELLEE

Of Counsel:

Lori Marks-Esterman
Jacqueline Y. Ma
OLSHAN FROME & WOLOSKY
1325 Avenue of the Americas
New York, NY 10019
(212) 451-2300

Joel Fleming
Amanda Crawford
EQUITY LITIGATION GROUP LLP
101 Arch Street, 8th Floor
Boston, MA 02110
(617) 468-8602

Ned Weinberger (Bar No. 5256)
Mark D. Richardson (Bar No. 6575)
LABATON KELLER SUCHAROW LLP
222 Delaware Ave., Suite 1510
Wilmington, DE 19801
(302) 573-2540

Attorneys for Amici Curiae James An, Lucian A. Bebchuk, Anat Alon Beck, Ilya Beylin, Robert E. Bishop, Joan Heminway, Mark Lebovitch, Michael Klausner, Frank Partnoy, Brian JM Quinn, Usha R. Rodrigues, Robert B. Thompson, Anne Tucker, and Charles Whitehead

Dated: December 10, 2024

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INTERESTS OF *AMICI CURIAE*

Amici curiae, identified in the accompanying Appendix, are fourteen law professors, lecturers, and fellows who teach and write about corporate law. *Amici* have no financial interest in this case. They share two core beliefs: first, that Delaware's corporate law is important to the orderly functioning of capital markets and, second, that private enforcement is critical to ensuring that Delaware's corporate law works. *Amici* write in support of Appellee and in response to the *amicus* argument by Professors Grundfest, Hamermesh, Macey, and O'Kelley.[1]

[1] "Appellant's *Amici*."

SUMMARY OF ARGUMENT

Appellant, Moelis & Company,[2] offers no argument that Appellee's claims were brought too early or are otherwise unripe. Rather, Moelis says Appellee brought its claims too late. On the merits, Moelis's appeal will have little impact either way, as the General Assembly has since rewritten the relevant statute. Yet in this narrow, statutory case, Appellant's *Amici* seek an advisory opinion that would radically redefine Delaware's ripeness doctrine and largely foreclose the Court of Chancery from playing its historical role in interpreting and enforcing Delaware law.

Airing a wide-ranging list of grievances with the Court of Chancery—from its approach to *Caremark* claims,[3] to *ConEd* provisions,[4] to fiduciary challenges to advance-notice bylaws[5]—Appellant's *Amici* ask this Court to use what little remains of *Moelis* as a back door to enact a sweeping transformation of the way that Delaware's corporate law gets made. The Court should decline the invitation.

Appellant's *Amici* badly distort Delaware's existing ripeness doctrine. Far from a return to "traditional ripeness principles,"[6] their proposal would work a

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[2] "Moelis."

[3] Appellant's *Amici* Br. at 18-19.

[4] *Id.* at 19.

[5] *Id.* at 12.

[6] *Id.* at 4.

substantial change that would cripple Delaware's private enforcement regime, while helping illegal and unreasonable provisions to spread and become market-standard.

While corporate advisors typically tell their clients to follow the law, they also face commercial pressures to push the envelope. Once one firm adopts a practice, others follow suit, emulating "cutting edge" legal technologies. Both legal and illegal practices thus tend to spread until challenged. Appellant's *Amici* would have Delaware shut down meritorious stockholder lawsuits, insulating companies and their advisors from judicial scrutiny, even when they get Delaware law wrong.

This is bad law and worse policy. This Court can trust the Court of Chancery to use case management tools and calibrated fee awards to manage docket congestion. It need not distort substantive law or immunize illegal practices.

ARGUMENT

I. THIS IS THE WRONG CASE TO REVISIT RIPENESS DOCTRINE

Delaware's existing ripeness doctrine works. But even if the Court were inclined to revisit the doctrine, it should wait for another case.

Even Appellant does not argue that Appellee's statutory claim was unripe. It argues, first, that Appellee's claim is time-barred[7] and, second, that the stockholder agreement was valid.[8] The trial court's ripeness discussion simply responded to Appellant's suggestion that an as-applied *fiduciary* challenge would be unripe.[9] That argument was directed "to a claim the plaintiff did not file."[10] This Court should not change the law when the Appellant has neither appealed from nor argued any ripeness question.[11]

Moreover, this case presents only a facial statutory challenge to a stockholder

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[7] Appellant's Br. at 13-23. This Court rejects attempts to "blend a laches argument with the ripeness inquiry." *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 817 n.27 (Del. 2018). Indeed, an argument that "the statute of limitations has started to run provides strong evidence that a claim is ripe." *Garfield v. Allen*, 277 A.3d 296, 318 (Del. Ch. 2022).

[8] Appellant's Br. at 24-36.

[9] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.* ("*Moelis I*"), 310 A.3d 985, 1003 (Del. Ch. 2024).

[10] *Id.*

[11] *NVIDIA Corp. v. City of Westland Police & Fire Ret. Sys.*, 282 A.3d 1, 22 (Del. 2022) ("[B]ecause overruling precedent requires a complex analysis ... we decline to overrule *Thomas & Betts* without proper briefing and arguments on those points.").

agreement (under a since-revised statute). Yet Appellant's *Amici* would have the Court give an advisory opinion foreclosing a far broader set of claims, including equitable challenges to advance-notice bylaws,[12] which present distinct legal and policy questions that the parties did not brief and the trial court did not opine upon.

Other peculiarities of this case make it an unsuitable vehicle to create new law. For example, the General Assembly has already overturned the trial court's core holding by statute.[13] And, unusually, this case presents **only** statutory claims. Directors violate their fiduciary duties if they "knowingly caus[e] the corporation to violate a section of the DGCL," as with any other positive law.[14] Thus, as Appellant's *Amici*'s counsel acknowledge elsewhere, "facial challenges to newly adopted governance innovations are often accompanied by equitable claims" and those equitable claims are "ripe for judication immediately."[15] Similarly, Appellant's *Amici* acknowledge here that fiduciary claims challenging the adoption of an illegal agreement are ripe.[16] They make no effort to explain why the same

[12] Appellant's *Amici* Br. at 12.

[13] 8 *Del. C*. § 122(18).

[14] *Firefighters' Pension Sys. of Kan. City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1182 (Del. Ch. 2024).

[15] John Mark Zeberkiewicz & Robert B. Greco, *Not All Facial Challenges Are Ripe* (Oct. 18, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4992321) at 14.

[16] Appellant's *Amici* Br. at 21.

should not be true of a fiduciary challenge to the adoption of an unreasonable or preclusive advance-notice bylaw.

II. APPELLANT'S *AMICI* ARE WRONG ABOUT EXISTING LAW

A. Appellant's Amici *Misstate Delaware's Ripeness Doctrine And Ignore That Impairment of Stockholders' Franchise Rights Creates A Ripe Claim*

Appellant's *Amici*'s brief provides an incomplete account of the ripeness doctrine that breezes over an essential detail: Delaware courts have repeatedly treated as ripe challenges to a defensive bylaw or poison pill, even when the plaintiff does not itself plan to violate that bylaw or trigger the pill.[17]

If bylaws or other defensive measures have a deterrent effect, then that effect is enough to render the dispute sufficiently concrete and final for adjudication.[18] Overbroad pills or advance-notice bylaws have "a chilling effect that exists whether the Board triggers the [pill or bylaws] or not."[19] Stockholders cannot "rely on the Board's benevolence" as they "must regulate their behavior based on what the Board could do."[20] That ongoing deterrent is a *present* harm.[21] Defensive measures need

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[17] *Williams Cos. S'holder Litig.*, 2021 WL 754593, *20 n.233 (Del. Ch. Feb. 26, 2021) (rejecting argument that harm was "entirely speculative" because plaintiff did not intend on running a proxy contest and was unaware of other stockholders who had refrained from action due to the pill), *aff'd* 264 A.3d 641 (Del. 2021).

[18] *See Solak v. Sarowitz*, 153 A.3d 729, 737 (Del. Ch. 2016) ("This Court repeatedly has recognized disputes to be ripe for review when stockholders challenge measures that have a substantial deterrent effect on stockholder rights.") (collecting cases).

[19] *Williams*, 2021 WL 754593, *39 n.401.

[20] *Id.* at *39.

[21] *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1072 (Del. Ch. 1985) (poison pill challenge ripe because of "alleged present depressing effect . . . on shareholder interests, regardless of whether the rights are in fact ever triggered"), *aff'd*, 500 A.2d

not eliminate activism in all cases to burden stockholders' rights to a free vote and to present alternative director candidates.

Thus, Delaware courts recognize that the lack of a stockholder "mov[ing] against the company or [a] proxy contest isn't dispositive" to challenges to board action injurious to the stockholder franchise, because "defensive measures like these act as deterrents. The best deterrents never have to be used. The even better deterrents not only never have to be used, but the threat you are attempting to deter never manifests because the deterrent is successful."[22] Deterrent effects are created not merely by the poison pills that Appellant's *Amici* highlight, but also by vehicles such as proxy puts[23] (which threaten a debt-default to burden the free exercise of the stockholder franchise) and advance-notice bylaws that have the "practical effect" of creating "dramatically fewer nominations and proposals at public companies."[24]

By demanding that a "proxy fight or other live dispute implicating the

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1346 (Del. 1985).

[22] *Browne v. Layfield*, 2024-0079 (Del. Ch. Sept. 5, 2024) (TRANSCRIPT) at 34; *see also Williams*, 2021 WL 754593, *20 n.233 ("absence of stockholder activism could be a consequence" of the challenged poison pill); *Pontiac Gen. Emps. Ret. Sys. v. Ballantine*, 9789-VCL (Del. Ch. Oct. 14, 2014) (TRANSCRIPT) at 72–73 (challenge to untriggered proxy put ripe because a "truly effective deterrent is never triggered").

[23] *Ballantine*, Tr. at 72–73.

[24] Proposed Brief as *Amicus Curiae* of Managed Funds Association in *Politan Cap. Mgmt. LP v. Kiani*, 2022-0948-NAC (Del. Ch. Feb. 2, 2023) (Trans. ID 69057833) (hereafter, "Managed Funds Brief") at 8, 9, 12, 20, 22.

challenged bylaw" must exist before a case becomes ripe,[25] Appellant's *Amici* would ensure that the best deterrents are *never* challenged. This cannot be the law. As this Court stated in *Kellner II*, "the General Assembly's capacious grant of power [to corporate boards] is policed in large part by the common law of equity, in the form of fiduciary duty principles."[26] The Court should decline Appellant's *Amici's* invitation to use this statutory case as a vehicle to make sweeping pronouncements that broad categories of claims, including fiduciary claims challenging defensive provisions, are now off-limits.

B. The Statutory Claim Is Ripe

More fundamentally, this is not a case about fiduciary challenges to bylaws. Appellee's claim here is purely statutory: the case presents neither fiduciary claims nor questions about standards of review.[27] And Appellant's *Amici*'s proposal makes even less sense in the statutory context. As the trial court recognized,[28] Delaware courts have long held that similar facial, statutory-validity challenges are ripe, including in *Moran*[29] and *Toll Brothers*.[30]

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[25] Appellant's *Amici* Br. at 19.

[26] *Kellner v. AIM ImmunoTech Inc.* ("*Kellner II*"), 320 A.3d 239, 260 (Del. 2024).

[27] A0039-42.

[28] *Moelis I*, 310 A.3d at 1005.

[29] 490 A.2d at 1072.

[30] *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1188 (Del. Ch. 1998).

Appellant's *Amici* say those precedents are distinguishable because they "involve[] stockholder rights plans, which raise unique considerations because they are incredibly powerful and novel devices."[31] The argument fails. This Court acknowledged in *Kellner II*, for example, that nomination bylaws can serve the same "tripwire" deterrent function as pills.[32] And as Chancellor Bouchard recognized in *Sarowitz*—holding that a facial challenge to a statutorily invalid bylaw was ripe—Delaware courts have "repeatedly ... recognized disputes to be ripe for review when stockholders challenge measures that have a substantial deterrent effect" because declining review on ripeness grounds "could encourage other corporate boards to adopt similar [provisions] to take advantage of their potent deterrent effect on stockholders without regard to whether such provisions are legally permissible."[33] Indeed, Appellant's *Amici*'s own counsel has acknowledged elsewhere that finding Appellee's challenge here to be ripe "should not be construed as a fundamental shift in Delaware's view of ripeness in facial validity challenges" because the challenged stockholder agreement has an "immediate deterrent effect on stockholders' individual interests analogous to that which may be posed by a rights plan adopted in response to the threat of a hostile takeover."[34]

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[31] Appellant's *Amici* Br. at 14 (cleaned up).

[32] *Compare Kellner II*, 320 A.3d at 265 with *Williams*, 2021 WL 754593, *39.

[33] 153 A.3d at 737–38.

[34] Zeberkiewicz & Greco, *Not All Facial Challenges* at 34 (discussing the trial

Appellant's *Amici*'s cases do not help them; none involved similar deterrent effects to those here. *Ackerman* challenged a provision of a stock option plan purportedly providing illegal indemnification to directors.[35] But the Court had previously held that the plan was valid and it accepted the defendants' argument that, thus, "there was no future prospect of [the indemnification provision] ever being utilized."[36] Moreover, unlike the stockholder agreement at issue here—or nomination bylaws or similar defensive measures—whether a director is indemnified has no deterrent effect on stockholders or anyone other than the director. *Corti*[37] is unhelpful to Appellant's *Amici* for the same reason. The only person harmed by the potential invalidity of a corporate opportunity waiver is the party deciding whether to take a corporate opportunity without knowing if the waiver is valid. Neither the board nor stockholders are deterred.

Finally, Appellant's *Amici* highlight "a series of cases, [where] the Court of Chancery found challenges to proposed bylaws unripe in advance of stockholder votes on their adoption."[38] These cases are facially unripe because the bylaws may

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court's decision in *Moelis I*).

[35] *Ackerman v. Stemerman*, 201 A.2d 173, 174 (Del. 1964).

[36] *Id.* at 175.

[37] *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, *17-18 (Del. Ch. July 24, 2009), *aff'd,* 996 A.2d 795 (Del. 2010).

[38] Appellant's *Amici* Br. at 7.

never become effective in the first place. But once a bylaw—or stockholder contract—is effective, a challenge has always been and should remain ripe. *Stroud* is distinguishable for similar reasons; there, the parties sought a ruling on an action that the board "proposed" to take only "if the trial court approved": a canonical request for an advisory opinion.[39]

C. *Appellant's Amici Ask the Court to Create A "Goldilocks" Problem*

In practice, if Appellant's *Amici*'s proposed ripeness standard were accepted, most stockholder challenges would be "too early" until they became "too late" and subject to a potential laches defense (just as Moelis argues here).[40] Chancellor McCormick aptly describes this as the "Goldilocks" problem.[41]

Consider the scenario in *Politan v. Masimo Corp.,* where a corporation entered into a single-trigger severance agreement with its CEO that provided for payment of hundreds of millions of dollars if just one-third of the board turned over, even if the CEO suffered no adverse employment consequences.[42] Seven years later,

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[39] *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 481 (Del. 1989).

[40] Appellant's Br. at 13-23.

[41] *Fishel v. Liberty Media Corp.*, 2021-0820-KSJM (Del. Ch. Oct. 12, 2021) (TRANSCRIPT) at 46.

[42] 2022-0948-NAC (Del. Ch. Feb. 3, 2023) (TRANSCRIPT) at 168-73.

an activist brought fiduciary and statutory challenges to that agreement, given its obvious entrenching effect.[43] The defendants responded with a laches defense.[44]

Appellant's *Amici* would presumably say that no stockholder could challenge the *Masimo* agreement at the time of adoption, just as they assert here that "[t]he Stockholder Agreement was not alleged to have ever blocked board-desired action or have caused the stockholders any harm."[45] Yet just like defendants in *Politan*, Appellant's *Amici* also complain that Appellee challenges "long-since-completed corporate acts[.]"[46] The rule that Appellant's *Amici* propose would create situations where a challenge to defensive, entrenching board action could be unripe until it was time-barred. That can't be right.

The correct answer is that both agreements were ripe for challenge immediately upon adoption. The stockholder agreement here includes a broad veto power that continuously blocked the board from acting without checking with the contractual counterparty. As with the CEO's agreement in *Politan*, the stockholder agreement here had a powerful deterrent effect and Moelis's stockholders were necessarily suffering harm every day that agreement transferred decision-making

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[43] *Id.*

[44] *Id.* at 185. The court declined to rule on laches until trial.

[45] Appellant's *Amici* Br. at 2.

[46] *Id.* at 4.

power away from the Board in a manner inconsistent with Delaware law.

III. APPELLANT'S *AMICI*'S PROPOSED REWRITE OF RIPENESS DOCTRINE WOULD FOSTER THE SPREAD OF ILLEGAL AND UNREASONABLE PROVISIONS

A. Stockholder Litigation Plays An Important Role In The Development Of Corporate Law

Appellant's *Amici* acknowledge that "[o]ne of the virtues of Delaware corporate law is that it is primarily developed through the case-by-case system of the common law."[47] Yet their proposed rule would undermine this virtue by eliminating one of the most significant enforcement mechanisms helping Delaware's common law to develop.

As Vice Chancellor Glasscock has observed, "[t]here are various ways you can construct protections for stockholders" and enforce corporate law.[48] "You could have a system, as in Europe, ... which has some type of government oversight ... that we don't have. But our system is an entrepreneurial plaintiff system."[49] In asserting that "[r]ipeness doctrine should deter ... value-destructive litigation,"[50] Appellant's *Amici* fail to differentiate excessive copycat suits —which can be restrained through other mechanisms without distorting substantive law—from the initial novel claim identifying an illegal or entrenching practice.

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[47] Appellant's *Amici* Br. at 8.

[48] *In re Viacom Inc. S'holders Litig.*, 2019-0948-SG (Del. Ch. July 25, 2023) (TRANSCRIPT) at 37.

[49] *Id.*

[50] Appellant's *Amici* Br. at 12.

Corporate governance practices should—and often do—emanate from corporate lawyers doing their best to advise clients regarding what is permissible under the law (common and statutory). But even the best-intentioned corporate lawyers will, at times, misjudge (or try to move) the line. Mistakes enter forms; forms spread from one firm to another.[51] And competition among law firms makes it hard for lawyers to draw clear lines or refuse to use new, envelope-pushing legal technology that peer firms are willing to sign off on.[52] Unsurprisingly, "common market practices" tend to test legal boundaries and sometimes cross them.

The Delaware system needs stockholder challenges to identify instances when the corporate bar adopts and then begins to copy unlawful practices. While representative litigation can present potential agency costs, it also plays a key role in the development of corporate law and governance. Creative investors' counsel can and do identify governance practices that cross the line.

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[51] Robert Bartlett, *Standardization and Innovation in Venture Capital Contracting: Evidence from Startup Company Charters*, (Stanford L. & Econ. Olin Working Paper No. 585, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4568695 (describing the spread of the National Venture Capital Association's model forms).

[52] *See* Ronald Orol, *Tulane: Hostile Bids, Activist Settlements Take Spotlight*, THE DEAL (Mar. 7, 2024) ("'There is a cottage industry of lawyers, bankers, other people who are trying to sell themselves by saying to companies, "We have a brilliant idea, we can put into advance-notice bylaws to make it incredibly difficult for activists to come in,"' Barshay said.").

Historic examples of governance practices that became fairly common and were first challenged by attentive stockholders' counsel include, for example: dead-hand proxy puts,[53] "don't ask don't waive" standstill agreements,[54] charter provisions purporting to require director removal only for cause,[55] anti-activism poison pills adopted to "insulate the Board" from "all forms of stockholder activism,"[56] erroneously tabulated stockholder voting thresholds on de-SPAC transactions,[57] and overbroad NOL pills.[58] While some may criticize the "copycat" lawsuits that followed, the initial claim identifying the spread of unlawful practices has significant systemic value.

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[53] So-called dead-hand proxy puts became a market practice in the 1980s, yet their disenfranchising effect remained unappreciated until a series of stockholder challenges from 2009 through 2014. *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc*., 983 A.2d 304 (Del. Ch. 2009); *see also Ballantine* Tr. at 68-81.

[54] *Minneapolis Firefighters' Relief Ass'n v. Ceridian Corp.*, 2996-CC (Del. Ch. Dec. 20, 2007) (ORDER) (approving class settlement eliminating standstill agreement and other merger agreement provisions limiting possibility of higher bidder emerging); *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, *20 (Del. Ch. Mar. 23 2012), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. Dec. 27, 2012).

[55] *In re VAALCO Energy, Inc. S'holder Litig*., 11775–VCL (Del. Ch. Dec. 21, 2015) (TRANSCRIPT) (invalidating charter provision permitting director removal only for cause); *Frechter v. Zier*, 2017 WL 345142 (Del. Ch. Jan. 24, 2017).

[56] *Williams*, 2021 WL 754593, *26.

[57] *Garfield v. Boxed, Inc*., 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

[58] *Layfield* Tr. at 37 ("I do take seriously what plaintiff's counsel said about market practice expanding and becoming more aggressive over time absent some periodic checks on what practitioners out there in the world are doing.").

Indeed, even Professor Hamermesh (one of Appellant's *Amici* here) joined an *amicus* brief in *Salzberg*, urging this Court to affirm the trial court's ruling on a facial challenge that invalidated so-called federal-forum provisions.[59] This Court ultimately disagreed with Professor Hamermesh on the merits,[60] but by treating the claim as ripe this Court was able to reach the merits and give timely, definitive guidance on the legality of an emerging trend. Similarly, in *Boilermakers*, then-Chancellor Strine found that a facial statutory and contractual challenge to Delaware-forum provisions was ripe and validated those provisions on the merits, substantially enhancing predictability and stability for all concerned.[61]

B. Appellant's Amici's *Ripeness Theory Creates Perverse Incentives*

Adopting Appellant's *Amici*'s restrictive view of ripeness will create perverse incentives for corporations, meaning that many illegal or unreasonable provisions/defensive mechanisms will likely never be challenged at all. For example, in the context of advance-notice bylaws, corporate boards will have incentive to wait for the proverbial "clear day" to adopt the most aggressive bylaws entrenching a

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[59] *See* Motion of Law Professors to File Brief As *Amici Curiae*, *Salzberg v. Sciabacucchi*, 346, 2019 (Del. Oct. 28, 2019) (Filing ID 64336867).

[60] *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

[61] *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 946 (Del. Ch. 2013). The Court did not reach the plaintiffs' claims "that the boards of Chevron and FedEx breached their fiduciary duties in adopting the bylaws." *Id.* at 938. The plaintiffs subsequently dismissed those claims. Trans. ID 56684591.

board against the potential for future shareholder activism. In some ways, this has already occurred on an industry-wide basis, with director questionnaires that resemble "colonoscopies" becoming endemic and extreme advance notice bylaw disclosures currently widespread and considered "state of the art" following adoption of the Universal Proxy Rule.[62]

Such a pattern could insulate invalid (or entrenching) bylaws from a challenge on several fronts under Appellant's *Amici*'s proposed regime. Corporate counsel will claim—as here—that such provisions are so widespread that striking them down would create mass instability. As we discuss, early adjudication of preclusive defensive measures is critical to ensure they are addressed before they become so widespread as to attain the veneer of reasonableness.

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[62] Leslie Pappas, *Del. Courts Examining 'Colonoscopy'-Like Bylaw Rules*, LAW360 (Mar. 22, 2024). The August 2022 Universal Proxy Rule, an SEC regulation designed to ensure that stockholders would be able to vote for either the company or a stockholder's nominees on any ballot, was soon followed by guidance from SEC Staff explaining that companies can exclude a dissident's nominees if the dissident failed to comply with advance notice requirements. *See* Proxy Rules and Schedule 14A/14C Compliance and Disclosure Interpretations, Question 139.04, https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/proxy-rules-schedules-14a14c.

Savvy corporate counsel seized upon this guidance, encouraging boards to "enhance" their bylaws with escalating procedural requirements to more effectively defend (*i.e.*, invalidate or deter) activist nominations. In some cases, bylaws were imposed in reaction to a particular activist; in others, they responded to a generalized fear of activism.

More fundamentally, bylaws might never be challenged if the corporation does not attract deep-pocketed, active investors. After learning about a corporation's unreasonable nomination bylaws, a rational activist stockholder may be deterred from investing and proposing an alternative slate, given the high legal costs required to achieve a successful nomination. Deterring activists harms the corporation and its stockholders.[63] Bylaws thus not only have an effect during a nomination process—they also produce *ex ante* effects on stockholder engagement and communications, as well as on investments and resource allocation decisions. Indeed, industry participants have explained how advance notice bylaws requiring broad disclosures of information – regarding, for example, plans to nominate at other corporations or identities of limited-partner investors – have a "chilling effect" on stockholder engagement, improperly "chill[]" communications between investors who share a "common goal or objective," and may very well deter potential investors from entering relationships with activist funds.[64]

Appellant's *Amici* assert that their interpretation of ripeness will not diminish stockholder protection because "misuse of corporate power" can still be challenged

[63] Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1671-76 (2013) (empirical evidence shows that activism enhances stockholder value).

[64] Managed Funds Brief at 12, 16, 20, 22.

on an as-applied basis.[65] For both stockholder agreements and advance notice bylaws, however, as-applied scenarios are not well-suited for contingency arrangements and are unlikely to come to the attention of public investors, leaving the only possible litigants the few activist investors willing to foot the enormous bill to litigate. But activists aren't in the business of generating mootness fees for their lawyers, and like most rational economic actors, are disinclined to subject themselves to the costs and public scrutiny attendant to litigation absent a very compelling reason. If confronted with particularly egregious bylaws, they will simply invest their capital elsewhere—rather than invest in a situation where they will need to spend significant additional capital and incur reputational risk just to enforce their right to nominate. Thus, the deterrent will have its intended effect: stockholder nominations will be chilled, and stockholders deprived of the benefits of contested elections.

C. If Delaware Law Is Going to Give Weight to Market Practice, It Must Permit Early Judicial Tests of Emerging Trends

Appellant's *Amici* observe that "*Moelis II* was at odds with market practice" and urge this Court to defer to market expectations.[66] While the specific agreement challenged here was, in fact, an extreme outlier,[67] it is true that "other corporations

[65] Appellant's *Amici* Br. at 21.

[66] *Id.* at 10, 15, 17.

[67] Marcel Kahan & Edward Rock, *Proposed DGCL § 122(18), Long-term Investors,*

[had] entered into similar stockholder agreements" and that there was a general "trend," in which "[c]orporate planners ... increasingly turned to stockholder agreements as a means of allowing favored stockholders to maintain control[.]"[68]

Appellant's *Amici* cannot have it both ways. Because "[p]romoting stability"[69] is important, that is all the more reason to reject Appellant's *Amici*'s proposed rule, which opens the door for illegal practices to spread throughout the market for years before facing an as-applied challenge. Delaware law should instead embrace early challenges to nascent market practices before they become pervasive.

If adopted, Appellant's *Amici*'s proposed ripeness standard will ensure that new transactional technologies—whether legal or not—will inevitably become widely adopted before facing a judicial challenge. By the time an as-applied challenge finally arises, corporate planners will—justifiably—claim that a decision enforcing the law will contribute to instability and unpredictability because the challenged practice is already so widespread. That is not a sustainable system.

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and the Hollowing Out of DGCL § 141(a), HARVARD L. SCH. FORUM ON CORP. GOV. (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl-§-12218-long-term-investors-and-the-hollowing-out-of-dgcl-§-141a/ ("The stockholder agreement at issue in *Moelis* ... is a comprehensive delegation of board responsibilities[.] ... To reject this holding is to reject the idea that § 141(a) imposes *any* limits on 'private ordering.'").

[68] *W. Palm Beach Firefighters Pension Fund v. Moelis & Co.* ("*Moelis II*"), 311 A.3d 809, 878 (Del. Ch. 2024).

[69] *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323, 354 (Del. 2022).

Outside of the Delaware courts, no regulator reviews corporate bylaws and other board actions.[70] Delaying the day when the Court can answer important questions impacting the stockholder franchise increases the risk that market expectations and market practices drift further and further from what the law requires. If a significant correction is needed, it will enhance predictability and certainty if that correction is implemented early, rather than years down the line.

D. The Court of Chancery Has Ample Docket-Management Tools To Control "Excessive Litigation"

The subtext of Appellant's *Amici*'s brief is a classic "floodgates" argument:[71] an appeal to change substantive law to reduce docket congestion.[72] No one denies that the Court of Chancery is busy or that *Kellner* and *Moelis* sparked follow-on litigation. But that is largely a function of transactional lawyers' refusal to follow the trial court's guidance in those cases. In any event, the solution is not to change substantive law to effectively immunize illegal or unreasonable contracts or bylaws. The Court of Chancery has a variety of tools that it can use to address docket

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[70] Frederick H. Alexander *et. al.*, *Panel: Fee-Shifting in Shareholder Litigation*, 21 FORDHAM J. CORP. & FIN. L. 455, 461 (2016) (private litigation in Delaware is "the only real regulator on the director/management and stockholder relationship. There is nobody ... looking at the, literally, trillions of dollars that are being managed.").

[71] Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013).

[72] Appellant's *Amici* Br. at 4 (complaining of a "wave of value-destructive lawsuits" and urging the Court to adopt its proposed rule to "allow the Court of Chancery to focus its invaluable, but limited, resources[.]").

congestion. It can:

- Adjust fee awards to "encourage wholesome levels of litigation,"[73] and avoid over-incentivizing "foot fault"[74] or "follow-on" cases.[75]

- Stay actions pending the resolution of earlier-filed cases presenting the same question.[76]

- Consolidate or coordinate cases raising the same issues.[77]

In short, this Court should trust the Court of Chancery to use the "tools ... at [its] disposal ... to respond to docket pressures, rather than altering substantive law."[78]

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[73] *Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 755 (Del. Ch. 2023) (cleaned up).

[74] *Christian v. Goldberg*, 2017 WL 589611 (Del. Ch. Feb. 13, 2017) (*de minimis* fee for correcting "foot fault"); John Mark Zeberkiewicz & Robert B. Greco, *Reassessing a Defused "Time Bomb": A Fresh Look at Corporate Foot Faults and the Benefits Conferred by Their Discovery*, 49 DEL. J. CORP. L. 1, 24 (2024).

[75] *Sciabacucchi v. Salzberg*, 2019 WL 2913272, *5 (Del. Ch. July 8, 2019) ("Only if a suit against a subsequent issuer itself involves a significant factual permutation or an additional dimension ... would that later suit warrant a substantial award."), *rev'd on other grounds,* 227 A.3d 102 (Del. 2020); Mark Lebovitch, *Soap Opera Summer: Five Predictions About Delaware Law's Response To New DGCL 122(18)*, 15 HARV. BUS. L. REV. 1, 23-24 (2024) ("The Court may find itself drawn towards ... rapidly lowering fees if it sees counsel just 'piling on.'").

[76] *Garfield v. Shake Shack, Inc.*, 2024-0642-PAF (Del. Ch. Oct. 7, 2024) (ORDER) (staying action pending outcome of this appeal); *Kogut v. Bejar*, 2024-0055-MTZ (Del. Ch. Apr. 6, 2024) (ORDER) ("the parties and the Court will be much better served by a short stay pending resolution of the [*Kellner*] appeal.").

[77] *In re Irrevocable Resignation Bylaw Litig.*, 2024-0538-JTL (Del. Ch.) (13 related cases consolidated); *In re Exclusive Forum Provision Mootness Fee Petitions*, 7216-CS (Del. Ch.) (same).

[78] Levy, *Flood*, 80 U. CHI. L. REV. at 1058.

CONCLUSION

Appellee's claim is ripe.

Of Counsel:

Lori Marks-Esterman
Jacqueline Y. Ma
OLSHAN FROME & WOLOSKY
1325 Avenue of the Americas
New York, NY 10019
(212) 451-2300

Joel Fleming
Amanda Crawford
EQUITY LITIGATION GROUP LLP
101 Arch Street, 8th Floor
Boston, MA 02110
(617) 468-8602

Dated: December 10, 2024

LABATON KELLER SUCHAROW LLP

/s/ Ned Weinberger
Ned Weinberger (Bar No. 5256)
Mark D. Richardson (Bar No. 6575)
222 Delaware Ave., Suite 1510
Wilmington, DE 19801
(302) 573-2540
nweinberger@labaton.com
mrichardson@labaton.com

Attorneys for Amici Curiae James An, Lucian A. Bebchuk, Anat Alon Beck, Ilya Beylin, Robert E. Bishop, Joan Heminway, Mark Lebovitch, Michael Klausner, Frank Partnoy, Brian JM Quinn, Usha R. Rodrigues, Robert B. Thompson, Anne Tucker, and Charles Whitehead

CERTIFICATE OF SERVICE

I, Ned Weinberger, hereby certify that on December 10, 2024, I caused a true and correct copy of the foregoing to be served on the following counsel listed below via File & ServeXpress:

John P. DiTomo
Miranda N. Gilbert
MORRIS, NICHOLS,
ARSHT & TUNNELL, LLP
1201 North Market Street
Wilmington, DE 19801

Thomas Curry
SAXENA WHITE, P.A.
824 North Market Street, Suite 1003
Wilmington, DE 19801

Raymond J. DiCamillo
Robert B. Greco
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

/s/ Ned Weinberger
Ned Weinberger (Bar. No 5256)