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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TESLA, INC. DERIVATIVE LITIGATION	No. 534, 2024 No. 10, 2025 No. 11, 2025 No. 12, 2025 Court Below—Court of Chancery of the State of Delaware C.A. No. 2018-0408

AMICUS CURIAE BRIEF OF THE TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF APPELLANTS AND REVERSAL

OF COUNSEL:

Randy D. Gordon (TX Bar No. 00797838)
Lucas C. Wohlford (TX Bar No. 24070871)
DUANE MORRIS LLP
100 Crescent Court, Suite 1200
Dallas, TX 75201
Telephone: (214) 257-7200
Fax: (214) 257-7201
Email: rdgordon@duanemorris.com
lwohlford@duanemorris.com

HALLORAN FARKAS + KITTILA LLP

Theodore A. Kittila (Bar No. 3963)
5722 Kennett Pike
Wilmington, DE 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law

Attorney for Amicus Curiae *Texas Association of Business*

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IDENTITY AND INTEREST OF AMICUS

The Texas Association of Business ("TAB") is a general business association and state chamber of commerce. It is a non-profit, tax-exempt organization incorporated in Texas, with no parent organization. TAB represents member companies large and small (including Fortune 500 companies and some of the largest companies in the country and world) to advocate for a policy, legal, and regulatory environment that allows them to thrive in business. TAB has worked alongside business and its chamber partners to represent companies of all sizes and sectors advocating for policies that help businesses grow and create jobs.

TAB is interested in this case because many of its members are headquartered in Texas and domiciled in Delaware. By way of example, in 2023, more Fortune 500 companies were headquartered in Texas than anywhere else[1] while roughly 2/3 of all Fortune 500 companies were domiciled in Delaware.[2] Many of the other 1,000,000 businesses organized under Delaware law maintain their physical presence in Texas. Decisions of the Delaware courts thus directly impact the management and internal affairs of TAB's members.

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[1]Press Release, Office of the Texas Governor Greg Abbott, *Texas Again Leads Nation With Most Fortune 500 Headquarters*, (June 5, 2023) https://gov.texas.gov/news/post/texas-again-leads-nation-with-most-fortune-500-headquarters.

[2] Division of Corporations - State of Delaware, 2023 Annual Report, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2023-Annual-Report.pdf.

RULE 28(C)(4) STATEMENT

Pursuant to Supreme Court Rule 28(c)(4), TAB states that no party's counsel authored this brief in whole or substantial part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than TAB, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. TAB's President and CEO, Glenn Hamer, authorized the filing of this brief on behalf of TAB.

ARGUMENT

This case involves a compensation plan that received board and shareholder approval, as well as a post-trial shareholder ratification. As it stands, the case is injecting disruption and uncertainty into the operation of Texas-based businesses that are incorporated in Delaware.

The development of corporate law is one left largely to the states, and a U.S. corporation is free to choose a state legal regime that suits its aims, without having to establish a physical presence in the state that it chooses. Indeed, that is the situation with respect to many Texas-headquartered businesses that are incorporated in Delaware. Unsurprisingly, then, Texas businesses feel ripple effects when decisions of the Delaware courts undermine otherwise predictable outcomes of internal corporate governance decisions.[3]

In "The Path of the Law," Oliver Wendell Holmes suggested that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."[4] Thus, "[a] man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will

[3] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. Econ. & Org. 225, 277-78 (1985)
[4] Oliver Wendell Holmes, Jr., *The Path of Law*, 10 Harv. L. Rev. 457, 458 (1897).

want to keep out of jail if he can."[5] Holmes' "predictive" theory of law anticipated a turn in corporate law generally, and in Delaware particularly.[6] As Professor Bainbridge notes:

> Providing certainty and predictability is an essential function of corporate law, as it serves several important policy functions. Businesses rely on clear and stable legal rules to make long-term decisions about investments, contracts, and risk management. Predictable legal outcomes allow corporations to make those decisions with confidence that they can allocate resources efficiently without the constant fear of unexpected legal consequences.
>
> Certainty in corporate law helps reduce litigation by providing clear guidelines on frequently litigated issues like corporate governance, contracts, and fiduciary duties. When legal standards are ambiguous, companies are more likely to wind up in court to resolve disputes. Predictable laws make law compliance simpler and less costly, while also encouraging early resolution of disputes through settlement.
>
> Certainty and predictability promote investment. Investors prefer jurisdictions with predictable and stable legal frameworks, because such frameworks help ensure that investors understand the rules that protect their investments.

Commentators often trace Delaware's valorization of predictability and stability in decision making to the opinions of Chancellor William T. Allen, who—according to former Chief Justice Strine—"sought to forge a predictable basis for resolving cases so as to preserve the wealth generating benefits of the corporate form

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[5] *Id.* at 459.
[6] *See* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, Del. J. Corp. L., 17 (2025).

and encourage directors to structure transactions in a manner that increased the likelihood that they were fair to stockholders."[7]

But now, the Court of Chancery's opinions stand to undermine stability in several key ways. First, they chart a continued migration away from Delaware's historical insistence that "a shareholder who owns less than 50% of a corporation's outstanding stock does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status."[8] And the "something more" was generally thought to require "actual exercise of control,"[9] which was "historically difficult to establish."[10]

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[7] Dalia T. Mitchell, *Proceduralism: Delaware's Legacy*, 2 The University of Chicago Business Law Review 333, 367 (2023) (cleaned up) (partially quoting Leo E. Strine, Jr., *The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path to Takeover Clear, in Corporate Law Stories* 197, 245 (J. Mark Ramseyer, ed. 2009)).

[8] *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

[9] *Weinstein Enterprises, Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005).

[10] Lawrence A Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law 321, 345; *In re Morton's Rest. Group, Inc., Shareholders Litig.*, 74 A.3d 656, 664-65 (Del. Ch. 2013) (dismissing case involving 27.7% stakeholder because "under our law, a minority blockholder is not considered to be a controlling stockholder unless it exercises 'such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." Accordingly, the minority blockholder's power must be "so potent that independent directors ... cannot freely exercise their judgment, fearing retribution' from the controlling minority blockholder.")

Second, the Court of Chancery's opinions erode this standard by embracing a "superstar CEO" concept that sidelines voting power and even management dominance as indicia of control. The problems here are manifold, perhaps none more apparent than it is hopelessly vague in the philosophical-linguistic sense of uncertainty as to whether something qualifies as a member of a class (e.g., what's "tall" or a "mountain").[11] Words like "tall" are vague because "no bright line [exists] between those individuals who are tall and those who are not."[12] This becomes a *legal* problem because interpretive effort can't specify the semantic content of a vague term. In the presence of a vague term, then, all a court can do is either declare an interpretive impasse or assign a meaning—a line drawing—that is, of necessity, arbitrary. And that would seem to be the case here. Just as vague terms like "tall" or "mountain" resist inquiry, so it is with "superstar CEO," which leaves corporate boards and management in a retrospective twilight.[13] Predictability is shorn, as the

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[11] Michael Herz states that "[a] term is vague when its scope is unclear." *Chevron Is Dead; Long Live Chevron*, 115 Colum. L. Rev. 1867, 1989, 1998 (2015); *see also* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 97–98 (2010) ("The technical sense of vagueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply.").

[12] *Id.*

[13] Retrospective laws are always an affront to the Rule of Law as it is traditionally articulated. The complaint is not just that a reversal in law undermines the law's stability, but that it's unfair to participants standing on one side of the decision line rather than another. See generally Lon L. Fuller, The Morality of Law, rev. ed. (New Haven: Yale University Press, 1969), 39 ("Certainly there can be no rational

Court of Chancery concedes: it is "impossible to identify or foresee all of the possible sources of influence that could contribute to a finding of actual control over a particular decision."[14]

The indeterminacy associated with the "superstar CEO" construct creates a double bind for corporate boards: one because the board cannot realistically predict whether a minority shareholder may be deemed a "superstar," another because once the threshold for "superstardom" is crossed, litigation risk increases exponentially. The latter is so because the standard of review in conflicted-controller scenarios (viz., entire fairness) produces results that border on certainty: "defense verdicts after an entire fairness review of fiduciary conduct are not commonplace."[15] As a consequence, as Professor Bainbridge observes, "[g]iven the rigor with which the fairness standard is applied, it is not surprising that routine application of entire fairness invites 'some of the more unscrupulous and entrepreneurial members of the plaintiffs' bar to file hastily crafted complaints in an effort to secure settlements that

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ground for asserting that a man can have a moral obligation to obey a legal rule … that came into existence only after he had acted").

[14] *Tornetta v. Musk*, 310 A.3d 430, 500 (Del. Ch. 2024).

[15] *In re Tesla Motors, Inc. Stockholder Litig.*, 2022 WL 1237185, at *48 (Del. Ch. Apr. 27, 2022), *aff'd*, 298 A.3d 667 (Del. 2023). The point is that too much determinacy—e.g., defendant always loses—inevitable leads to likely parties opting out of the system in which they "always lose." *See generally Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 Northwestern L. Rev. 113, 113- 114 (1990)

offer no discernable advantage to the remaining stockholders.'"[16] A version of this problem has emerged here: Plaintiffs' counsel—representing a small stakeholder—were awarded $345 million for securing relief that a supra-majority of Tesla's stockholders twice opposed.

One thing coming out of this litigation is certain: "however you slice it, the [second] vote suggests shareholders did not believe that Delaware's formal legal standards were providing them many benefits at all."[17] Texas-headquartered companies deserve more from their Delaware incorporation. The alternative is that they can put themselves to the choice that Texas Governor Greg Abbott proposes: "They can stay and be subject to increasingly unpredictable theories of liability. Or, like Americans before them, they can come to Texas."[18]

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[16] *Bainbridge supra*, at 32 (quoting Itai Fiegenbaum, *The Geography of MFW-Land*, 41 Del. J. Corp. L. 763, 780 (2017)).
[17] Ann Lipton, *The Legitimation of Shareholder Primacy*, ECGI Law Working Paper No. 826/2025 (Feb. 2025) at 19.
[18] Greg Abbott, *Forget Delaware—'Y'All Street' Is Open for Business*, Wall St. J. (March 5, 2025).

CONCLUSION

For the reasons set forth above and in Appellants' Opening Briefs, this Court should reverse.

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Respectfully submitted,

/s/ Theodore A. Kittila

Theodore A. Kittila (Bar No. 3963)
HALLORAN FARKAS + KITTILA LLP
5722 Kennett Pike
Wilmington, DE 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law

Attorney for Amicus Curiae *Texas Association of Business*

OF COUNSEL:

Randy D. Gordon (TX Bar No. 00797838)
Lucas C. Wohlford (TX Bar No. 24070871)
DUANE MORRIS LLP
100 Crescent Court, Suite 1200
Dallas, TX 75201
Telephone: (214) 257-7200
Fax: (214) 257-7201
Email: rdgordon@duanemorris.com
lwohlford@duanemorris.com

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