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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| 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 |
| | § | |

# BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLANTS AND REVERSAL

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## IDENTITY AND INTEREST OF AMICUS CURIAE[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae in state courts of last resort to champion these values. *See, e.g., Cantor Fitzgerald L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024); *Frlekin v. Apple*, 457 P.3d 526 (Cal. 2020); *Delisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018).

WLF and its supporters actively defend and operate within our economy. They have a strong interest in seeing that state courts apply a clear, stable, and predictable body of corporate law. This includes ensuring a well-defined and robust doctrine of stockholder ratification. The possibility of *ex post* ratification is an issue of vital importance to WLF and its supporters.

The Court of Chancery ruled that stockholders may not ratify a voidable transaction once a court has deemed it unfair. If that decision stands, trial judges and plaintiffs' lawyers—not informed stockholders—will have the final say on what is in the best interests of Delaware corporations. That not only would undermine the "highest and best form of corporate democracy," *Williams v. Geier*, 671 A.2d 1368,

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[*] Under Rule 28(c), WLF states that no party's counsel authored any part of this brief. No one, apart from WLF or its counsel, contributed money intended to fund this brief's preparation or submission.

1381 (Del. 1996), but—as we show below—it would seriously jeopardize Delaware's status as a preferred state for incorporation and carry the Delaware judiciary far afield into policymaking—a role best suited to the General Assembly.

## INTRODUCTION AND SUMMARY OF ARGUMENT

One of the general rules of history is that few things go exactly according to plan. In 2018, Tesla's future was uncertain. The Model 3 had launched, but vexing production issues loomed. The company was burning through cash at an alarming rate—about $1 billion per quarter—raising concerns about its financial future. Tesla was valued at around $31 billion—making a $650 billion valuation seem audacious. To keep Elon Musk in Tesla's driver's seat going forward, the Board crafted a bold compensation agreement. It promised Musk immense rewards if he could transform Tesla into a powerhouse but left him with virtually nothing if he failed. It was a major gamble for Musk and a stroke of genius for Tesla. Tesla went on to vastly outpace market expectations; its stock rose over 1,700% from 2018 to its peak. The gambit had paid off handsomely, or so it seemed.

Then a lone stockholder filed a derivative suit, claiming that Tesla's directors failed in their duty to negotiate the deal properly. The Court of Chancery ultimately agreed, cancelling Musk's compensation package. But months later and with perfect hindsight, Tesla's stockholders voted on whether to ratify or reject the terms of the 2018 agreement. Stockholders now had a virtually unprecedented advantage—they could look back at Musk's results under the 2018 plan, see his potential earnings, and decide whether to stick with the 2018 agreement or push for a new one.

In the end, 72% of Tesla's disinterested stockholders ratified Musk's 2018 compensation package as best for them and the company. They cast their votes with full knowledge of the history of this litigation, all the facts surrounding Musk's 2018 agreement, and the Special Committee's full report recommending the ratification vote. Above all, the stockholders had the Court of Chancery's 200-page, blistering post-trial criticism of the 2018 agreement. Despite flaws in how the 2018 deal was negotiated, a vast majority of disinterested stockholders voted to uphold it. That vote should have been the final word. Such ratification gives a "cleansing effect" to the 2018 agreement that avoids "judicial second-guessing" altogether. *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *27–29 (Del. Ch. June 11, 2020).

Even so, the Court of Chancery insisted that a clear majority of Tesla's disinterested stockholders have no recourse once a court finds a transaction unfair. That decision upends Delaware law and unduly restricts the scope and sweep of stockholder ratification. According to the Court of Chancery, procedural impropriety forever taints corporate actions, no matter how decisive the subsequent stockholder ratification. As appellants show in their opening briefs, that approach is inconsistent with Delaware law. We write separately to explain why it also invites great mischief.

Upholding the Court of Chancery's decision to set aside Tesla's stockholder ratification could lead to significant, unintended consequences for corporate governance. By dismissing a vote that was both free and fair, the court assumed

authority traditionally reserved for stockholders, potentially disrupting the established framework of Delaware law under the business judgment rule. This shift transfers decision-making power from stockholders and boards—entities with direct business insight—to courts, which often lack such expertise. For instance, hesitation to pursue ambitious plans, like Musk's compensation package that drove Tesla's market cap from $50 billion to over $650 billion, could arise if boards anticipate judicial overrides rather than stockholder judgments, thereby weakening the principle of stockholder primacy.

The decision below also poses a threat to the stability that underpins Delaware's status as a preferred state for incorporation. By rejecting stockholder ratification, the Court of Chancery may encourage excessive litigation, allowing plaintiffs' attorneys to challenge decisions already approved by informed and uncoerced stockholders. This could shift ultimate authority over corporate interests from directors and stockholders to courts and attorneys, fostering an environment ripe for strategic lawsuits. Such uncertainty, particularly in areas like executive compensation, might lead boards to adopt overly cautious strategies, further undermining Delaware's attractiveness to businesses. Past judicial oversteps, such as those during the 1980s takeover era, illustrate how such disruptions can generate instability until corrected, often at the expense of corporate independence.

Delaware's prominence as a corporate hub—home to over two-thirds of S&P 500 companies—rests on its deference to directors, officers, and stockholders rather than judicial intervention. Affirming the decision below could signal that even well-informed stockholder votes are vulnerable to reversal, prompting companies to reconsider their Delaware incorporation. Notable examples include Dropbox, which has secured approval to reincorporate in Texas, and Meta, which is exploring similar moves. News and commentary in 2024 and early 2025 highlights a growing perception that Delaware's judicial approach is faltering, with states like Texas and Nevada offering alternatives that promise reduced judicial oversight and litigation risks. This trend jeopardizes Delaware's economic benefits tied to its corporate franchise.

Nor is that all. Establishing new substantive law through this ruling would extend the judiciary beyond its appropriate role. Courts are not in the business of business. Delaware has historically valued flexibility and private ordering, with courts imposing only minimal procedural safeguards rather than dictating substantive outcomes. Overriding stockholder preferences on matters like Musk's compensation package ventures into policymaking—a role best suited to the General Assembly, which can assess empirical data and broader implications. Courts, constrained by the parties and facts of individual cases, cannot always fully evaluate or address economic or systemic effects. This judicial overreach risks inconsistency

with Delaware's tradition of restraint, potentially harming its reputation as a business-friendly jurisdiction, and underscores the need for legislative, rather than judicial, solutions.

## ARGUMENT

### I. AFFIRMING THE DECISION BELOW WOULD INVITE FAR-REACHING, UNINTENDED CONSEQUENCES.

By rejecting a free and fair ratification vote, the Court of Chancery assumed a role reserved for stockholders. This overreach endangers corporate governance and poses harmful consequences far beyond this case.

Affirming the Court of Chancery's decision would disrupt the reliance interests of Delaware corporations by shifting business decision-making from stockholders and boards—where it traditionally resides under the business judgment rule—to the courts, which lack business expertise. This shift erodes stockholder primacy by signaling that even clear, informed votes can be second-guessed, reducing stockholders' ability to shape corporate policy. For example, if courts routinely scrutinize and overturn compensation packages or strategic decisions ratified by stockholders, boards might hesitate to propose bold initiatives—like Musk's performance-based plan tied to Tesla's market cap soaring from $50 billion to over $650 billion—fearing judicial veto rather than stockholder rejection.

The decision below also threatens Delaware's corporate-law stability, a cornerstone of its incorporation appeal. The Court of Chancery's approach risks fostering litigation abuse, empowering plaintiffs' lawyers to challenge stockholder-approved transactions post-adjudication, even when fully informed and uncoerced. That would give courts and the plaintiffs' bar, not stockholder-owners, the last word

on what is (and is not) in the best interests of the company. This, in turn, would incentivize strategic lawsuits, eroding trust in Delaware's judicial process and burdening corporations with legal uncertainty, particularly in executive compensation—a ubiquitous, individualized business judgment ill-suited to judicial second-guessing.

The practical fallout could be significant. Boards might adopt overly conservative strategies to avoid judicial scrutiny, stifling innovation in industries where risk-taking drives value. Stockholders, meanwhile, could lose faith in their voting power, diminishing participation and accountability mechanisms like proxy contests. Over time, this judicial creep could transform Delaware's governance model—historically balanced between board discretion and stockholder voice—into one where courts wield disproportionate influence, undermining the predictability that attracts businesses to incorporate here. Historical analogs, like the backlash to overly interventionist rulings in the 1980s takeover era (*e.g., Unocal Corp. v. Mesa Petroleum Co*., 493 A.2d 946, (Del. 1985)), suggest such shifts provoke uncertainty until corrected, but not before damage to corporate autonomy accrues.

Delaware's preeminence as the home state of incorporation—boasting over two-thirds of S&P 500 companies—springs from its business judgment rule, which presumes directors, officers, and stockholders, not judges, are best positioned to maximize corporate wealth. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361

(Del. 1993). By overriding Tesla's stockholder ratification, the Court of Chancery "creates a slippery slope that a judge can decide . . . what is an 'appropriate' compensation," undermining innovation in high-growth firms where expert governance and high compensation drive value. Betsy Atkins, *Musk Comp Overturned: Is Shareholder Democracy At Risk?*, Forbes.com (Feb. 2024), https://perma.cc/VJY4-6YTD.

Above all, affirming the decision below will send a clear signal to corporate America that Delaware is no longer a reliable home for incorporation. Widespread criticism of the Court of Chancery's decision has prompted a broader debate about Delaware's future. Dropbox and Meta are considering reincorporating in Texas, with Dropbox already securing stockholder approval to leave Delaware. *See Delaware Faces Exodus of Tech Companies*, Newsweek (Feb. 1, 2025), https://perma.cc/MC43-84AG. As one leading academic put it: "For those who don't spend their days studying corporate law," this is "an absolutely seismic event." *Id*.

A recent article from the *Harvard Law School Forum on Corporate Governance* describes 2024 as the year when more and more companies began questioning Delaware's dominance. *See* Mark E. McDonald, et al., *Delaware's Rocky Year—What Lies Ahead?*, Harv. L. Sch. Forum on Corp. Governance (Feb. 7, 2025), https://perma.cc/6RJQ-X8NX. It cites controversial Delaware Court of

Chancery decisions, including the decision below, for unsettling corporate norms, prompting legislative responses, and fueling the reconsideration trend.

The stakes are high. Texas and Nevada are courting defectors with promises of less judicial interference and lower litigation risks. In Texas, the legislature created specialized business courts "to provide consistency efficiency, and a level playing field for corporate disputes." Will Maddox, *Texas Is Coming for Delaware's Business Court Crown* (Feb. 10, 2025), https://bit.ly/4kvqhUk. Aiming to lure away Delaware companies, "Nevada has changed its laws to shield executives from personal liability . . . and to limit the power of activist investors." Katya Schwenk, *The Battle for Musk's Lair*, The Lever (Feb. 26, 2025), https://perma.cc/4RHK-AAFZ.

These strategies are working. Just last month, "a small group of influential corporate attorneys told Delaware legislators that blue-chip companies including Walmart were considering moving their legal homes out of the state." Liz Hoffman, *MAGA offers corporations cover to flee Delaware*, Semafor (March 5, 2025), https://perma.cc/ 33DC-M7AC. "We are reincorporating our management company in Nevada for the same reason," Bill Ackman, the CEO of Pershing Square Capital Management, recently announced. Katie Balevic, *Billionaire hedge fund manager Bill Ackman says he will move management company out of Delaware*, Business

Insider (Feb. 1, 2025), https://perma.cc/R6S5-FYR4. "Top law firms are recommending Nevada and Texas over Delaware." *Id*.

When industry leaders and corporate lawyers begin publicly disavowing Delaware's corporate-law climate, it erodes the State's reputation as a place where businesses can flourish. If this trend holds, Delaware risks losing its dominance, and with it, the billions of dollars in revenue tied to its corporate franchise.

## II. CREATING NEW SUBSTANTIVE LAW FROM THE BENCH IN THIS AREA WOULD CARRY THE COURTS FAR BEYOND THEIR PROPER ROLE.

"Delaware policy has long recognized the values of flexibility and private ordering." *Maffei v. Palkon*, __A.3d__, 20225 WL 384054 (Del. Feb. 4, 2025). Because stockholder democracy and respect for private ordering are so paramount, Delaware courts have traditionally erected only the most necessary guardrails against abuse in *process*—for example, to prevent decisions by a controlling stockholder or a biased board of directors. *See, e.g., Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014). But moving beyond those basic procedural guardrails into *substance* "involves public policy considerations which can best be considered by the General Assembly." *Wright v. Moffitt*, 437 A.2d 554, 556 (Del. 1981).

Again, courts are not in the business of business. Whatever business shortcomings Musk's compensation package may have, the judiciary is not the

forum to resolve that debate. A court that overrides the wishes of a majority of disinterested stockholders does so in defiance of many blind spots. A court cannot know whether it is wise, despite the many other problems facing the company (including the need to spur investment and economic growth), to divert private capital in the way it thinks best. "The omnipresence of unintended consequences can be attributed, in large part, to the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86.

Engaging in judicial policymaking would also carry the judiciary far beyond its proper role—resolving discrete and tractable disputes rather than trying to manage wider social or economic ills. One corollary to the rule that courts cannot enact substantive law is that the political branches may do so when necessary. "The General Assembly is in a far better position than this Court to gather the empirical data and to make the fact finding necessary to determine what the public policy should be . . . and the scope of any such law." *Moffitt*, 437 A.2d at 556. The political branches are better able to "collect dispersed knowledge" and "bring it to bear on official choices." Sunstein, *supra*, at 88.

When, by contrast, a court is presented with a systemic problem, it can merely hear from a few witnesses, a few experts, and a few lawyers, and then impose

remedies limited to the parties in the lawsuit. Litigation, with its inherent limitations (and frightful expense), is no way to go about crafting substantive rules for all corporations. A court is ill-equipped to grasp the many factors at play outside the confines of a given case or controversy.

This is especially true when it comes to overriding stockholders' preferences on executive compensation. Delaware has been the first choice for incorporation for a century because Delaware courts have had the humility to know that directors, officers, and stockholders are better positioned than judges to run companies and maximize stockholder wealth. Although Delaware courts will override director and officer decisions in rare cases, interfering with executive compensation is a bridge too far. Unlike M&A or squeeze outs, for instance, every company must set compensation, which is highly bespoke for each company and employee.

Even if this Court could somehow craft a superior compensation agreement to the one the stockholders approved, that would not justify such drastic judicial activism. The judge's power to write laws mirroring the judge's sense of fairness belongs to an era that lacked a popular branch of government. "Our preference for liberty and self-rule is undermined when the courtroom is opened up as an alternative forum for lawmaking." Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 Va. L. Rev. Online 31, 34 (2015). That is not a role any member of this Court should embrace.

In sum, only Delaware's legislature, not its judiciary, may enact substantive corporate policy, as shown by the General Assembly's historical engagement on these issues, such as 8 *Del. C.* § 204 (2013 Del. H.B. 127) codifying *ex post* ratification (*Knoll Cap. Mgmt. L.P. v. Advaxis, Inc.*, 2016 WL 381195, at *2 (Del. Ch. Jan. 29, 2016)). Indeed, Delaware lawmakers have already proposed several corporate law changes in the wake of the Court of Chancery's decision, reflecting a preference for private ordering. *See* Sarah Petrowich, *Delaware lawmakers propose corporate law changes amid ongoing departure threats and Musk litigation*, Delaware Public Media (Feb. 18, 2025), https://perma.cc/VC8K-A9QN. By barring ratification, the Court of Chancery has preempted this legislative role, risking inconsistency and undermining Delaware's business-friendly reputation. This Court should reverse that decision and defer to the General Assembly.

## CONCLUSION

The Court of Chancery's rejection of Tesla's *ex post* ratification erodes stockholder rights, destabilizes corporate law, invites litigation abuse, and exceeds judicial bounds. This Court should reverse.

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