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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

Case Below: Court of Chancery of the State of Delaware

C.A. No. 2025-0499-LWW

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND INTERVENOR THE STATE OF DELAWARE

Of Counsel:

Brian T. Frawley
Matthew A. Schwartz
Michael T. Lemanski
William S.L. Weinberg
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Anthony A. Rickey (Bar No. 5056)
MARGRAVE LAW LLC
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
(302) 604-5190

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one, which raise issues of concern to the nation's business community.

This case presents a question of paramount importance to the Chamber and its many members incorporated in Delaware: may Delaware institute the important corrective measures in Senate Bill 21 (S.B. 21) that provide business leaders with a clear and predictable framework for evaluating and approving related-party transactions?

The Chamber is cognizant that the parties will directly brief the legal answer to this question. Accordingly, the Chamber here seeks to use its unique expertise to highlight the practical importance of S.B. 21 to Delaware corporations in light of recent judicial decisions that have fomented significant uncertainty and concern in the business community when dealing with related-party transactions. Many businesses chose to incorporate in Delaware because, prior to these decisions, the

State had long provided an extensive, stable, and predictable body of corporate law—created through both legislation and judicial rulings. What is more, corporations rely on the General Assembly to respond to case law that misunderstands market and boardroom realities, and to allow corporations to petition the General Assembly to enact needed or desirable legal reforms. Through S.B. 21, the General Assembly did just that, reinforcing and enhancing the bedrock principles of clarity, predictability, and balance in the area of related-party transactions that have long been the hallmarks of Delaware corporate laws. The successful implementation of S.B. 21 is thus very important to the business community.

STATEMENT PURSUANT TO SUPREME COURT RULE 28(C)(4)

Pursuant to Supreme Court Rule 28(c)(4), the Chamber states that: (i) no party's counsel authored this brief in whole or in substantial part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than the Chamber, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Chamber's Delaware-incorporated members have long relied on the State to provide a stable and predictable body of corporate law to make decisions that maximize stockholder value. This goal is embodied in the business-judgment rule, under which courts, absent compelling reasons, defer to directors' informed business decisions.

Many corporate transactions involve directors or controlling stockholders, who often are important leaders, funders, and counterparties. Transacting with them frequently provides the best value to the corporation because of their knowledge of, synergies with, and economic interest in the corporation. At the same time, Delaware law rightly seeks to protect stockholders against potential harms from conflicts of interest that may arise in these related-party transactions. When navigating between these two goals, it is of vital importance that decisionmakers know ahead of time (1) what Delaware considers to be a conflicted transaction requiring procedural safeguards, and (2) that transactions employing those safeguards will receive judicial deference.

Although Delaware did not have specific statutory answers to these questions before S.B. 21, case law historically provided clarity and predictability. In recent years, however, decisions in this area have become increasingly unpredictable. Companies have found themselves embroiled with increasing frequency in lengthy

and expensive litigation over transactions that corporate boards believed satisfied the requirements of Delaware law and benefited stockholders—sometimes even ensnaring transactions that stockholders themselves approved. These lawsuits take a toll on Delaware corporations, forcing them either to settle meritless claims or otherwise gamble on an immensely expensive and risky defense under the demanding "entire fairness" standard.

As a result, the Court of Chancery has developed a reputation as the preferred forum for entrepreneurial, lawyer-driven litigation, with massive settlements and judgments, and nine-figure fee awards for individual cases. The problem of plaintiffs' lawyers disrupting corporate plans, deterring value-maximizing transactions, and diverting value from stockholders has become so pervasive that many large companies have reincorporated in other States, and the country's largest venture capital firm has encouraged its investees to do the same.

Consistent with Delaware's long tradition of legislative course corrections in corporate law, S.B. 21 restores balance and predictability by giving corporate decisionmakers clear rules and safe harbors they can use to protect informed decisions from second-guessing, while safeguarding stockholders from insider self-dealing. Contrary to Appellant's assertions, S.B. 21 has not harmed the value of Delaware corporations. Indeed, the number of corporations initiating departures from Delaware has declined since S.B. 21 took effect, and many companies undoubtedly

are waiting for the outcome of this and other pending cases before deciding whether to remain incorporated in Delaware or leave the State. S.B. 21 thus is critically important to businesses incorporated in Delaware, and a decision from this Court confirming S.B. 21's validity will help restore and retain confidence in the State.

ARGUMENT

I. RELATED-PARTY TRANSACTIONS CAN ENHANCE STOCKHOLDER VALUE.

Delaware law has long struck a balance between giving corporate fiduciaries "the authority to be creative, take chances, and make mistakes so long as their interests are aligned with those who elect them" and maintaining safeguards to protect stockholders "from unfair exploitation" by insiders.[1] This careful balancing "preserve[s] the benefits of profit-increasing activities in a complex business world where purity is by necessity impossible."[2]

Regulating related-party transactions demands precisely this kind of careful balancing. Although they carry the risk of self-dealing, related-party transactions often enhance stockholder value, including by unlocking otherwise-unavailable opportunities for companies. An entrepreneurial CEO may correctly discern that "a specific component or material produced only by [a] company [that he owns] is necessary for the development of a new product," which, if brought to market, promises disinterested stockholders a substantial return on their investment.[3] Or

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1 Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Fiduciary Law: Searching for the Optimal Balance*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 871, 871 (Evan J. Criddle et al. eds., 2019).

2 *Id.*

3 Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 596-597 (2016).

directors and controllers may foster partnerships between companies in which they are invested, enabling synergistic growth. For example, Palantir has partnered with Anduril, in which Palantir director Peter Thiel is an investor, to develop advanced artificial-intelligence capabilities.[4]

More prosaically, a loan from a corporation's controlling owners may be the "cheapest option" available to the company because the controller "will have better access to [relevant] information [about the business] and a better idea of its reliability" than a third-party lender, who will charge a higher risk premium to compensate for the information asymmetry.[5] And related-party transactions even align the interests of corporate insiders and outside investors, as in the case of equity-based compensation for managers and directors.[6]

Maximizing value for disinterested stockholders requires an optimal balance between freedom for corporate decisionmakers and robust stockholder protections,

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[4] Palantir Technologies, Inc., Proxy Statement (Form DEF 14A) 46 (Apr. 25, 2025).

[5] Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CAL. L. REV. 393, 400 & n.15 (2003).

[6] *E.g.*, Vanguard Inv. Stewardship Insights, *Redomestication and Executive Pay Proposals at Tesla, Inc.*, VANGUARD (June 2024), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/tesla_insights.pdf (endorsing Elon Musk's performance-based compensation package because it reflected a "strong alignment . . . with shareholder returns").

attentive to the costs and risks that vetting procedures impose.[7] Where genuine conflicts exist, the standards governing related-party transactions must be clear and predictable for corporate decisionmakers to weigh these costs and risks appropriately.[8] Uncertain standards will discourage beneficial transactions, dissuade third parties from transacting with controlled (or potentially controlled) Delaware corporations, and disincentivize controllers from "exerting constructive influence, offering strategic guidance, or serving as a check on management" as costs become too high or too uncertain.[9]

Moreover, "[i]ncentivizing transactional planners to use mechanisms that are both costly and risky, such as special committees or stockholder votes, requires that those mechanisms meaningfully restrain judicial review."[10] Stockholders frequently bring meritless lawsuits,[11] whether because of the "inordinate . . . pressure on

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[7] 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. LAWYER 321, 322 (2022); Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, at 597; Robert B. Greco, *A Corporate Governance Solution to the Inefficiencies of Entire Fairness*, 79 BUS. LAWYER 993, 1009 (2024).

[8] Hamermesh et al., *Optimizing*, at 322.

[9] Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 544-549 (2025).

[10] Hamermesh et al., *Optimizing*, at 322.

[11] *See* Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 596, 600-601 (2017).

defendants to settle, avoiding the risk, however small, of potentially ruinous liability" in high-stakes class actions,[12] or because of information asymmetries and differences of opinion.[13] And courts sometimes make mistakes or must apply suboptimal rules of decision under principles of *stare decisis*.[14] The threat of litigation often stops beneficial transactions from occurring at all, as "some business opportunities are unique to the agent involved in a [related-party] transaction, and litigation delays could reduce or entirely preclude the benefits of such transactions."[15]

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[12] *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001).

[13] *See* Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, at 595-597.

[14] Goshen, *The Efficiency of Controlling Corporate Self-Dealing*, at 403-404; Hamermesh et al., *Optimizing*, at 324-325.

[15] Zohar Goshen & Tomer Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts* 46 (Eur. Corp. Governance Inst., Working Paper No. 837/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5200668.

II. DEVELOPMENTS IN DELAWARE LAW BEFORE S.B. 21 CREATED UNCERTAINTY AROUND RELATED-PARTY TRANSACTIONS TO THE DETRIMENT OF STOCKHOLDERS.

Delaware historically has been considered the leading jurisdiction for meeting corporations' need for "clarity, predictability, and practicality" in corporate law.[16] Delaware courts have often excelled at "decid[ing] which disputes warrant[ed] judicial intervention and which should be left to shareholders' self-help" and private-ordering arrangements, as reflected in the application of the business-judgment rule and safe harbor doctrines.[17] Recently, however, jurisprudential developments concerning related-party transactions have created uncertainty for businesses, leading to inefficiencies in corporate transactions and the diversion of stockholder value to the plaintiffs' bar.

A. Legal Developments Before S.B. 21 Discouraged Beneficial Transactions.

Four recent trends in Delaware law have combined to scramble incentives around related-party transactions, increasing the cost of pursuing beneficial transactions: (1) an ill-defined expansion of who counts as a "controlling stockholder";

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[16] *See* Jonathan R. Macey, *Delaware Law Mid-Century: Far from Perfect but Not Leaving for Las Vegas Quite Yet*, 50 J. CORP. L. 1111, 1124 (2025) (quoting bar association report describing perceived benefits of Delaware corporate law).

[17] Zohar Goshen & Tomer Stein, *Leaving Delaware? The Hidden Promise of Specialized Corporate Courts*, CLS BLUE SKY BLOG (May 13, 2025), https://clsbluesky.law.columbia.edu/2025/05/13/leaving-delaware-the-hidden-promise-of-specialized-corporate-courts/ (summarizing article, *supra* note 15, of same name).

(2) unpredictable director-independence determinations; (3) the *MFW* framework's expansion and practical difficulty to implement; and (4) fairness review's drift away from validating beneficial, if procedurally defective, transactions. Litigation therefore has become a "graveyard" for related-party transactions,[18] encouraging Delaware companies and their putative transaction partners to avoid beneficial deals altogether.

Expansive Control Findings. Courts recently have materially expanded the definition of "control," subjecting a growing number of transactions to hindsight fairness review. Using amorphous factors like "leverage,"[19] "status,"[20] and even "superstardom,"[21] courts have found control by one or more stockholders holding minimal stakes—or, in one instance, *no equity ownership at all*.[22] This departure from Delaware law's traditional focus on "majority voting control" or its practical equivalent *substantively* expands fairness review's scope,[23] while making it easier

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18 Jonathan R. Macey, *"Fair is Fair" in Corporate Law* 7 (Feb. 16, 2025) (unpublished Yale L. & Econ. Rsch. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5139995.

19 *Voigt* v. *Metcalf*, 2020 WL 614999, at *12 (Del. Ch. Feb. 10, 2020).

20 *Id*.

21 *Tornetta* v. *Musk*, 310 A.3d 430, 507 (Del. Ch. 2024).

22 Bainbridge, *Course Correction*, at 539-543; Hamermesh et al., *Optimizing*, at 344-348; *see In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674, at *36-46 (Del. Ch. May 6, 2021).

23 *See* Bainbridge, *Course Correction*, at 537-541; Jill E. Fisch & Steven D. Solomon, *Control and its Discontents*, 173 U. PA. L. REV. 641, 679-686 (2025).

for skillful plaintiffs' lawyers to avoid pleadings-stage dismissal, increasing lawsuits' settlement value irrespective of the merits.[24]

Erosion of Director Independence. In a similar vein, Delaware's historical director-independence presumption is a shadow of its former self. Courts have found directors lacking material ties to transaction counterparties to lack independence under amorphous standards that treat run-of-the-mill business and social relationships as serious conflicts, largely negating the benefit of special committees.[25] Moreover, because courts have treated independence for demand-futility purposes purely as a pleading-stage matter that a plaintiff need not *prove* at trial,[26] director independence presents little obstacle to plaintiffs' lawyers dragging Delaware corporations into unwanted derivative litigation.[27]

MFW*'s Impracticability*. In *MFW*,[28] this Court "provide[d] a path for controlling stockholders to avoid the burdens and costs of entire fairness review and the opportunistic controller buyout challenges" previously subject to fairness review

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24 Bainbridge, *Course Correction*, at 544-547.

25 *Id.* at 586-593.

26 *See Tornetta*, 310 A.3d at 496 n.541.

27 Outside of Delaware, demand futility is often an element of a derivative action that the plaintiff must prove at trial. *E.g.*, *In re Amerco Deriv. Litig.*, 252 P.3d 681, 700 (Nev. 2011).

28 *Kahn* v. *M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

in all cases.[29] The *MFW* framework for vetting controller transactions was "tailored specifically" to the problems inherent in freeze-out transactions.[30] Recent judicial decisions have raised the specter that it is required for *all* transactions with a controller to avoid fairness review.[31] But the *MFW* standard "was never designed to apply to all transactions between controlling stockholders and companies,"[32] making its use outside the freeze-out context difficult and costly.

The proof is in the numbers. From 2019 to 2024, "*MFW* defenses succeeded in only four of 15 cases for a success rate of 26.7%" at the pleading stage; in the preceding five years, from 2014 to 2019, the success rate was little better than a coin toss.[33] These rates reflect companies' "difficulty in assuring *ex ante* that [their] process [for approving the transaction] will be sufficiently rigorous to meet the *MFW*

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29 Greco, *Corporate Governance Solution*, at 1008.

30 Hamermesh et al., *Optimizing*, at 339.

31 Fisch & Solomon, *Control and its Discontents*, at 664-672; *see* Hamermesh et al., *Optimizing*, at 337.

32 Hamermesh et al., *Optimizing*, at 339; *see MFW*, 88 A.3d at 524-527; *Friedman* v. *Dolan*, 2015 WL 4040806, at *7-8 (Del. Ch. June 30, 2015).

33 Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, *'MFW' Just Turned 10, but Is It Worth the Candle?*, DEL. BUS. CT. INSIDER (July 3, 2024), https://www.law.com/delbizcourt/2024/07/03/mfw-just-turned-10-but-is-it-worth-the-candle/.

standard."[34] They may also reflect practitioners' reasonable beliefs at the transaction stage that the transaction would not be subject to *MFW* review in hindsight.

Dual approval by independent committees and disinterested stockholders for run-of-the-mill transactions poses particular challenges. *MFW*'s majority-of-the-minority requirement disproportionately burdens corporations with widely distributed retail stockholder bases, which struggle to generate sufficient turnout of disinterested stockholders.[35] And even if a company holds a successful minority stockholder vote, plaintiffs' lawyers have "identified litigation strategies that got around *MFW*" by challenging as deficient disclosures about "the special committee's negotiating process and . . . independence" as opposed to "the economic terms of the transaction."[36] Many corporate decisionmakers have given up on *MFW* completely, resigned to the fact that a very expensive "attempt at compliance will not meaningfully reduce their litigation risk."[37]

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[34] Fisch & Solomon, *Control and its Discontents*, at 647; *see also* Stuhlmiller & Mammarella, *'MFW' Just Turned 10* (summarizing reasons for courts' refusal to dismiss on *MFW* grounds).

[35] Greco, *Corporate Governance Solution*, at 1009.

[36] Zohar Goshen, Assaf Hamdani & Dorothy Lund, *Fixing MFW: Fairness and Vision in Controller Self-Dealing* 17-18 (Eur. Corp. Governance Inst., Working Paper No. 818/2025, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5061341.

[37] Fisch & Solomon, *Control and its Discontents*, at 687.

Fairness Jurisprudence Drift. Finally, in recent years, Delaware courts' fairness jurisprudence has proven ill-suited to evaluating transactions providing a positive, but differential, benefit to both interested and disinterested parties. "Fairness review was invented in order to validate transactions that provided benefits to companies and [disinterested] shareholders," despite procedural flaws.[38] "In the limited context of freeze-outs and similar transactions, courts can rely on well-developed tools for evaluating . . . the price shareholders would have obtained through an arm's-length third-party transaction."[39] In other transactions, especially those bound up with a decisionmaker's "idiosyncratic vision,"[40] the task is more difficult, and "[t]he law provides no ready way to evaluate the fairness of [such] transactions."[41] As a result, "courts remain focused on . . . issues of director independence and on the flaws in the behavior of the directors who approved the transaction," rather than asking the more difficult question whether the transaction is "wealth-increasing" for disinterested and minority stockholders.[42] And, even when courts focus on the economics, they at times have added a punitive element to fairness review, empowering themselves to set a "fairer price" even if the consideration

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38 Macey, *"Fair is Fair,"* at 6.

39 Fisch & Solomon, *Control and its Discontents*, at 691.

40 *See* Goshen et al., *Fixing MFW*, at 20-37.

41 Fisch & Solomon, *Control and its Discontents*, at 690-691.

42 Macey, *"Fair is Fair,"* at 6-7.

in a procedurally flawed transaction already is "fair."[43] These developments have "divorced [fairness review] from the actual preferences of the [disinterested] investors," who benefit from value-enhancing related-party transactions regardless of interested decisionmakers' behavior, and turned entire fairness into "a transactional graveyard."[44]

B. Uncertain Treatment of Related-Party Transactions Has Allowed Plaintiffs' Lawyers to Siphon Value from Stockholders.

This proliferation of litigation over related-party transactions has been bad for disinterested stockholders. Plaintiffs' lawyers in derivative cases "function essentially as entrepreneurs who . . . exercise nearly plenary control over all important decisions in the lawsuit."[45] Without effective client monitoring, "the entrepreneurial attorney will serve her own interest at the expense of the client."[46] In fact, the conflict is "inherent," as "[t]he more the attorneys receive, the less goes to the [stockholders]."[47]

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43 *See, e.g.*, *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, 309 A.3d 474, 541 (Del. Ch. 2024).

44 Macey, *"Fair is Fair,"* at 5-7.

45 Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991); *see* Goshen & Stein, *Leaving Delaware*, *supra* note 15, at 8.

46 Macey & Miller, *The Plaintiffs' Attorney's Role*, at 3.

47 *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 697 (Del. 2024).

The lure of transaction litigation in the Court of Chancery for plaintiffs' lawyers also is easy to understand. More than other litigation, the stakes in merger challenges that form a significant part of Court of Chancery litigation are exceedingly high—the *average* public company deal size in 2024 equaled about $650 million, and nearly 20% of all deals exceeded $10 billion in value.[48] Despite the large stakes, the hurdles to recovery in the Court of Chancery are comparatively low. Delaware courts rarely dismiss lawsuits involving transactions subject to fairness review at the pleading stage.[49] And, unlike in federal courts, which have expressed concern with "the risk of potentially ruinous liability" in class actions,[50] class certification in the Court of Chancery is routinely granted and infrequently opposed.[51] Plaintiffs' lawyers thus can "extract a fee-generating settlement solely because the anticipated costs of discovery and litigating a case that cannot be dismissed on the pleadings

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48 *See* MCKINSEY & CO., M&A ANNUAL REPORT: IS THE WAVE FINALLY ARRIVING? (2025), https://www.mckinsey.com/capabilities/m-and-a/our-insights/top-m-and-a-trends.

49 *See, e.g.*, *Salladay* v. *Lev*, 2020 WL 954032, at *1 (Del. Ch. Feb. 27, 2020).

50 *See* FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment; *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999) ("Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.").

51 *See In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2022 WL 2236192, at *1 (Del. Ch. June 14, 2022).

exceeds the cost of a settlement."[52] Such costs regularly exceed $30 million in entire fairness cases litigated through trial,[53] providing skillful lawyers a strong incentive to file a case with minimal up-front investment regardless of the merits. These nuisance settlements are purely extractive, providing no tangible benefits to companies or stockholders and siphoning stockholder value to third parties (or diverting value from current to former stockholders).[54]

Moreover, even where plaintiffs' lawyers ostensibly have obtained a recovery for the company, recent astronomical fee awards—completely untethered from the work the lawyers actually performed or their investment in the case—have distorted the incentives to the stockholders' detriment. The chance to win a nine-figure payout at the end of a case[55] makes filing a lawsuit look more like buying a Powerball ticket

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52 Hamermesh et al., *Optimizing*, at 322.

53 Greco, *Corporate Governance Solution*, at 1001 (citing *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 724 (Del. Ch. 2023), *aff'd*, 326 A.3d 686 (Del. 2024)).

54 *See* Greco, *Corporate Governance Solution*, at 994, 1004-1005, 1008; Hamermesh et al., *Optimizing*, at 344; Bainbridge, *Course Correction*, at 559 ("Given 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 offer no discernible advantage to the remaining stockholders.") (quotations omitted).

55 *See, e.g.*, Mike Leonard, *Musk's Tesla Board Pay Case Nets $176 Million Lawyer Fee*, BLOOMBERG LAW (Jan. 8, 2025), https://news.bloomberglaw.com/esg/musk-gets-court-nod-for-settlement-pact-in-tesla-board-pay-case; The Editorial Board, *Musk Loses, Trial Lawyers Win: Plaintiffs Firms Get $345 Million For*

than ordinary litigation. These nine-figure outliers have skewed the averages, but, even in the mine run of cases, Delaware attorneys' fee awards are now significantly higher than those in federal cases, which are subject to stricter pleading and procedural standards, higher dismissal rates, and more onerous proof burdens,[56] exacerbating the mis-incentives to bring stockholder lawsuits. These fee awards have heightened the concerns among corporate decisionmakers about the litigation risks arising from Delaware incorporation.[57]

C. Legal Uncertainty and the Increased Cost of Pursuing Beneficial Transactions Have Pushed Corporate Decisionmakers to Leave Delaware.

In the roughly two years before S.B. 21's enactment, numerous Delaware corporations proposed reincorporating out-of-state citing an increasingly uncertain and inhospitable legal environment. TripAdvisor, for example, cited the "increasing frequency of claims and litigation directed towards directors and officers," and the

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Causing a Decline in Tesla Stock, WALL ST. J. (Dec. 3, 2024), https://www.wsj.com/opinion/elon-musk-tesla-pay-package-overturned-kathaleen-mccormick-delaware-court-f2c5b4b2; Alison Frankel, *Whopper $267 Million Fee Award in $1 Billion Dell Case Shows Why Delaware is Different*, REUTERS (Aug. 1, 2023), https://www.reuters.com/legal/transactional/column-whopper-267-million-fee-award-1-billion-dell-case-shows-why-delaware-is-2023-08-01/.

[56] Joseph A. Grundfest & Gal Dor, *Lodestar Multipliers in Delaware and Federal Attorney Fee Awards* 2-6, 17-18 (Rock Ctr. for Corp. Governance, Working Paper No. 263, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5379166.

[57] Andrew Ross Sorkin et al., *Companies Rely on Delaware Courts. Lawyers Reap Huge Fees There*, N.Y. TIMES (June 2, 2025), https://www.nytimes.com/2025/06/02/business/dealbook/delaware-courts-legal-fees.html.

substantial "amount of time and money required to respond to these claims and to defend" them in Delaware, and stated that "provid[ing] potentially greater protection from unmeritorious litigation" through redomestication might improve the company's ability to "attract and retain qualified management."[58] Dropbox cited a perceived "more predictable legal environment" that would "better permit the Company to respond to emerging business trends and conditions" as a reason for choosing to move from Delaware to Nevada.[59] And Simon Property Group, a non-controlled company, highlighted perceived uncertainty in Delaware law, and the resulting increases in costly and distracting litigation "brought by financially-interested law firms," when seeking stockholder approval to redomesticate.[60] Indeed, 2024 was the first year that more Russell 3000 corporations left Delaware than moved there.[61]

Investment firms that historically favored Delaware also have started looking elsewhere, citing the same concerns about legal uncertainty and litigation costs, as well as perceived shifts in judicial attitudes towards entrepreneurial founders and

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58 TripAdvisor, Inc., Proxy Statement (Form DEF 14A) 29 (Apr. 26, 2023).

59 Dropbox, Inc., Information Statement (Form DEF 14C) 5 (Feb. 10, 2025).

60 Simon Property Group, Inc., Preliminary Proxy Statement (Form PRE 14A) 90 (Mar. 31, 2025).

61 Tom Hals, *In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware*, REUTERS (May 14, 2025), https://www.reuters.com/business/autos-transportation/teslas-wake-more-big-companies-propose-voting-dexit-to-depart-delaware-2025-05-14/.

corporate decisionmakers.[62] Explaining its decision to redomesticate to Nevada, Andreessen Horowitz noted that "Delaware courts can at times appear biased against technology startup founders and their boards."[63] The firm also cited the "unprecedented level of subjectivity in[] judicial decisions" resulting in widespread "legal uncertainty [that] is a real cause for concern for entrepreneurs and their professional investors."[64] Andreessen Horowitz was explicit that, "[a]s the largest VC firm in the country," it wanted to send a "signal[] to [its] portfolio companies, as well as to prospective portfolio companies" that they could—and should—look beyond Delaware when making incorporation decisions.[65]

In addition, many Delaware corporations are undoubtedly waiting for the outcome of this case and others before deciding whether to remain in Delaware. Whether S.B. 21 is able to successfully return predictability to key areas of Delaware

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62 *See* Jai Ramaswamy, Andy Hill & Kevin McKinley, *We're Leaving Delaware, and We Think You Should Consider Leaving Too*, ANDREESSEN HOROWITZ (July 9, 2025), https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too/; Chris Morris, *'Something is Awry in Delaware': New Study Reveals Lawyers in the Tiny U.S. State are Winning Fee 'Multipliers' From Major Companies Up To 66 Times their Normal Hourly Rate*, FORTUNE (June 2, 2025), https://fortune.com/2025/06/02/delaware-lawyers-fee-multipliers-dexit/.

63 Ramaswamy et al., *We're Leaving Delaware*.

64 *Id.*

65 *Id.*

law will inevitably weigh on future decisions about where to incorporate, or whether to redomesticate.

III. S.B. 21 STRIKES A BALANCE BETWEEN ENABLING BENEFICIAL TRANSACTIONS AND PROTECTING STOCKHOLDERS.

A. S.B. 21 Creates a Predictable Framework to Protect Transactions from Harmful Litigation.

The General Assembly's record of enacting corrective legislation to align Delaware corporate law with commercial realities is an important draw for companies in choosing to incorporate in Delaware.[66] S.B. 21 is the latest in a long line of bipartisan legislative interventions, dating at least as far back as *Smith* v. *Van Gorkom*,[67] targeting emerging legal problems to reduce uncertainty for corporate decisionmakers and stockholders.[68] Like the General Assembly's previous reforms, S.B. 21 reflects a balanced course correction to give decisionmakers a clearer and more predictable framework within which to plan value-enhancing transactions.

First, by defining what constitutes a "controlling stockholder" or "disinterested director," S.B. 21 brings much-needed clarity to which transactions are subject to entire fairness review absent the use of certain stockholder-protecting safe harbors. By replacing the ambiguous soft-power factors of recent case law with a bright-line rule that emphasizes the traditional requirement of actual control or domination, the legislation eliminates the prior regime's widespread uncertainty about whether

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66 *See, e.g.*, Goshen & Stein, *Leaving Delaware*, *supra* note 15, at 53-56.

67 488 A.2d 858 (Del. 1985).

68 *See* Macey, *Delaware Law Mid-Century*, at 1117-1127.

someone could be considered a controller despite owning little or even no stock.[69] The amendment thus enhances predictability, giving boards and investors a clearer *ex ante* understanding of who qualifies as a controller and when minority stockholder protections should be efficiently utilized.

Likewise, S.B. 21's clear definition of a "disinterested" director[70] and strong presumption of independence for certain directors[71] aligns Delaware corporate law with industry standards and provides a more stable and predictable framework for assessing director independence in related-party transactions. This provision enhances certainty in board decisionmaking and limits plaintiffs' lawyers' ability to circumvent S.B. 21's safe harbors through clever pleading.[72] This ensures that related-party transactions remain subject to meaningful oversight without stifling value-enhancing decisionmaking.

Second, S.B. 21's graduated safe harbors correctly recognize that freeze-outs present a greater and more discernable risk of self-dealing than other controller transactions and that courts are better able to assess the financial fairness of freeze-

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69 *Supra* p.12.

70 8 *Del. C.* § 144(e)(4).

71 *Id.* § 144(d)(2).

72 *See* Robert L. Burns, Mark A. Kurz & Sara T. Wagner, *What Bankers Need to Know About Senate Bill 21*, DEL. BANKER, Spring 2025, at 12, 13, https://www.debankers.com/assets/Delaware_Banker_Vol_21_No_2-2.pdf.

outs than other controller transactions.[73] By giving companies the flexibility of approving non-freeze-out controller transactions by either a special committee process or stockholder vote, S.B. 21 lifted the barrier to value-enhancing transactions at companies where board composition or the impracticality of organizing a disinterested stockholder vote made *MFW*'s safe harbor unworkable, or the presence of a controller was unclear.[74] In addition, under S.B. 21's safe harbors, companies can confidently submit potential controller transactions for committee or stockholder approval without the risk that flaws in one process will be weaponized to nullify the result of the other, pushing the transaction into the uncertain waters of fairness review.[75] S.B. 21's graduated approach aligns with the recommendation of corporate-law scholars, who favored aligning the standards for controller and non-controller related-party transactions outside the freeze-out context.[76] By adhering to one of the statutory safe harbors, companies can confidently engage in beneficial transactions without the pervasive uncertainty and risk of "highly burdensome collateral litigation"[77] that characterized the pre-S.B. 21 environment.[78]

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73 *See, e.g.*, Fisch & Solomon, *Control and its Discontents*, at 690-702.

74 *Supra* pp. 12-15.

75 *Supra* pp. 14-15.

76 *See* Fisch & Solomon, *Control and its Discontents*, at 649, 700.

77 *Id.* at 701.

78 *See* Burns et al., *What Bankers Need to Know About Senate Bill 21*, at 13.

In sum, S.B. 21 seeks to restore much-needed predictability to areas of Delaware law that faced uncertainty in recent years—predictability that is vital to Delaware corporations and their decisionmakers as they seek to enter into value-added transactions to benefit their companies and stockholders.

B. Claims That S.B. 21 Harms the Value of Delaware Corporations Are Unfounded.

Some critics of S.B. 21 have alleged that the legislation stripped away investors' rights for the benefit of corporate insiders.[79] If that were true, there would have been a detectable fall in the market price for Delaware corporations' common stock. But the market did not react negatively to S.B. 21, and the study raised by the Appellant does not actually support that conclusion.[80] In reality, S.B. 21 had "no discernible effect on the shareholder value of companies incorporated in Delaware."[81] Rather, from the period between S.B. 21's introduction and its enactment, the stock

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79 *See, e.g.*, BERNSTEIN, LITOWITZ, BERGER & GROSSMAN LLP, BALANCING OR BULLDOZING: SB 21'S PROPOSAL TO ABANDON THE DELAWARE MODEL OF CORPORATE LAW 1 (2025), https://www.blbglaw.com/news/publications/2025-03-03-blbg-alert-banacing-or-bulldozing-sb-21-propsal-to-abandon-the-delaware-model-of-corporate-law; Joel Friedlander, *Don't Undermine Delaware's Judiciary at the Behest of Elon Musk*, CLS BLUE SKY BLOG (Mar. 6, 2025), https://clsbluesky.law.columbia.edu/2025/03/06/dont-undermine-delawares-judiciary-at-the-behest-of-elon-musk/.

80 *See* Appellant's Opening Br. at 8-9.

81 Tiago Duarte-Silva & Aaron Dolgoff, *Did SB21's Changes to Delaware Corporate Law Harm Shareholders?*, CLS BLUE SKY BLOG (Apr. 16, 2025), https://clsbluesky.law.columbia.edu/2025/04/16/did-sb21s-changes-to-delaware-corporate-law-harm-shareholders/.

market results across all Delaware and non-Delaware S&P 500 companies were *the same* on average.[82] Indeed, before S.B. 21, "controlled Delaware firms [were] on average worth 4.9% less than similarly situated firms incorporated elsewhere," representing an effective tax on stockholders of controlled companies.[83] S.B. 21 tries to correct that imbalance by unlocking value for stockholders that the previous legal regime had stifled.

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82 *Id.*

83 Edward Fox, *Is There a Delaware Effect for Controlled Firms?*, 23 U. PA. J. BUS. L. 1, 40 (2020).

CONCLUSION

The framework S.B. 21 creates strikes a balance between protecting stockholders and, by reducing harmful uncertainty, facilitating Delaware corporations' pursuit of transactions that enhance stockholder value.

MARGRAVE LAW LLC

By: */s/ Anthony A. Rickey*
Anthony A. Rickey (Bar No. 5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
(302) 604-5190
arickey@margravelaw.com

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

Of Counsel:

Brian T. Frawley
Matthew A. Schwartz
Michael T. Lemanski
William S.L. Weinberg
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Dated: September 15, 2025

CERTIFICATE OF SERVICE

I, Anthony A. Rickey, hereby certify that on September 15, 2025, I caused true and correct copies of the foregoing to be served through File & Serve*Xpress* on the following counsel of record:

Gregory V. Varallo
Andrew E. Blumberg
Daniel E. Meyer
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

Peter J. Walsh, Jr.
Michael A. Pittenger
T. Brad Davey
Callan R. Jackson
Joshua S. Almond
POTTER ANDERSON & CORROON LLP
1313 N. Market Street
Hercules Plaza, 6th Floor
P.O. Box 951
Wilmington, DE 19801

Srinivas M. Raju
Matthew D. Perri
Andrew L. Milam
Kaitlyn R. Zavatsky
RICHARDS, LAYTON & FINGER,
P.A.
920 North King Street
Wilmington, DE 19801

Elena C. Norman
Skyler A. C. Speed
Alyssa T. Atkisson McKeever
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801

/s/ Anthony A. Rickey
Anthony A. Rickey (DE Bar No. 5056)