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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

The Society for Corporate Governance (the Society) is a professional association representing approximately 3,700 corporate secretaries, counsel, and other governance professionals who advise and serve over 1,000 public companies, private companies, and non-profit organizations. Its members work closely with boards of directors and senior management teams to help them fulfill their fiduciary duties and to support effective corporate governance. The Society provides resources to its members on a broad range of corporate governance topics, including directors' fiduciary obligations.

Because of its membership and expertise, the Society has a strong interest in the development and application of laws that shape directors' responsibilities and the legal framework governing corporate decisionmaking. The Society provides expert, non-partisan, and balanced advocacy that reflects its members' practical experiences and promotes policies that enhance the effectiveness and efficiency of corporate governance. In particular, the Society files *amicus* briefs in important cases involving issues affecting directors' responsibilities, to share its perspective on the real-world effects of those issues.[1]

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[1] *See, e.g.*, *Facebook, Inc. v. Amalgamated Bank*, U.S. No. 23-980 (Aug. 16, 2024); *Institutional Shareholder Servs. v. SEC*, D. C. Cir. No. 24-5105 (Nov. 22, 2024).

A key issue in this case is whether SB 21's safe harbor provisions are constitutional. The Society has a significant interest in this issue because its members rely on the safe harbor provisions and similar provisions to advise their boards. More generally, the Society has an interest in ensuring that the Delaware General Assembly has sufficient flexibility, consistent with the Delaware Constitution, to develop workable rules to guide fiduciary behavior. The Society seeks to ensure that the law develops in a way that both respects constitutional principles and provides clarity and predictability for those charged with governing corporations. For example, the Society commented on the proposed bill while SB 21 was under consideration by the General Assembly, to offer its expertise on these issues. *See* Ltr. from Soc'y for Corp. Gov. to Darius J. Brown et al. (Mar. 14, 2025), https://perma.cc/X75U-TS38.

In the Society's view, SB 21's safe harbor provisions fall squarely within the General Assembly's authority to shape corporate law, including the scope of directors' fiduciary obligations. The General Assembly has long played an integral role in articulating and refining the contours of corporate governance standards. SB 21's safe harbor provisions reflect a measured continuation of that tradition, offering needed clarity to directors and the companies they serve, and thereby reinforcing stability in the corporate governance system.

In contrast, Plaintiff's position would radically curtail the General Assembly's authority. Plaintiff's view is, in effect, that the General Assembly lacks the ability to enact legislation that affects the scope of directors' fiduciary obligations – even though the General Assembly has done so for decades. That extreme stance would strip elected lawmakers of their role in refining and adapting fiduciary standards to meet contemporary needs.

STATEMENT REGARDING AUTHORSHIP

No party's counsel authored this brief in whole or in substantial part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person other than the *amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

A. The Stability And Predictability Of Corporate Governance Law Is Vitally Important For Directors

Stability and predictability in corporate governance law are indispensable to corporate directors. Companies and their directors face considerable business risk in their day-to-day activities, as they "must operate in the real world, with imperfect information, limited resources, and an uncertain future." *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009). Directors cannot effectively discharge their responsibilities in addressing business risks if the legal standards governing their fiduciary obligations also are uncertain. Accordingly, this Court has long recognized that corporate law generally, and corporate-fiduciary law in particular, should seek to promote "certainty and predictability" so that directors can effectively discharge their obligations. *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996).

The existence of a stable and predictable legal framework is critical for a core decision that a company's directors must make: where to incorporate the corporation. That choice determines the body of corporate law that will govern the corporation's internal affairs. *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987) (explaining that "the law of the state of incorporation should determine issues relating to internal corporate affairs"); *see Rogers v. Guaranty Tr. Co. of N.Y.*, 288 U.S. 123, 130 (1933). And it includes the law that will govern the roles and

responsibilities of directors with respect to the corporation. *Citigroup*, 964 A.2d at 118. Directors can make an informed decision on this foundational issue only if the governing law is clear and stable.

Once the corporation is incorporated, its directors must understand the core duties they owe to the corporation and its stockholders. Directors' core fiduciary duties are "the duties of care and loyalty." *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006). These duties ensure that directors focus their efforts on advancing the best interests of the corporation and its stockholders in an informed manner. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

But if the scope of directors' duties is unsettled or subject to sudden and unpredictable changes, directors cannot reliably anticipate how their actions will be judged. *See In re Topps Co. S'holders Litig.*, 924 A.2d 951, 961 (Del. Ch. 2007). That may cause them to act more cautiously than is warranted – leading to "a harmful diminution in wealth-generating risk-taking by directors." *Id.* at 961 n.38. For this reason, "it is important that the responsibilities of directors be articulated in a consistent and predictable way." *Id.* at 961. Directors must have "clear signals" of the conduct expected of them. *Malone*, 722 A.2d at 10.

Uncertainty also may deter qualified individuals from board service. Directors fulfill a challenging and demanding role. *See Citigroup*, 964 A.2d at 126. Fiduciary obligations are "unremitting" – they apply to "all director actions for the

corporation and interactions with its shareholders." *Malone*, 722 A.2d at 10. If the standards governing those obligations are unclear or subject to abrupt and unpredictable changes, "qualified persons" will be discouraged from serving as directors. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996). Clear, and stable, standards are needed to ensure that capable individuals are willing to undertake the important obligations of board service – and that corporations and stockholders therefore will benefit from board service by experienced, expert individuals.

Effective boards are essential to creating long-term stockholder value. *See, e.g.*, Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 80 Harv. Bus. Rev. 160 (Sept. 2002). In particular, directors must navigate between options that might lead to short-term returns for current stockholders (such as a merger) against pursuing longer-term strategies that could ultimately lead to greater returns. *See Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 99 (Del. Ch. 2011). In order for directors to make those types of decisions effectively, they must understand the standards by which their actions will be judged – and those standards must be consistent. Legal uncertainty impairs board performance and weakens corporate accountability. Ultimately, corporations – and their stockholders – suffer when the law governing directors' fiduciary obligations is unstable and unpredictable. *See Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) (explaining that "ad hoc"

decisions "do violence to normal corporate practice and [Delaware] corporation law").

The need for stable and predictable rules for fiduciary obligations does not mean that the rules should be frozen in time. To the contrary, the law must be able evolve in response to developments in the legal and regulatory landscape, marketplace dynamics, and trends in the broader economy. That ensures that directors' obligations remain attuned to the needs of the corporations they serve. But that evolution must itself proceed in an orderly fashion. *See Topps*, 924 A.2d at 961. Unpredictable shifts frustrate and impair directors' ability to govern, to the ultimate detriment of the corporations and stockholders they serve.

Although this case concerns only SB 21 in Delaware, the underlying need for stability and predictability is true for all States. Each State may develop its own corporate law, including the law governing fiduciary obligations. But even though the substantive standards may differ from one State to another, the need for predictability is the same in every State. *See, e.g.*, *Eccles v. Shamrock Cap. Advisors, LLC*, 245 N.E.3d 1110, 1121 (N.Y. 2024) (recognizing the need for "providing consistency to legal obligations" in corporate law matters).

B. SB 21's Safe Harbor Provisions Are A Permissible Exercise Of The General Assembly's Authority To Shape Fiduciary Obligations

One key to ensuring that corporate law in Delaware has evolved in an orderly manner is that the courts and the General Assembly have played complementary

roles in developing the law. The courts often have advanced the law by developing legal rules as part of their case-by-case adjudication. At the same time, the General Assembly also has played an important role in guiding and shaping the contours of the law, including by providing and then adjusting the statutory framework in response to judicial decisions or broader developments. The law thus has evolved through an orderly dialogue between the courts and the General Assembly, rather than as the result of the unfettered discretion of either branch.

SB 21's safe harbors fit comfortably within that tradition. They represent the considered policy judgment of the General Assembly as to the appropriate scope and contours of corporate fiduciary obligations. They were enacted in response to developments in the case law and in the market. And they are just the type of incremental refinement of the law that the General Assembly historically has made. Plaintiff's radical view, in contrast, would strip the General Assembly of any say in refining and shaping corporate fiduciary obligations, leaving the future development of the law in this area solely to the courts. That approach would have a significant negative effect on the stability and predictability of Delaware corporate law.

1. The Courts And General Assembly Have Jointly Guided The Development Of Delaware Corporate Law

Delaware corporate law has developed incrementally through the interplay of judicial precedent and legislative refinement.

The Delaware General Corporation Law (DGCL) is "[a]t the formal apex of the structure of Delaware corporate law." Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1752 (2006) (*Policy Foundations*). But the DGCL is mostly permissive rather than prescriptive and reflects a "preference for . . . broad statutory rules" and "a corresponding preference that the details of corporate law should be sketched in through the judicial process" – particularly when it comes to fiduciary obligations. *Id.* at 1777. Accordingly, much of the content of Delaware corporate law has been developed incrementally by the courts through case-by-case adjudication. *E.g.*, *Malone*, 722 A.2d at 10.

But, as Professor Hamermesh emphasizes, the DGCL's general "preference" for common-law development "should not be taken as legislative indifference or impotence." *Policy Foundations* 1779. The General Assembly undoubtedly has the authority to shape Delaware corporate law. *See* Del. Const. Art. IX, § 1. And it has on many occasions exercised that authority to amend the DGCL in response to – and sometimes in direct rejection of – judicial decisions on particular issues of corporate law. *See Policy Foundations* 1779-82.

To take one example: In 1996, the Court of Chancery decided in *Hoschett v. TSI International Software, Ltd.*, 683 A.2d 43 (Del. Ch. 1996), that DGCL Section 211(b) always requires corporations to hold an annual meeting to elect directors. *Id.*

at 46. The next year, the General Assembly amended Section 211(b) to expressly provide that directors may be "elected by written consent in lieu of an annual meeting." 8 *Del. C.* § 211(b).

To take another example of the General Assembly overruling a judicial decision that is particularly relevant to this case: In 1985, this Court ruled in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), that the defendant directors were grossly negligent and could be held personally liable for their breaches of the duty of care. *Id.* at 864, 872. That decision "exacerbated" a crisis in the market for directors' and officers' liability insurance, which threatened to make that insurance "prohibitive[ly] expens[ive]" – and, in some cases, entirely "unavailab[le]." Lawrence A. Hamermesh, Jack B. Jacobs, & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77 Bus. Lawyer 321, 364 (2022). The next year, the General Assembly enacted DGCL Section 102(b)(7), which permits corporations to include in their certificates of incorporation exculpation provisions that limit or eliminate directors' personal liability for breach of the duty of care. *Id.* (citing 8 *Del. C.* § 102(b)(7)).

The General Assembly also on occasion has acted at the request of the courts. For example, in *Liebermann v. Frangiosa*, 844 A.2d 992 (Del. Ch. 2002), the Court of Chancery addressed whether to give effect to the filing date of a particular corporate instrument, when the instrument had in fact been filed later and had been

back-dated by the Division of Corporations at the request of the defendant. *Id.* at 1007-09. The court declined to accept the recorded date and noted in a footnote that the Division of Corporations should reconsider its practice of back-dating filings on request. *Id.* at 1008 & n.49. Within months of that decision, the General Assembly amended the DGCL to establish "a firm antibackdating rule." *Policy Foundations* 1781 (citing 8 *Del. C.* § 103(c)(3)).

Importantly, when the General Assembly has acted, this Court and the Court of Chancery have respected the General Assembly's policy judgments and recognized its constitutional prerogative to set and refine the rules governing corporations. As this Court explained in *Williams v. Geier*, 671 A.2d 1368 (Del. 1996), "[d]irectors and investors must be able to rely on the stability and absence of judicial interference with the State's statutory prescriptions." *Id.* at 1385 n.36. For that reason, courts cannot "engraft . . . an exception to the statutory structure and authority," even if they might think that such an exception would be a desirable policy outcome in a particular case. *Id.* at 1385. Similarly, the Court of Chancery has explained that the General Assembly "has the authority to eliminate or modify fiduciary duties and the standards that are applied by [the] court[s]." *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 715 (Del. Ch. 2023) (internal quotation marks omitted); *see Totta v. CCSB Fin'l Corp.*, 2022 WL 1751741, at *15 (Del. Ch. May 31, 2022), *aff'd*, 302 A.3d 387 (Del. 2023).

This back-and-forth dialogue between the courts and the General Assembly has been critical to the stability and orderly evolution of Delaware corporate law. The courts act as the "first responders" when new issues arise in applying Delaware law, and their decisions incrementally evolve the law in common-law fashion to adapt the law to new developments in the market. *Policy Foundations* 1782. But the General Assembly serves as a backstop to check and, on occasion, restrain or refine the courts' development of the law. This dynamic ensures that Delaware corporate law is stable and its development is orderly.

2. SB 21's Safe Harbor Provisions Fit Comfortably Within The General Assembly's Authority

SB 21's safe harbor provisions are entirely consistent with Delaware's long tradition of gradual developments in corporate law. In particular, the provisions represent a codification and modest refinement of the law that has been developed by the courts.

SB 21 adds three sets of safe harbors to the DGCL, one for interested director and officer transactions, one for controlling stockholder transactions, and one for going private transactions. *See* 8 *Del. C.* § 144(a)-(c). For example, SB 21 adds DGCL Section 144(b), which provides that a transaction between a corporation and controlling stockholder "may not be the subject of equitable relief, or give rise to an award of damages" if the material facts about the transaction are disclosed to the board, and a majority of the disinterested directors of the board or of a special

committee of the board authorize the transaction "in good faith and without gross negligence." *Id.* § 144(b)(1).[2] Alternatively, the transaction qualifies for the safe harbor if it is "approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders," or if it is "fair as to the corporation and the corporation's stockholders." *Id.* § 144(b)(2)-(3).

These safe harbors merely codify and refine the law on controlling stockholder transactions that had been developed by the courts. Under *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (*MFW*), and its progeny, Delaware courts had developed a safe harbor for controlling stockholder transactions that considered many of the same factors. *See In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 462-63 (Del. 2024) (factors include whether the independent directors meet their duty of care and whether informed stockholders approve the transaction in an uncoerced vote).

But that safe harbor involved six core factors and several sub-factors, *see Match Grp.*, 315 A.3d at 462-63, and the General Assembly became concerned that its application would be unpredictable, *see* Sen. Bryan Townsend et al., Press Release, *Bipartisan Legislation Filed to Promote Clarity and Balance in Delaware's Corporate Laws* (Feb. 17, 2025), https://perma.cc/9X7Q-W5EK. The General

[2] The statute provides additional requirements that must be met if less than a majority of the board is disinterested in the transaction. *See* 8 *Del. C.* § 144(b)(1).

Assembly accordingly enacted SB 21's safe harbors to codify and streamline the *MFW* factors so that their application would be more consistent. That is congruent with the orderly evolution of Delaware law governing the conduct of corporate directors. Indeed, the drafters of SB 21 expressly stated that the new safe harbors "do[] not displace the common law requirements regarding core fiduciary conduct." Del. Gen. Assembly, *Senate Substitute 1 for Senate Bill 21* (Mar. 2025), https://perma.cc/H5ND-YB2N (original synopsis for SB 21).

SB 21's safe harbors thus fit comfortably into the long tradition of the General Assembly shaping and adjusting fiduciary obligations in response to judicial decisions and changing market conditions. For example, in DGCL Section 141(e), the General Assembly provided a safe harbor that "fully protect[s]" directors who can establish that they "rel[ied] in good faith upon" their corporations' records or upon the statements of the corporations' officers or employees. 8 *Del. C.* § 141(e). Similarly, in DGCL Section 152(d), the General Assembly provided a safe harbor for when a corporation issues stock: It provides that, "[i]n the absence of actual fraud," the directors' judgment as to the value of that stock "shall be conclusive." *Id.* § 152(d). Just as with SB 21's safe harbors, DGCL Sections 141(e) and 152(d) set clear rules for what fiduciary conduct will (and will not) give rise to liability.

Plaintiff's attempt to paint SB 21's safe harbors as radical departures from Delaware law thus is unfounded. *See* Appellant's Opening Brief (OB) 27. The safe

harbor provisions neither abolish nor dilute fiduciary duties. Instead, they establish substantive requirements that directors must meet if they wish to invoke statutory protection.

Although Plaintiff derides these requirements as merely "check-the-box" provisions, OB26, they are robust and substantive. For example, the safe harbor based on stockholder ratification requires that the stockholders' vote be "informed" and "uncoerced." 8 *Del. C.* § 144(b)(2). As numerous decisions of this Court and the Court of Chancery attest, these are meaningful requirements. *See, e.g.*, *Morrison v. Berry*, 191 A.3d 268, 275 (Del. 2018) (holding that plaintiffs adequately alleged that a ratification vote was not fully informed); *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *31 (Del. Ch. June 11, 2020) (holding that plaintiffs adequately alleged that a vote was coerced). Further, whether a stockholder vote was unformed and uncoerced in a particular case – and thus whether the safe harbor applies – will be determined by the Court of Chancery, building on the substantial body of precedent already developed on each requirement.

The bottom line is that the General Assembly has not excused directors from their fiduciary responsibilities; it has merely structured how those responsibilities are to be applied in particular contexts to promote consistent application of the law. That is well within the power of the General Assembly to prescribe the rules of

liability for Delaware corporate law, and part of a robust tradition of the General Assembly doing just that.

3. Plaintiff's Position Would Deprive The General Assembly Of Its Constitutional Role

Plaintiff takes the radical position that SB 21's safe harbors are unconstitutional because they reduce the Court of Chancery's equity jurisdiction below what it was at the time of the American Revolution. OB 27-28. Plaintiff's theory is that the safe harbors reduce the Court of Chancery's jurisdiction because they prevent that court from providing relief for a breach of fiduciary duty. *Id.* But that is not what the safe harbors do; the safe harbors refine whether directors have breached their fiduciary obligations in the first place, not limit relief for those breaches. That is, the safe harbors provide that directors who can demonstrate that they meet the safe harbors' requirements have not breached their fiduciary duties, so there is no relief that courts can provide.

By conflating the scope of directors' fiduciary obligations with the scope of the Court of Chancery's equity jurisdiction, Plaintiff's position would in effect entirely remove the General Assembly from the lawmaking process. That is directly contrary to the Delaware Constitution, which expressly grants the General Assembly the authority to amend Delaware corporate law. *See* Del. Const. Art. IX, § 1. Plaintiff's position also ossifies fiduciary obligation law to what it was at the time of the American Revolution – a time before controlling stockholder transactions or

the DGCL even existed. Only the Court of Chancery and this Court would have any say in defining or refining directors' fiduciary obligations under Delaware law.

That extreme approach does not make sense and has no support in Delaware law. It also would call into question decades of legislative changes to the law of fiduciary obligations – changes that affected the scope of those obligations just as much, if not more so, than SB 21's safe harbors. *See, e.g.*, 8 *Del. C.* § 102(b)(7) (permitting corporations to eliminate directors' personal liability). And it would imperil the orderly evolution of Delaware corporate law, which for decades has depended on a mutual dialogue between the courts and the General Assembly. *See Policy Foundations* 1782. Plaintiff's view would replace that tradition with a regime under which courts have unilateral control over the future of Delaware corporate law. That is not how things ever have worked in Delaware, and it would damage if not destroy the stability and predictability of Delaware corporate law.

For these reasons, the Court should uphold SB 21's safe harbor provisions as a legitimate and measured exercise of the General Assembly's authority to refine directors' fiduciary obligations under Delaware law.

CONCLUSION

The Court should uphold the constitutionality of SB 21's safe harbors.

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