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IN THE SUPREME COURT OF THE STATE OF DELAWARE

	:	Consolidated
	:	No. 218, 2025
	:	No. 257, 2025
IN RE THE AES CORPORATION AND OWENS CORNING	:	
	:	Court Below: Court of Chancery
	:	of the State of Delaware
	:	
	:	C.A. No. 2024-0628-NAC
	:	C.A. No. 2024-0688-NAC

SECOND CORRECTED *AMICUS CURIAE* BRIEF OF MANAGED FUNDS ASSOCIATION AND TEN LEGAL ACADEMICS IN SUPPORT OF APPELLANTS

Thomas Curry (#5877)
SAXENA WHITE P.A.
824 N. Market Street, Suite 1003
Wilmington, Delaware 19801
(302) 485-0483
tcurry@saxenawhite.com

Counsel to Amici Curiae Managed Funds Association, James An, Ben Bates, Anat Alon-Beck, Lucian A. Bebchuk, Ilya Beylin, George S. Georgiev, Joan Heminway, Michael Klausner, Mark Lebovitch, and Brian JM Quinn

Dated: October 8, 2025

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INTERESTS OF *AMICI CURIAE*

Amicus Managed Funds Association ("MFA"), based in Washington, D.C., New York City, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest it, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 fund manager members, including traditional hedge funds, private credit funds, and hybrid funds, that employ a diverse set of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns throughout the economic cycle.

Amici ten legal academics, identified in Exhibit 1 hereto, are law professors, lecturers, and fellows who teach and write about corporate law. They share two core beliefs: first, that Delaware's corporate law is important to the orderly functioning of capital markets and, second, that private enforcement is critical to ensuring that Delaware's corporate law works.

None of the *amici* has any financial interest in this case.

RULE 28(C)(4) CERTIFICATION

Pursuant to Supreme Court Rule 28(c)(4), no party, party's counsel, or other person (other than *amici* and their counsel) authored this brief in whole or in substantial part or contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case seems to present the Court with clashing policy imperatives: substantively, Delaware law must protect the stockholder franchise; procedurally, this Court may seek to limit duplicative litigation. This is a false choice. The Court of Chancery has other tools to discourage low-value stockholder litigation without undermining the judiciary's role in protecting the stockholder franchise.

Advance notice bylaws ("ANBs") have evolved beyond their original scope. As this Court recognized in *Kellner II,*[1] modern ANBs can be weaponized to deter or preclude stockholders from exercising their rights. If one company adopts a next-generation ANB with entrenching provisions, others will follow. Legal technology evolves and ANBs become more pernicious until a stockholder challenge allows courts to draw a line.

Here, the Court of Chancery initially denied the defendants' motion to stay discovery[2] but reversed course after this Court decided *Kellner II.*[3] The trial court ultimately dismissed the complaints, relying on a footnote in *Kellner II* observing

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

[2] *Siegel v. Morse* ("*AES I*"), 2024-0628-NAC (Del. Ch. June 26, 2024) (Transcript) at 50 ("I'm not staying discovery.").

[3] *Siegel v. Morse* ("*AES II*"), 2024 WL 3791683, *1 (Del. Ch. Aug. 21, 2024) (granting renewed motion to stay because "Plaintiff points to no pending or imminent proxy contest. Nor can Plaintiff identify a stockholder who is 'chilled.'").

that the *Kellner* defendants did *not* challenge ripeness.[4] The trial court's expansion of the *Kellner II* footnote seemingly leaves stockholders unable to bring equitable challenges to a board's adoption of an entrenching ANB ("Adoption Challenges"), unless the ANB is adopted in the context of a live/imminent proxy contest.[5]

Eliminating Adoption Challenges and limiting stockholders to challenging the enforcement of ANBs during a proxy contest ("Enforcement Challenges") would ensure that ANBs become increasingly pernicious. The most effective ANBs will never face an Enforcement Challenge because they will deter anyone from making a nomination. Even if a particular ANB would likely be invalidated, the burdens of litigating an Enforcement Challenge to trial will often deter activists from engaging or reduce their leverage when they do engage. In the rare instance when Enforcement Challenges are filed during a proxy fight, the Court of Chancery will have to resolve

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[4] *Siegel v. Morse* ("*AES III*"), 2025 WL 1101624, *5 n.52 (Del. Ch. Apr. 14, 2025) (citing *Kellner II*, 320 A.3d at 258–59 n.139)); *Assad v. Chambers* ("*Owens Corning*"), 2025 WL 1554609, *3 (Del. Ch. June 2, 2025) (citing *Kellner II*, 320 A.3d at 258–59 n.139)).

[5] In *Owens Corning*, the trial court observed that it had "little doubt that circumstances exist where an equitable challenge to the adoption of advance notice bylaws can be ripe in the absence of a pending or imminent proxy contest," *Owens Corning*, 2025 WL 1554609, *5, but elsewhere suggested that plaintiff must plead "a proxy contest, or ... a stockholder saying she is chilled from making a nomination." *Id.* at *4.

This distinction is largely theoretical: a stockholder deterred from pursuing a nomination has limited incentive to incur the high costs of litigating to invalidate a bylaw. In practice, the decisions below require a plaintiff who has launched a proxy fight or stated its intent to do so if the challenged bylaw is invalidated.

disputes in hyper-expedited fashion while facing heavy-handed arguments about how "common" the challenged ANBs have become and how much "market turmoil" will result if the challenged ANB is invalidated.

Why would Delaware abandon its previous willingness to recognize Adoption Challenges as ripe? The trial court's broad reading of the *Kellner II* footnote may have been driven, in part, by concerns that Delaware's historic openness to Adoption Challenges, outside of pending election contests, encouraged duplicative litigation challenging similar ANBs at multiple companies.

But the harm of reading *Kellner II* to eliminate Adoption Challenges outweighs any perceived benefits. The Court of Chancery has case-management tools to limit excessive litigation, including calibrating fee awards to discourage duplicative suits. Rather than eliminating Adoption Challenges—that have, historically, helped shape and improve governance practices—this Court should either (i) make clear that when an ANB's substantive terms are sufficiently egregious, courts can infer entrenching intent (making an Adoption Challenge ripe), or (ii) allow facial challenges to intelligible but patently unreasonable ANBs.

ARGUMENT

I. MODERN ANBs GROW MORE PERNICIOUS

Delaware corporations have used ANBs for decades. What began as a simple tool, establishing ground rules for director nominations, has metamorphosized into a complex defensive device that can cross the line into improper entrenchment.

"Historically, advance notice bylaws were intended to serve the valid purpose of administration of shareholder meetings. Without them, chaos would result from stockholders unexpectedly nominating directors from the floor. Order was maintained by requiring notice 30 days in advance."[6] These first-generation ANBs were typically upheld as "a valid method of giving the Board and shareholders time to review the qualifications of a nominee" ahead of time.[7]

First-generation ANBs "required submission of the information that would be required," in any event, "under the federal proxy rules" but little else.[8] Second generation ANBs emerged from a wave of activism, starting in 2008, and became steadily more aggressive through 2021. A recent empirical analysis shows that

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[6] Lawrence Cunningham, *The Hottest Front in the Takeover Battles: Advance Notice Bylaws*, HARVARD L. SCH. FORUM ON CORP. GOVERNANCE ("HARVARD FORUM") (Oct. 23, 2022), https://corpgov.law.harvard.edu/2022/10/23/the-hottest-front-in-the-takeover-battles-advance-notice-bylaws/.

[7] *Nomad Acquisition Corp. v. Damon Corp.*, 1988 WL 383667, *8 (Del. Ch. Sept. 20, 1988).

[8] Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 141 (2014).

"enhanced disclosure provisions were essentially absent from ANBs ... prior to 2008."[9] Beginning in 2008, ANBs' "informational component ... expanded considerably over a fairly short time, but without much comment."[10] After this initial expansion of disclosure requirements, the disclosure demands on nominating stockholders "gradual[ly] strengthen[ed] from 2010 to 2021."[11]

ANBs have become a defensive tool wielded against activists. The data show that "ANB strength is connected to firms' exposure to hedge fund activism."[12] The data also show "that some firms directly respond to the appearance of an activist by increasing the level of disclosure required in their ANBs relative to their peers," which "tend[s] to corroborate the theory that boards view ANB disclosure requirements as defensive tools for managing activist engagements."[13] ANBs increase in strength after a company is approached by an activist.[14]

Management-side practitioners admitted that second-generation ANBs were

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[9] Benjamin C. Bates, *Rewriting The Rules For Corporate Elections* ("*Rules*"), 100 N.Y.U. L. REV. 635, 637 (2025).

[10] Hamermesh, *Nominations*, 39 DEL. J. CORP. L. at 141.

[11] Bates, *Rules*, 100 N.Y.U. L. REV. at 637.

[12] *Id.* at 682; *see also* Anita Anand & Michele Dathan, *An Empirical Analysis of Advance Notice Provisions in Corporate Bylaws: Evidence from Canada*, 49 INT'L REV. L. & ECON. 41, 41 (2017) (firms are more likely to propose an ANB when they are "more vulnerable" to a proxy contest).

[13] Bates, *Rules*, 100 N.Y.U. L. REV. at 682.

[14] *Id.* at 689.

a "response to ... growing phenomen[a] in the market for corporate control," including the potential use of derivative contracts to engage in "empty voting" and fears of so-called "wolf pack behavior" by "the activist investor community."[15] Second-generation ANBs frequently required nominating stockholders to disclose derivative positions and the identities of "any person with whom the proposing shareholder or beneficial owner [was] 'Acting in Concert,'" which was often defined broadly to "cover mere consciousness of each other plus discussion."[16]

Over time, this legal technology migrated from ANBs to poison pills. In its February 2021 *Williams* decision, the Court of Chancery struck down an anti-activist pill with, among other things, a broad acting-in-concert provision that contained a daisy-chain feature "that operate[d] to aggregate stockholders even if members of

[15] Charles Nathan (Latham & Watkins LLP), *Second Generation Advance Notice Bylaws and Poison Pills*, HARVARD FORUM (Apr. 22, 2009), https://corpgov.law.harvard.edu/2009/04/22/second-generation-advance-notice-bylaws-and-poison-pills/.

[16] Marc Weingarten and Erin Magnor (Schulte Roth & Zabel LLP), *Second Generation Advance Notification Bylaws*, HARVARD FORUM (Mar. 17, 2009), https://corpgov.law.harvard.edu/2009/03/17/second-generation-advance-notification-bylaws/.

the group have no idea that the other stockholders exist."[17] This Court unanimously affirmed.[18]

Just a few weeks later, the Securities and Exchange Commission approved the Universal Proxy Card rules "requiring parties in a contested election to use universal proxy cards that include all director nominees presented for election at a shareholder meeting. The rule changes [gave] ... shareholders the ability to vote by proxy for their preferred combination of board candidates, similar to voting in person."[19] In response, corporate counsel began creating third-generation ANBs.[20] As one of the advisors in this case noted, "[a]s of June 30, 2023, 44% of S&P 500 companies [had] amended their bylaws in connection with the adoption of the universal proxy rule."[21] Firms "added new substantive disclosure requirements" and the average strength of

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[17] *Williams Companies Stockholder Litig.*, 2021 WL 754593, *37 (Del. Ch. Feb. 26, 2021).

[18] *Williams Companies, Inc. v. Wolosky*, 264 A.3d 641 (Del. 2021) (affirming "on the basis of and for the reasons assigned by the Court of Chancery").

[19] SEC Release 2021-235, *SEC Adopts New Rules for Universal Proxy Cards in Contested Director Elections* (Nov. 17, 2021), https://www.sec.gov/newsroom/press-releases/2021-235.

[20] David Berger, *et al.*, *SEC Requires Use of Universal Proxy Cards in Proxy Contests*, WILSON SONSINI GOODRICH & ROSATI (Nov. 22, 2021), https://www.wsgr.com/en/insights/sec-requires-use-of-universal-proxy-cards-in-proxy-contests.html ("These rules ... may make it easier for activist investors [.] ... [A]s a matter of good corporate governance, companies and boards should review their advance notice bylaws ... to ensure that they ... provide the expected level of protection...").

[21] *AES III*, 2025 WL 1101624, *1 (quoting AES's advisors).

"all active ANBs increased at a faster rate during 2022 and 2023 than it did over the previous decade."[22]

As one prominent company-side advisor acknowledged in 2024, there has developed "a cottage industry of lawyers, bankers, other people who are trying to sell themselves by saying to companies, 'We have a brilliant idea, we can put into advance-notice bylaws to make it incredibly difficult for activists to come in[.]'"[23] Former Chief Justice Strine agreed, observing that for many third-generation ANBs, "[y]ou basically have to submit to a colonoscopy by the incumbents[.]"[24]

Third-generation ANBs have faced high-profile challenges. In *Politan Capital Management LP v. Kiani* ("*Masimo*"), an activist challenged a third-generation ANB that, among other things, required disclosure of the identity of the activist's limited partners as well as its plans to nominate directors at other public companies.[25] After three-and-half months of expedited litigation, in which the activist incurred over $15

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[22] Bates, *Rules*, 100 N.Y.U. L. REV. at 673.

[23] Ronald Orol, *Tulane: Hostile Bids, Activist Settlements Take Spotlight*, THE DEAL (Mar. 7, 2024), https://pipeline.thedeal.com/article/0000018e-19bf-d606-a5ee-3fbfd6ea0000/deal-news/activism/hostile-bids-activist-settlements-bylaws-debated-at-tulane (quoting Scott Barshay of Paul Weiss).

[24] Michael Flaherty and Tim Baysinger, *Overheard at 36th Tulane Corporate Law Institute*, AXIOS (Mar. 8, 2024), https://www.axios.com/2024/03/08/tulane-law-institute-delaware.

[25] Trans. ID 71060641 at 11-12.

million in attorneys' fees and faced highly intrusive discovery, the incumbent board withdrew the challenged ANB provisions before trial.[26]

In *Kellner I*, the Court of Chancery considered a third-generation ANB that, among other things, included a provision with broad acting-in-concert provisions that created a daisy-chain dynamic similar to the "tripwire" invalidated in *Williams*.[27] The Court of Chancery held that provision and others "r[a]n afoul of Delaware law" and ordered that they were "of no force and effect."[28] Tracking the *Williams* analysis, *Kellner I* assessed the challenged bylaws' practical effect on nominations by recognizing their inherently defensive nature.[29]

This Court affirmed, in part, in *Kellner II*, concluding that the substantive unreasonableness of the challenged provisions showed "that the ... board's motive was not to counter the threat of an uninformed vote. Rather, the board's primary purpose was to interfere with [the activist's] nomination notice, reject his nominees, and maintain control. As the product of an improper motive and purpose, ... all the

[26] 2022-0948-NAC (Del. Ch. Nov. 17, 2023) (Transcript) at 26.

[27] *Kellner v. AIM ImmunoTech Inc.* ("*Kellner I*"), 307 A.3d 998, 1030 (Del. Ch. 2023) *aff'd in part, rev'd in part,* 320 A.3d 239 (Del. 2024).

[28] *Id.* at 1036.

[29] *Id.* at 1027.

Amended Bylaws at issue in this appeal are inequitable and therefore unenforceable."[30]

Despite this guidance, many companies, including AES and Owens Corning, maintained or adopted ANBs with similar features to those held unenforceable in *Kellner II*. Defendants here—and the corporate bar more broadly—seized on *Kellner II*'s footnote 139, in which this Court observed that defendants had conceded ripeness because the "board amended its bylaws during a prolonged proxy contest with dissidents[.]"[31] Here, the trial court read that footnote—noting that a proxy contest was *sufficient* for ripeness—as changing Delaware law to effectively make a proxy contest a *necessary* predicate to equitable review of an ANB.[32]

Delaware has never held that a proxy contest is a prerequisite to judicial review, and for good reason. This Court should preserve Delaware courts' role in timely correcting improper market practices before they proliferate.

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[30] *Kellner II*, 320 A.3d at 267.

[31] *Id.* at 259 n.139.

[32] *AES III*, 2025 WL 1101624, *5 n.52 (citing *Kellner II*, 320 A.3d at 258–59 n.139)); *Owens Corning*, 2025 WL 1554609, *3 (same).

II. DELAWARE'S ABILITY TO RESTRAIN THE EXPANSION OF ANBS DEPENDS ON ORDINARY STOCKHOLDERS CHALLENGING THE WORST PRACTICES

A. Stockholder Activism Plays a Pivotal Role In Corporate Law

"Many forms of stockholder activism can be beneficial to a corporation[.]"[33] The "central problem of U.S. corporate law" is the "separation of ownership and control."[34] Because activists make concentrated investments, they do not suffer from the "'rational apathy' that characterizes more diversified and even indexed investors ... who hold smaller stakes[.] ... So viewed, hedge fund activism can bridge the separation of ownership and control[.]"[35] Activists act as "governance arbitrageurs," by "identify[ing] strategic and governance shortfalls with significant valuation consequences, ... acquir[ing] a position in a company with governance-related underperformance, and then ... present[ing] ... institution[al] investors with their value proposition: a specified change in the portfolio company's strategy or structure."[36] When activists succeed in causing value-enhancing changes, all

[33] *Williams*, 2021 WL 754593, *29.

[34] Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1909 (2013).

[35] John Coffee, Jr. and Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 548 (2016).

[36] Ronald Gilson & Jeffrey Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 896 (2013).

stockholders reap the benefits.[37]

B. Rules Making Proxy Challenges Prohibitively Burdensome Harm the Stockholder Franchise

Eliminating Adoption Challenges outside the context of a proxy contest would mean that the burden of challenging unreasonable ANBs falls solely on nominating stockholders who must litigate those challenges while simultaneously pursuing a proxy contest. This is bad policy. Nominating stockholders should not be forced to bear the cost—inevitably in the millions of dollars—of litigating to invalidate obviously unreasonable ANBs as the price of vindicating the franchise. Beyond out-of-pocket costs, adding a litigation hurdle means that nominators must worry about delays in launching their proxy contest, the risk of reputational harm through unpredictable courtroom battles, and the distraction and annoyance of invasive discovery, including potentially abusive subpoenas to limited partners.[38]

Masimo, AES, and Owens Corning are all large companies. Most activism, however, focuses on small-capitalization companies ("small-caps"), like AIM Immunotech (the defendant company in *Kellner*). "[T]he preponderance of

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[37] Jeffrey Gordon, *The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill*, 2022 COLUM. BUS. L. REV. 206, 235 (2022) (discussing a "persistent pattern of positive returns on average to shareholder activism").

[38] *Politan Capital Management LP v. Masimo Corporation*, 2022-0948-NAC (Del. Ch. Dec. 20, 2022) (Transcript) (granting motion to quash subpoena issued to activist's suspected limited partner).

shareholder activism is in small-cap companies" because (1) "it's a lot cheaper to buy 5 percent of a $200 million company than 5 percent of a $200 billion company" and (2) "corporate governance in smaller public companies isn't great," so there is more for activists to fix.[39]

An investor who owns a 5% stake (*i.e.*, a $10 million position) in a $200 million company cannot rationally incur a multi-million-dollar legal bill to challenge an unreasonable ANB. It will simply pick another target.[40] The board that adopted the unreasonable ANB benefits and their stockholders lose out on the chance to decide whether a change is needed. If Delaware courts can only hold that ANBs are unenforceable when a proxy fight is imminent, valuable proxy activity will die on the vine because the prospect of out-of-pocket litigation costs will make the underlying investment uneconomic (win or lose).[41] Even when activists do engage,

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[39] Adam Epstein, *The Challenges of Small-Cap Governance*, NACD DIRECTORSHIP (May/June 2018) at 24.

[40] *Browne v. Layfield*, 2024-0079 (Del. Ch. Sept. 5, 2024) (Transcript) at 34 ("The best deterrents never have to be used. The even better deterrents not only never have to be used, but the threat you are attempting to deter never manifests because the deterrent is successful."); *see also Williams*, 2021 WL 754593, *20 n.233 (the "absence of stockholder activism could be a consequence" of the challenged pill); *Pontiac Gen. Emps. Ret. Sys. v. Ballantine*, 9789-VCL (Del. Ch. Oct. 14, 2014) (Transcript) at 72–73 (challenge to untriggered proxy put ripe because a "truly effective deterrent is never triggered").

[41] Notably, contingently compensated counsel representing stockholders *not* running a proxy contest can seek a fee award if they successfully challenge an ANB, but there is uncertainty about plaintiffs' ability to seek a fee award when they *are* running a proxy contest. *Compare Full Value Partners, L.P. v. Swiss Helvetia Fund,*

incumbent directors will use unreasonable ANBs as a source of unfair bargaining leverage. [42]

Inc., 2018 WL 2748261, *7 (Del. Ch. June 7, 2018) (rejecting argument that "plaintiff [was] not entitled to a fee because its principal motivation was to benefit itself by gaining control of the Board") (cleaned up) *with ARC Glob. Investments II LLC v. Digital World Acquisition Corp.*, 2025 WL 1922011, *4 (Del. Ch. July 14, 2025) ("Because ARC set out primarily to benefit itself, a fee award ... is unwarranted."); *TS Falcon I, LLC v. Golden Mountain Fin. Holdings Corp.*, 2024 WL 3942255, *10 (Del. Ch. Aug. 27, 2024) ("The main beneficiary of this action is Falcon[.] ... Although invalidating the retroactive record date promotes the stockholder franchise, the benefit to stockholders other than Falcon is comparatively slight. Falcon's request for attorneys' fees and expenses is denied."); *Keyser v. Curtis*, 2012 WL 3115453, *19 (Del. Ch. July 31, 2012) ("In bringing this action, Keyser was principally motivated by a desire to benefit himself, not a desire to benefit Ark. There is nothing wrong with that, but it does not present the type of situation that calls out for an award of attorneys' fees."), *aff'd sub nom. Poliak v. Keyser*, 65 A.3d 617 (Del. 2013).

[42] Most activist engagements result in a negotiated outcome and parties "necessarily bargain[] in the shadow of a defensive measure that has deterrent effect." *Ballantine*, Tr. at 72.

III. THIS COURT SHOULD PRESERVE A PATH FOR STOCKHOLDERS TO CHALLENGE PERNICIOUS BYLAWS

A. Stockholder Suits Challenging Anti-Activist Tools Play a Critical Role in the Evolution of Corporate Law and Practice

Delaware courts have "repeatedly ... recognized disputes to be ripe for review when stockholders challenge measures that have a substantial deterrent effect" because declining review on ripeness grounds "could encourage other corporate boards to adopt similar [provisions] to take advantage of their potent deterrent effect on stockholders[.]"[43] By deciding Adoption Challenges, without requiring proof that directors are actively enforcing the deterring provision, Delaware courts provide market guidance and limit the spread of unreasonably entrenching legal technology.[44]

Over the years, Delaware courts have provided critical market guidance regarding ambiguous treatment of derivative positions in pills,[45] "dead-hand" proxy

[43] *Solak v. Sarowitz*, 2016 WL 7468070, *6 (Del. Ch. Dec. 27, 2016).

[44] Delaware has long recognized the value of guiding transactional planners, in a variety of contesxts, and this Court sometimes gives guidance very directly. *See, e.g.*, *Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 855 (Del. 1998) ("The path for future drafters to follow in articulating class vote provisions is clear....").

[45] *In re Atmel Corp. S'holders Litig.*, 4161-CC (Del. Ch. May 19, 2019) (Transcript).

puts,[46] "don't ask don't waive" standstills,[47] charter provisions purporting to require for-cause removal of non-staggered board members,[48] anti-activism pills,[49] and overbroad NOL pills.[50] Each time, corporate advisors had extended governance tools to give their clients an advantage against hostile bidders or shareholder activists and the courts ensured that market practice was consistent with Delaware law. These cases created systemic benefits whether Delaware courts endorsed the new technology, invalidated it, or simply warned the corporate bar about the propriety of common governance practices.

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[46] *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc*., 983 A2d 304 (Del. Ch. 2009); *see also Ballantine* Tr. at 68-81.

[47] *Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp.*, 2996-CC (Del. Ch. Dec. 20, 2007) (Order).

[48] *In re VAALCO Energy, Inc. S'holder Litig*., 11775–VCL (Del. Ch. Dec. 21, 2015) (Transcript).

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

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

B. This Court Should Preserve the Judiciary's Role in Discouraging The Spread of Unreasonable Bylaws

Williams shows the benefits of smart stockholder litigation. Advisors pushed the envelope and Delaware courts drew the line. Companies continue to adopt anti-activist pills[51] but have steered clear of the provisions that *Williams* invalidated.

If the Chancellor had followed the logic of *AES* and *Owens Corning*, *Williams* could have been dismissed on ripeness grounds.[52] The substantively improper terms of the pill would have spread unchecked unless someone pursued a proxy fight while simultaneously litigating over the terms of the pill. A decision striking down the pill or its problematic provisions would have faced substantial criticism for upsetting "market practice."

The trial court's broad interpretation of *Kellner II* practically assures this unwelcome scenario. If directors cannot face equitable review absent a threatened proxy fight, they are incentivized to adopt extraordinarily entrenching ANBs to prevent a proxy fight from ever emerging. And with little reason to fear that a

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[51] Ronald Orol, *Pills Emerge Amid Tariff Uncertainty, Activism*, THE DEAL (Apr. 22, 2025), https://pipeline.thedeal.com/article/00000196-5e13-d666-a5de-7f5b46a20000/deal-news/activism/pills-emerge-amid-tariff-uncertainty-activism.

[52] *Williams*, 2021 WL 754593, *20 n.233 (plaintiff "testified that he does not intend on running a proxy contest, replacing any director, acquiring more than 5% of Williams stock, engaging in a takeover transaction, or engaging with other stockholders, and he is not aware of any Williams stockholders who have refrained from taking this action because of the Rights Plan").

reviewing court will ever reach the equitable merits of their innovations, corporate advisors will compete for business by drafting increasingly pernicious ANBs, which will soon become standard.

C. Amici's Proposed Solution

In *Williams*, the Court applied *Unocal* review[53] because pills "have a potentially entrenching effect."[54] In *Kellner II*, this Court held that only one of the challenged provisions was "unintelligible," and thus facially invalid. [55] Yet it also held that the other challenged provisions were so substantively unreasonable that the directors' inequitable, entrenching motive in adopting them could be inferred.[56]

Amici see two non-exclusive pathways to reconcile the teaching of *Williams* and *Kellner II* here. This Court can follow *Kellner II*'s second holding and confirm that if an ANB's substantive provisions are so unreasonable as to deter the lawful exercise of franchise rights, then—regardless of whether a proxy contest is imminent—the law will infer the adopting board's defensive purpose. Courts would

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[53] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

[54] *Williams*, 2021 WL 754593, *21 (cleaned up).

[55] *Kellner II*, 320 A.3d at 266.

[56] *Id.* at 267 ("The unreasonable demands of most of the Amended Bylaws show that the AIM board's motive was not to counter the threat of an uninformed vote. Rather, the board's primary purpose was to interfere with Kellner's nomination notice, reject his nominees, and maintain control.").

then consider Adoption Challenges to determine whether the directors breached their fiduciary duties in adopting the challenged ANB with that purpose.

This Court could also clarify that *Kellner II*'s first holding—*i.e.*, that a bylaw is facially invalid if it is "unintelligible"[57]—was a non-exclusive example of facial invalidity. A bylaw can be perfectly decipherable, yet so substantively onerous that it should be facially unenforceable because it would never survive an Enforcement Challenge.[58] The *Kellner II* bylaws, for example, failed equitable review even though they were enforced in extreme circumstances against a plaintiff who submitted "false and misleading responses" and whose nominees engaged in "deceptive conduct."[59] That suggests that the material facts warranting that finding were "static"[60] by the time of adoption. Nothing about the circumstances in which the bylaws were enforced (against Kellner *or anyone*) could have changed the outcome.

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[57] 320 A.3d at 263.

[58] Consider a bylaw providing that the shares owned by a nominating stockholder whose nominee fails to win election will be cancelled for no consideration. Regardless of its syntactic clarity, the bylaw is obviously improper. Delaware must preserve its ability to hear a prompt challenge.

[59] *Kellner II*, 320 A.3d at 267.

[60] *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014) ("Generally, a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the material facts are static.") (cleaned up)

IV. CHANCERY CAN MANAGE EXCESSIVE LITIGATION

Amici recognize that this Court may also be concerned about deterring so-called "copycat" stockholder litigation challenging similar bylaws. For example, "some of the corporate bar's rush to override *Moelis* was a [perceived] need to stem the tide of the plaintiffs' bar 'piling on' and filing suits challenging repeat instances of the same improper governance practices."[61] And in the aftermath of *Kellner I*, numerous suits were filed challenging similar ANBs.[62] More recently, investors have begun to challenge so-called "Irrevocable Resignation Bylaws."[63]

The Court of Chancery has faced similar challenges before and has adequate tools available to manage them. Most obviously, in the 2010s, the Court of Chancery faced a wave of rent-seeking "disclosure-only" merger litigation. Rather than wielding a blunt instrument—*e.g.*, holding that disclosure challenges were ripe only if there was a real possibility of a vote failing—the Court of Chancery used a scalpel, making clear that it would not approve settlements or award significant attorneys' fees for immaterial disclosures.[64] In doing so, the Court of Chancery effectively

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[61] Mark Lebovitch, *Soap Opera Summer: Five Predictions About Delaware Law's Response to New DGCL 122(18)*, 15 HARV. BUS. L. REV. 283, 305 (2025).

[62] *See, e.g.*, Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in *Kellner v. AIM Immunotech Inc.*, 3,2024 (Del. Feb. 23, 2024) at 24-25.

[63] *In re Irrevocable Resignation Bylaw Litig.*, 2024-0538-JTL (Del. Ch.) (13 cases consolidated).

[64] *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898 (Del. Ch. 2016); *Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 749 (Del. Ch. 2023).

eradicated wasteful litigation without harming substantive law. The Court of Chancery can achieve the same outcome by calibrating any fee awards in copycat lawsuits to discourage unnecessarily duplicative litigation.[65]

The Court of Chancery can (and has) used a variety of other case management tools in similar scenarios, including stays or sequencing of proceedings that present similar questions, or using consolidation or coordination orders tying later-filed cases into a lead case. This Court should encourage those tools but should not close the courthouse door to good-faith actions challenging inequitable conduct.

[65] *Sciabacucchi v. Salzberg*, 2019 WL 2913272, *5 (Del. Ch. July 8, 2019) ("Only if a suit against a subsequent issuer itself involves a significant factual permutation or an additional dimension ... would that later suit warrant a substantial award."), *rev'd on other grounds,* 227 A.3d 102 (Del. 2020).

CONCLUSION

Amici acknowledge the perceived tension between ensuring that the courthouse remains open to meaningful challenges to potentially improper governance practices, on the one hand, and limiting "copycat" litigation challenging the same governance practice multiple times, on the other. The Court can use this case to confirm that Delaware will always protect the stockholder franchise, and to endorse the Court of Chancery's creative use of case-management tools and fee awards to incentivize wholesome levels of litigation.

Of Counsel:

Joel Fleming
EQUITY LITIGATION GROUP LLP
1 Washington Mall #1307
Boston, MA 02110
(617) 468-8602

Dated: October 6, 2025

SAXENA WHITE P.A.

/s/ *Thomas Curry*
Thomas Curry (#5877)
824 N. Market Street, Suite 1003
Wilmington, Delaware 19801
(302) 485-0483
tcurry@saxenawhite.com

Counsel to Amici Curiae Managed Funds Association, James An, Ben Bates, Anat Alon-Beck, Lucian A. Bebchuk, Ilya Beylin, George S. Georgiev, Joan Heminway, Michael Klausner, Mark Lebovitch, and Brian JM Quinn

CERTIFICATE OF SERVICE

I, Thomas Curry, hereby certify that on October 8, 2025, I caused a true and correct copy of the foregoing to be served on the following counsel listed below via File & ServeXpress:

Blake Rohrbacher
Matthew W. Murphy
John M. O'Toole
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

Christine M. Mackintosh
Rebecca A. Musarra
Vivek Upadhya
William G. Passannante II
GRANT & EISENHOFER P.A.
123 Justison Street, 7th Floor
Wilmington, Delaware 19801

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

/s/ Thomas Curry
Thomas Curry (#5877)

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