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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

DEFENDANTS-APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Marjorie P. Duffy
Elizabeth A. Benshoff
Daniel C. Loesing
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
(614) 469-3939

Blake Rohrbacher (#4750)
Matthew W. Murphy (#5938)
John M. O'Toole (#6448)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700
Rohrbacher@rlf.com
Murphy@rlf.com
OToole@rlf.com

Attorneys for Defendants-Appellees Brian D. Chambers, Eduardo E. Cordeiro, Adrienne D. Elsner, Alfred E. Festa, Edward F. Lonergan, Maryann T. Mannen, Paul E. Martin, W. Howard Morris, Suzanne P. Nimocks, John D. Williams, Owens Corning, Jay Morse, Gerard M. Anderson, Janet Davidson, Andrés Gluski, Holly Keller Koeppel, Julie Laulis, Alain Monié, Moisés Naim, Teresa Sebastian, Maura Shaughnessy, Tarun Khanna, and The AES Corporation

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NATURE OF PROCEEDINGS[1]

Following the Court of Chancery's decision in *Kellner I*,[2] a case involving a ripe dispute challenging the enforcement of advance notice bylaws as to a specific nomination, a number of "opportunistic lawyers representing stockholders who have no intention of nominating a director" brought abstract, hypothetical challenges to the bylaws of numerous companies.[3] The lawsuits consolidated for purposes of this appeal are part of that "wave of stockholder litigation and demands." *Carroll v. Burstein*, 2025 WL 2446891, at *2 (Del. Ch. Aug. 25, 2025).

Notwithstanding this Court's clear guidance in *Kellner*, which the court below faithfully applied, Plaintiffs insist that their hypothetical claims were wrongly dismissed as unripe.[4] Plaintiffs concede that the challenged advance notice bylaws

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[1] Unless otherwise noted, all internal citations and quotations are omitted and all emphases are added. References to "A##" refer to the pages of the Appendix to Plaintiffs-Below/Appellants' Amended Opening Brief, which is cited as "OB." References to "B##" refer to the pages of the Appendix to Defendants-Appellees' Answering Brief, submitted herewith.

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

[3] Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Defendants-Appellees at 24-25, *Kellner v. AIM ImmunoTech Inc.*, No. 3, 2024 (Del. Feb. 23, 2024); *Kellner v. AIM ImmunoTech Inc.*, No. 3, 2024 (Del. Mar. 18, 2024) (ORDER) (granting leave to file).

[4] Plaintiffs Martin Siegel and George Assad are alleged stockholders of, respectively, The AES Corporation ("AES") and Owens Corning ("OC," and together with AES, the "Companies").

were adopted on a clear day when there was no actual or threatened proxy contest, but nevertheless contend that the AES and OC boards of directors (the "Boards" or "Defendants") amended the bylaws to deter future stockholder nominations and impede hypothetical proxy contests. Tellingly, however, neither Plaintiff alleged that the challenged bylaws have any deterrent effect as to them, and both affirmatively conceded that they have no intention to submit a nomination.

Nevertheless, Plaintiffs jumped on the bylaw-challenge bandwagon. In June 2024—nearly a year after AES's clear-day amendment of its advance notice bylaws and more than a year after OC's clear-day adoption—Plaintiffs filed the complaints, alleging that Defendants breached their fiduciary duties by amending bylaws.

Plaintiffs moved to expedite both cases. During the hearing on Siegel's motion to expedite, his counsel conceded that neither he nor anyone else intends to submit a nomination but is deterred by the informational requirements of the bylaws. A095; *see also* A123-24 ("Do we have a stockholder coming up and saying I want to nominate, but I'm not going to do it because these provisions are so difficult? No."). The Court of Chancery therefore denied expedition, given Siegel's failure to show "nonspeculative imminent irreparable harm." A119.

Two weeks later, this Court issued its decision in *Kellner*, confirming the framework for a challenge to the validity of a bylaw (a "facial" challenge) versus an equitable challenge to its application "under the circumstances of the case" (an "as-

applied" challenge). 320 A.3d 245-46. Plaintiffs ultimately amended their complaints to expressly disclaim their doomed facial challenges (the "Complaints"). OB Ex. A ("AES Op.") 11 n.54. Yet Plaintiffs still sought facial-challenge relief: specifically, an injunction against any future enforcement of the bylaws under any circumstances. *Id.*; A145 n.3; A173; A255 n.3; A284. And they still purported to assert "as-applied" challenges to the bylaws' adoption, which they alleged was for defensive purposes.

Defendants moved to dismiss the Complaints under Rule 12(b)(1) for lack of subject-matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. In April 2025, the Court of Chancery dismissed the *Siegel* complaint under Rule 12(b)(1), applying *Kellner* and correctly concluding that Plaintiff's claims were not ripe. AES Op. 11, 19 & OB Ex. B. Given that Plaintiff could not "identify a stockholder who either intends to run a proxy contest" or is "chilled," the court below concluded that Plaintiff's challenge was "a hypothetical one" and that "absent any proxy contest threat," the Board's adoption of the bylaws was "not the kind of circumstance that the Supreme Court envisioned in *Kellner[]* would trigger the machinery of equitable review." AES Op. 11, 14, 16-17. In early June 2025, the Court of Chancery issued a letter opinion dismissing the *Assad* complaint under Rule 12(b)(1) for the same reasons. OB Ex. C ("OC Op.") 7, 14.

Plaintiffs appealed both decisions, in effect demanding that this Court revisit *Kellner*—all for hypothetical claims that are not ripe under any standard. Enforceability challenges are entirely different from Plaintiffs' academic theories. A stockholder who makes an actual nomination that is rejected "may choose to engage with the company's board to address shortcomings in the nomination, sue, or do both, as routinely occurs. Upon a rejection of nominees, the proverbial eggs are perhaps broken, but hardly scrambled; equity need not leap to the stove before anyone even considers a meal." AES Op. 19.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly concluded that Plaintiffs' claims are based on the bylaws' hypothetical operation and are therefore unripe. This Court in *Kellner* divided advance notice bylaw claims into two types: facial challenges (which Plaintiffs here disclaimed) and as-applied challenges. However, Plaintiffs try to create a third option, a so-called "adoption claim" that purportedly would allow them to evade the ripeness question altogether. But, however they characterize their claim, Plaintiffs did not adequately allege that they would be affected by the bylaws so as to create an actual controversy between these parties and vest the Court of Chancery with jurisdiction. Plaintiffs cannot evade that result by invoking a standard of review, which applies only to a ripe claim. *See* Section I.C.1.

2. Denied. The Court of Chancery correctly concluded that Plaintiffs' claims are unripe. The facts here are not "static" and litigation between these parties is far from "unavoidable," particularly given Plaintiffs' admissions that they have no intention to nominate directors. *See* Section I.C.2.

3. Denied. The Court of Chancery correctly concluded that Plaintiffs' claims are unripe. Plaintiffs' efforts to transform their hypothetical challenges into ripe disputes fail. Plaintiffs cannot substitute *Unocal*, or any other standard of review, for ripeness. Nor can Plaintiffs' speculation about potential deterrent effects

create a ripe dispute, especially where Plaintiffs did not allege they are deterred and did not identify any other stockholder who is deterred. Plaintiffs' arguments about statutes of limitations and declaratory relief similarly fail to cure their ripeness problem. *See* Section I.C.3.

4. Denied. The Court of Chancery correctly dismissed Plaintiffs' unripe claims under Rule 12(b)(1) for lack of jurisdiction. Ripeness is a question of subject-matter jurisdiction, and Plaintiffs waived any argument against a Rule 12(b)(1) standard for ripeness by failing to mention Rule 12(b)(1) in their briefing or argument below. Even if not waived, their argument that Rule 12(b)(6) applies to the ripeness inquiry here is wrong. Their "intertwined with the merits" test does not apply to ripeness inquiries; regardless, the facts demonstrating that Plaintiffs' claims are unripe are not "intertwined" with the merits of those claims. Plaintiffs' arguments regarding their so-called *Unocal* claim are irrelevant, but, in any event, Plaintiffs failed to plead facts sufficient to trigger enhanced scrutiny. Even assuming their claims were ripe, Plaintiffs' claims are validity challenges brought under the guise of enforcement challenges, and Plaintiffs affirmatively disclaimed any validity challenge. Even if Plaintiffs did bring ripe enforcement challenges, Plaintiffs cite no case or rule applying enhanced scrutiny where the advance notice bylaws were adopted on a concededly clear day. Even if enhanced scrutiny did apply, the bylaws pass that review. *See* Section I.C.4; Section II.

5. Denied. Precedent is clear that as-applied review of advance notice bylaws occurs only when a proxy contest emerges. Plaintiffs did not adequately allege any deterrent effects, and the disclosure consequences of advance notice bylaws are nothing like the consequences of a rights plan or a dead hand proxy put. Prudential considerations, including the Delaware courts' interest in the reasoned development of equitable rules through case-by-case adjudication, weigh heavily in favor of delaying review, and certainly outweigh Plaintiffs' nonexistent interest in receiving prompt relief. *See* Section I.C.3.

STATEMENT OF FACTS

AES is an energy company with "decades of experience helping the world transition to clean, renewable energy." A154. OC is a global building and construction materials company and a leader in materials innovation. A263. Both strive for best corporate governance practices and, as part of that commitment, regularly review their governance documents, including their bylaws. *See* A584-85, A588.

In 2023, each Company undertook just such a review and adopted the bylaws challenged here.

A. AES And OC Amended The Bylaws On A Clear Day.

The OC Board amended its bylaws (the "OC Bylaws") on a clear day in June 2023, when there was admittedly "no specifically identified activist campaign in progress," no "ongoing activist campaign," and no "specific activist" who had "surface[d] with a proxy challenge." A258-59.

The OC Board conducted its review in light of "evolving market practices and modernizing changes to Delaware law." B254.[5] Among other proposed amendments, the OC Board considered those "to align with current market practice

[5] In 2021, the Securities and Exchange Commission adopted the "universal proxy rule," which requires both company and stockholder director nominees to be listed on a universal proxy card and imposes enhanced notice, filing, solicitation, disclosure, and other requirements.

more closely," including "enhance[ed] procedures and disclosure requirements for director nominations made and business proposals submitted by stockholders." A268. As noted, a "significant number of [OC's] proxy peer group companies" had recently adopted comparable bylaw provisions. B254. When adopting the Bylaws, the Board specifically discussed "the ***benefits*** of the Proposed Bylaws for the Corporation ***and its stockholders***, which included the advantages of earlier notice of dissident stockholders to use a universal proxy card and greater disclosure about nominating stockholders and their nominees." A270.[6]

Two months later, the AES Board amended its by-laws (the "AES By-Laws" and, together with the OC Bylaws, the "Bylaws") on a "clear day" in August 2023 when there was no active or imminent proxy contest. A149. The *Siegel* complaint did not allege that any nomination had been submitted or was pending when the By-Laws were amended, nor that there was any active or anticipated proxy contest. There was no "specific activist" threat, as Plaintiff admitted. A148; *see also* A158.

The Board reviewed AES's By-Laws in light of "[r]ecent changes to the law, case law, and market developments." A158. The Board considered revised "informational and procedural requirements" in line with those already by then adopted at nearly half of all companies in the S&P 500. A159; *see also id.*

[6] *See also* B464-546.

(explaining the rationale of the many other companies that had amended their bylaws in light of the universal proxy rule). The proposed amendments would require "additional information, representations, and disclosures" for stockholder nominations. A160. Critically, "the proposed AES By-Law changes ***d[id] not include***" any of the provisions that had been challenged in litigation as "draconian," but rather, provisions that had been upheld by courts. A159-61.[7]

B. The Challenged Bylaws

1. The "Acting In Concert" Provisions

Plaintiffs challenge the Bylaws' definitions of "acting in concert," which require stockholders who nominate a director candidate to disclose stockholders with whom they "***knowingly***"—a qualifier Plaintiffs tellingly omit, OB 17—act towards a common goal where: (1) "each person is ***conscious*** of the other person's conduct or intent"; (2) "this awareness ***is an element in their decision-making processes***"; and (3) "at least one additional factor suggests that such persons ***intend*** to act in concert or in parallel." A183 (AES By-Laws § 2.15(B)); A231 (OC Bylaws § 1.7(c)(3)) (the "Acting in Concert" provisions). The provisions make clear that "a person shall not be deemed to be 'acting in concert' with any other person solely as a result of the solicitation or receipt of revocable proxies" under "Section 14(a) of

[7] *See also* B054-66.

the Exchange Act"—another limitation Plaintiffs selectively omit, OB 17. A183 (AES By-Laws § 2.15(B)); A231 (OC Bylaws § 1.7(c)(3)). Finally, the provisions provide that a "person deemed to be 'acting in concert' with another person shall be deemed to be 'acting in concert' with any third party who is also 'acting in concert' with such other person." A183 (AES By-Laws § 2.15(B)); A231 (OC Bylaws § 1.7(c)(3)).

Of course, those definitions do not require any disclosures on their own. Plaintiffs challenge not so much these definitions as their interaction with other provisions containing actual disclosure requirements, specifically, Section 9.01(C)(4)(d) of AES's By-Laws, A163, and Section 1.7(a)(2)(A) and (C)(iii) of OC's Bylaws, A273.[8]

2. The So-Called "Ownership" Provisions

Plaintiffs misleadingly dub Section 2.16(B) of AES's By-Laws and Section 1.7(a)(2)(A) of OC's Bylaws the "Ownership Provisions." A167; A278. Those sections, however, require disclosures unrelated to ownership, such as of certain legal proceedings, or other disclosures Plaintiffs did not challenge, such as the nominating stockholder's name or whether the nominating stockholder is a

[8] AES's By-Laws require certain disclosures as to those acting in concert with certain specified persons, such as the nominating stockholder, the proposed nominee and the nominee's "affiliates," as defined "under the rules and regulations promulgated under the Exchange Act." A197-98, 201 (§ 9.01(C)(4)(d)). OC's Bylaws require similar disclosures. A223, 228 (§ 1.7(a)(2)(A) & (C)(iii)).

stockholder of record. A185 (AES By-Laws § 2.16(B)(6), (10)); A223, 226 (OC Bylaws § 1.7(a)(2)(A)(i), (iii), (vi)).

Plaintiffs challenged only certain disclosure requirements within the Ownership Provisions: primarily the disclosure of performance-related fees or "carry" in the event the Companies' stock price increased or decreased. A167-169; A278-80; *see* OB 20, 42.

C. Neither Company Was Vulnerable To Activism

Given their allegations regarding the clear-day adoption of the Bylaws, A158, A258-59, Plaintiffs attempted to show that the Companies were nonetheless "ripe for activist engagement," A156, A265. But Plaintiffs could muster only allegations about unrelated events spanning years before the Bylaws were adopted. The Complaints did not allege that any of those events had any effect on the Boards' respective decisions to amend the Bylaws.

Stockholder proposals. Like other companies, AES and OC periodically interact with investors or receive stockholder proposals. But neither faced an active or anticipated proxy contest when the Bylaws were amended—a point Plaintiffs conceded. A148, A158, A258-59. Nevertheless, Siegel attempted to imply some causal connection between AES's receipt of Rule 14a-8 stockholder proposals in 2017 and the amendment of the Bylaws five years later in 2023. A154. But, because a 14a-8 proposal cannot be used to nominate a director, 17 C.F.R. § 240.14a-

8(i)(8)(iv), the 2017 proposals by John Chevedden and Mercy Investment Services necessarily had nothing to do with any director nomination.[9] Nor does the allegation about Jeffrey Ubben's addition to AES's Board in 2018, after his request to join the Board was warmly embraced by AES, have anything to do with the By-Laws. A155, A364 & n.16. Siegel did not allege that any of these stockholders or any others ever expressed any intention to nominate a director to the AES Board.

As to OC, Assad alleged that, four years before the OC Bylaws were amended in 2023, hedge fund HG Vora had taken a "stake" of an undisclosed size in OC. A264. Assad alleged that HG Vora "uses activism to affect corporate strategy when necessary," A264, but nothing else—not even an allegation that HG Vora (or any other stockholder) had ever considered submitting a nomination to the OC Board.

Risk disclosure about environmental activism. Nearly four years before the Bylaws were adopted, OC disclosed in 2019 numerous potential risk factors in a prospectus supplement for a senior notes offering, which were to fund certain green projects that could have "direct or indirect environmental, sustainability or social impact." A264, A300-01 & n.10. Accordingly, OC disclosed, among other risks, the possibility of criticism "by activist groups or other stakeholders." *Id*. Assad did not allege that any of these unidentified environmental activists were OC

[9] Mercy's proposal, ultimately withdrawn, related to climate change. A362-63 & nn.10 & 11. Chevedden's proposal related to special stockholder meetings. A363-64 & n.15.

stockholders, nor that any ever submitted a nomination or had any intention to do so. AES made a nearly identical disclosure in connection with its own senior notes offering in May 2023. A156, A365 & n.19. Siegel likewise did not allege that any of these unidentified environmental activists were AES stockholders who intended to submit a nomination, but were deterred from doing so by the Bylaws.

Stockholder support for directors. Plaintiffs argue that "the lengthy tenure of its incumbent directors made [the Companies] ripe for activist engagement," OB 6-7, but the Complaints ignored the overwhelming support the Boards have received. For instance, in the election before the Bylaws were adopted, directors of both Companies received "for" votes from more than 90% of the voting stockholders. *See* A361 & n.7-8; A298-99 & n.7-8. Such overwhelming support is unsurprising, as each Company has delivered strong results under its respective Board's leadership. AES's stock price increased 97% between December 19, 2017 (the date of the SEC's no-action letter regarding Mercy's proposal, which allegedly evidenced some "activist" risk, A154-55) and August 1, 2023 (when AES's By-Laws were adopted). A362 & n.9.[10] OC's stock price nearly tripled between June 25, 2019 (the day before HG Vora allegedly acquired a "stake" in OC evidencing some "activist" risk, *see supra* 13) and June 15, 2023 (when OC's Bylaws were adopted).

[10] *E.g.*, *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 656 n.65 (Del. Ch. 2008) ("The court may take judicial notice of the trading price of a listed stock[.]").

D. This Litigation And The Decision Below

After *Kellner I*, Plaintiffs each made a demand under 8 *Del. C.* § 220, in response to which the Companies produced certain materials relating to the adoption of the Bylaws. A056; A145.

On June 7, 2024, Siegel filed his initial complaint and moved to expedite proceedings. A029-30. Defendants opposed expedition and cross-moved to stay proceedings pending the then-forthcoming decision in *Kellner*. A025. On June 26, 2025, the Court of Chancery heard argument on those motions. Plaintiff's counsel confirmed that Plaintiff did not intend to submit a nomination and was unaware of any other stockholder who intended to do so. *E.g.*, A095. The court below therefore denied expedition. A119; A128.

Assad filed his initial complaint on June 26, 2024, the same day as the hearing on Siegel's motion to expedite. A053. Assad also sought expedition, but abandoned his motion in light of the denial of Siegel's motion to expedite.[11]

After *Kellner* was issued, Defendants moved to dismiss the original complaints under Rules 12(b)(1) and 12(b)(6). A015-16; A050. Plaintiffs opted to amend their complaints in response to Defendants' motions and, in the Complaints, affirmatively disclaimed any facial challenge to the Bylaws. A145; A255.

[11] For efficiency, the parties agreed to treat certain rulings in the *Siegel* case as applicable to the *Assad* case. A302, A308 n.12.

In September 2024, Defendants moved to dismiss the Complaints under Rule 12(b)(1) for lack of subject-matter jurisdiction over Plaintiffs' unripe claims and under Rule 12(b)(6) for failure to state a claim. A005-06; A038-39. The Court of Chancery heard argument on the motions to dismiss during a hearing in November 2024. A002; A033. After a lengthy hearing, the transcript of which spans nearly 115 pages, the Court took the motions under advisement. A529-642.[12]

In April 2025, the Court of Chancery issued a thoughtful, thorough memorandum opinion dismissing the *Siegel* complaint under Rule 12(b)(1) for lack of ripeness. AES Op. 11, 19. Given the lack of ripeness, the Court found it unnecessary to reach Defendants' Rule 12(b)(6) arguments. *Id.* at 11. In June 2025, the Court of Chancery issued a letter opinion dismissing the *Assad* complaint under Rule 12(b)(1) for the same reasons. OC Op. 7, 14.

Plaintiffs appealed both decisions, and this Court granted their motion to consolidate the appeals.

[12] In the meantime and in light of *Kellner*, both Companies adopted bylaw amendments focused on the disclosure requirements "with respect to derivative interests" in the Ownership Provisions. A217, A278; AES, 10/7/2024 Form 8-K/A, https://www.sec.gov/ix?doc=/Archives/edgar/data/0000874761/000087476124000064/aes-20241003.htm.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFFS' CLAIMS AS UNRIPE.

A. Question Presented

Did the Court of Chancery correctly dismiss Plaintiffs' hypothetical challenges to the adoption of the Bylaws under Rule 12(b)(1) for lack of ripeness where Plaintiffs—who did not dispute the applicability of Rule 12(b)(1) in the court below—(i) admitted that the Bylaws' informational requirements do not deter them or any other stockholder from making a nomination, (ii) did not contend that they would be unable to comply with the Bylaws if they made a nomination, and (iii) did not allege that the Bylaws even would require them to disclose any information if they were to make a nomination? A307-20, A370-83; B615-24, B652-61.

B. Scope Of Review

This question of law is reviewed *de novo*. *Kellner*, 320 A.3d at 257; *see also XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216 (Del. 2014) ("We review questions of justiciability *de novo*.").

C. Merits Of The Argument

The Court of Chancery correctly dismissed Plaintiffs' hypothetical claims as unripe under Rule 12(b)(1). Contrary to Plaintiffs' assertions, the facts here are not "static" and litigation between these parties is not "unavoidable," further underscoring the unripe nature of Plaintiffs' claims.

Plaintiffs' efforts to transform their hypothetical challenges into ripe claims—whether through attempted invocation of *Unocal*, hypothetical "deterrence," speculation about a future statute of limitations defense, or requests for declaratory relief—fail. The lack of ripeness of Plaintiffs' challenges is a jurisdictional defect under Rule 12(b)(1), and, even if Plaintiffs had not waived any argument to the contrary, their arguments for application of Rule 12(b)(6) to their claims do not save them.

Dismissal of Plaintiffs' unripe claims should be affirmed.

1. Plaintiffs' Claims Are Hypothetical, And Thus Unripe.

The Court of Chancery correctly found that Plaintiffs' challenges to the Bylaws are "hypothetical" and thus unripe for judicial review. AES Op. 14; OC Op. 9. That conclusion was the right one, as Delaware courts generally "refrain from issuing a purely advisory opinion on an ill developed record." *Bebchuk v. CA, Inc.*, 902 A.2d 737, 745 (Del. Ch. 2006). That is why, as relevant here, "Delaware law does not permit challenges to bylaws based on hypothetical abuses." *Openwave Sys. Inc. v. Harbinger Cap. P'rs Master Fund I, Ltd.*, 924 A.2d 228, 240 (Del. Ch. 2007) (refusing to consider "possible scenarios"); *see also, e.g.*, *Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992) ("*Stroud II*") (finding no basis for challenge to a bylaw based on "hypothetical" abuse); *Bebchuk*, 902 A.2d at 741 (declining to decide bylaw interpretation issue based on ripeness).

Bylaw challenges must "be made based on real-world circumstances by real parties," and thus equitable review only "happens when there is a genuine, extant controversy in which the … bylaw is being applied." *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949, 941, 963 (Del. Ch. 2013). This makes sense. "Fiduciary review standards are meant to address 'real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones.'" *Kellner*, 320 A.3d at 259 n.139. This Court recently reinforced the principle: "[a] court should only hear bylaw adoption, amendment, and application claims that are 'ripe for judicial determination.'" *Id.*; *id.* at 246 (only challenges "ripe for judicial review" may be considered).

Here, as the court below correctly concluded, Plaintiffs' challenges are not ripe. Plaintiffs did not "point to a single stockholder who is deterred by the Advance Notice Bylaws from nominating a director for election," nor "even allege that any of the Advance Notice Bylaws' disclosure requirements that [they] challenge would apply to [them] if [they] were to submit a nomination." AES Op. 14; *see also* OC Op. 9. Plaintiffs also did not allege that they:

- Had ever "discuss[ed] potential proxy contests" with any other stockholder, A164; A275;
- "[E]ver had" any "conversation … with other stockholders" regarding either Company's management or governance, A165; A275;

- Are limited partners in any limited partnership, much less that the identities of any of their (apparently nonexistent) limited partners "constitute commercially sensitive information," A169; A279; or

- Are entitled to or "charge[] performance-related fees such that this disclosure requirement would apply to [them] if [they] were to make a nomination," AES Op. 14; A168-69; A278-79.

Because the Complaints were devoid of any factual allegations regarding the supposedly "deterrent effect" of the Bylaws as to Plaintiffs, Plaintiffs were left to speculate about some potential "deterrent effect" the Bylaws might have on some unknown, hypothetical stockholder in some future, hypothetical circumstance involving some future, hypothetical nomination that might not even implicate the disclosure requirements. *See* A166; A277. That cannot begin to establish a genuine controversy permitting this Court's review. *See Kellner*, 320 A.3d at 259 n.139.

Underscoring the hypothetical nature of their claims, Plaintiffs effectively admitted that there is no ripe dispute. A169; A279. Siegel's counsel made clear during the hearing for expedition that AES's By-Laws deter no one:

> ATTORNEY [FOR PLAINTIFF]: … Do we have a stockholder coming up and saying I want to nominate, but I'm not going to do it because these provisions are so difficult? No.

A123-24.

> [THE COURT]: Is there a stockholder that has in any way identified or articulated that these bylaws are an actual problem to them in making a nomination?

> ATTORNEY [FOR PLAINTIFF]: … The answer is none that we are aware of.

A095; *see also* A097 ("[THE COURT]: I don't even have an affidavit or a verified allegation from anyone saying that they are even thinking about making a nomination and they are concerned by these bylaws.").

With those fatal admissions in the record, Plaintiffs now accuse the Court of Chancery of "improperly elicit[ing] [this] information" because it is "outside the pleadings" and "inferences must be drawn in Plaintiffs' favor." OB 59. Dismissal under Rule 12(b)(1) may consider information outside the pleadings, AES Op. 12; OC Op. 7, so Plaintiffs try to make this a Rule 12(b)(6) analysis. But even on a Rule 12(b)(6) motion, a court may accept counsel's concessions at oral argument. *See, e.g.*, *Teamsters Loc. 677 Health Servs. & Ins. Plan v. Martell*, 2023 WL 1370852, at *13 (Del. Ch. Jan. 31, 2023). In any event, Plaintiffs simply acknowledged what the Complaints already made clear, given the admitted absence of any allegations about nomination plans by Plaintiffs or any other stockholder. For that reason, Plaintiffs' "inference" argument is wrong, too, as it ignores that the Complaints provided no factual basis to support any inference that Plaintiffs or any other stockholder had any plans to submit a nomination, far less that the Bylaws deterred them from doing so. *See, e.g.*, *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013) ("We do not … credit conclusory allegations that are not supported by specific facts, or draw unreasonable inferences in the plaintiff's favor.").

Plaintiffs posit that they do not "speculate about future applications" of the Bylaws because they assert so-called "adoption challenges." OB 28, 34. But, as *Kellner* explained, there are two types of challenges to an advance notice bylaw: "a 'validity' challenge [or] an 'enforceability' challenge."[13] 320 A.3d at 262. As the name suggests, an "enforceability challenge" asserts that a bylaw is "unenforceable" because the board acted inequitably in "adopt[ing], amend[ing], or enforc[ing] advance notice bylaws during a proxy conte[s]t." *Id.* at 258-60. But even where the allegedly inequitable act is the adoption itself, a court cannot ask whether a bylaw is "unenforceable" without considering how it would apply if enforced in the future. *Id.* at 260; *see also id.* at 264-67 (analyzing how challenged bylaws might apply).

The ripeness standard when considering future enforcement is clear: to establish subject-matter jurisdiction, Plaintiffs must show that the enforcement-related "injury that has not yet happened is sufficiently likely to happen." *In re COVID-Related Restrictions on Religious Servs.*, 326 A.3d 626, 642 n.117 (Del. 2024) ("*COVID II*").[14] Here, Plaintiffs request injunctions against any future

[13] The former is a legal claim; the latter, an equitable one. *Kellner*, 320 A.3d at 259 & n.142.

[14] Even if Plaintiffs were right that in some circumstances "ripeness addresses whether the court *should* exercise the subject-matter jurisdiction it already has," OB 52 (emphasis in original), it would not prove ripeness is not jurisdictional here. Federal courts have long distinguished between jurisdictional ripeness based on "Article III limitations on judicial power" and prudential ripeness based on case-specific factors. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808

enforcement of the Bylaws despite having no reasonable apprehension of a need for such enforcement. *See* A173; A284. In the absence of any allegation that Plaintiffs or any other stockholder intends to submit a nomination, concern about "the prospect of inequitable or defensive enforcement by the board," OB 45, is exactly the sort of "hypothetical and speculative" harm that fails to establish jurisdiction over a request for injunctive relief, *see COVID II*, 326 A.3d at 641. In other words, Plaintiffs' characterization of their claims as "adoption" claims does not cure their hypothetical nature nor make them ripe.

2. The Facts Are Not "Static" And Litigation Between These Parties Is Not "Unavoidable."

The Court of Chancery correctly observed that "[w]hether any such stockholder will step forward in the future is unknown, and the facts that might arise in such an instance are not static." AES Op. 15; OC Op. 10. Plaintiffs disagree, insisting that, because the adoptions of the Bylaws happened in the past, there are "no relevant 'facts that might develop in the future.'" OB 30.

Plaintiffs miss the point. The ripeness inquiry focuses on the "existence of an actual controversy ***between the parties***," *Ackerman v. Stemerman*, 201 A.2d 173,

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(2003); *see Crescent/Mach I P'rs L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 n.7 (Del. 2008) ("The Delaware courts have announced justiciability rules that closely resemble those followed at the federal level."). As explained below, the ripeness defect here is squarely jurisdictional. And even if it were not, prudential considerations weigh heavily in favor of declining jurisdiction.

175 (Del. 1964), and specifically on "the interests of ***the party*** seeking immediate relief," *XL Specialty*, 93 A.3d at 1217. In asking whether "the material facts are static," the ripeness inquiry is concerned with whether "the rights of ***the parties*** are presently defined rather than future or contingent." *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 481 (Del. 1989) ("*Stroud I*"). Here, there are no "facts"—static or otherwise—establishing an actual dispute between ***these Plaintiffs and these Defendants***. The "facts" surrounding the Bylaws' adoption to which Plaintiffs point are nothing more than "excerpts from a few slides in a slide deck" and "a handful of vanilla memorandum excerpts and meeting minutes." AES Op. 16; OC Op. 11. They do nothing to establish that ***these Plaintiffs*** have an interest in immediate relief or any "presently defined" right to the relief they seek. *Stroud I*, 552 A.2d at 481. These so-called "facts" are therefore "just not enough … to demonstrate that a genuine, extant controversy exists" between these Parties or to "transform this dispute from an 'imagined' one to a 'real-world' one." AES Op. 16 (quoting *Kellner*, 320 A.3d at 259 n.139); OC Op. 11.

Nor is litigation unavoidable. Plaintiffs do not even attempt to explain how or why litigation is unavoidable "between the[se] parties." *Ackerman*, 201 A.2d at 175. Plaintiffs did not allege that the Bylaws even apply to them, much less in a way that is inequitable or unenforceable, or that the Bylaws resulted in the rejection of any (nonexistent) nominations. Hypothetical future lawsuits by unknown parties are

exactly the sort of "uncertain and contingent events" that fail to establish ripeness. *XL Specialty*, 93 A.3d at 1217-18.

3. Plaintiffs' Efforts To Transform Their Hypothetical Challenges Into A Ripe Dispute Fail.

a. *Unocal* Is No Substitute For Ripeness.

Plaintiffs try to transform their unripe claims into ripe ones by invoking an enhanced standard of review (that, in any event, is inapplicable, *see infra* 51-58). But whether a claim is ripe and which standard of review applies are two separate questions. The Court reaches the question of which standard of review to apply only if Plaintiffs first establish the threshold question of ripeness. *VT S'holder Representative, LLC v. Edwards Lifesciences Corp.*, 2023 WL 8597956, at *13 (Del. Ch. Dec. 12, 2023) (declining to address the merits of an unripe claim "because, without a claim ripe for judicial adjudication, the Court does not have jurisdiction under the Declaratory Judgment Act"), *aff'd*, 326 A.3d 370 (Del. 2024) (TABLE); *see also Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2022 WL 34688, at *7 (Del. Ch. Jan. 4, 2022) ("I address subject matter jurisdiction first, as I can only substantively review the pleadings if I have jurisdiction to do so."), *aff'd sub nom. Mobile Invs., LLC v. Tygon Peak Cap. Mgmt., LLC*, 315 A.3d 445 (Del. 2024) (TABLE).

Nevertheless, Plaintiffs demand the Court adopt their backward approach and find that any assertion of a purported "*Unocal* claim" satisfies the threshold issue of

ripeness. *See* OB 35-37. Essentially, Plaintiffs ask this Court to reach the merits because their claim is ripe, and urge that their claim is ripe because of its merits. Plaintiffs cite no authority for this approach, which is unsurprising given that the Court of Chancery has rejected such "circular" arguments before because "the fact that the claims are not yet ripe precludes the Court from considering the merits." *VT S'holder*, 2023 WL 8597956, at *12 n.161 (granting Rule 12(b)(1) motion to dismiss).

b. Speculation About "Deterrence" Cannot Establish Ripeness.

Next, Plaintiffs insist their claims are ripe because of the supposed "present deterrent effect" of the Bylaws. OB 38. But Plaintiffs' Complaints contain no well-pleaded, non-speculative factual allegations of deterrence. Plaintiffs did not allege that they or any other stockholder are deterred. AES Op. 14; OC Op. 9. Instead, Plaintiffs alleged only that some hypothetical stockholders in some hypothetical circumstances could be deterred. AES Op. 14; OC Op. 9. These "conclusory allegations that are not supported by specific facts" are entitled to no "credit" from this Court. *Norton*, 67 A.3d at 360.

Even if Plaintiffs' hypotheticals had adequately alleged deterrence, Plaintiffs cite no case finding an advance notice bylaw challenge ripe because of the bylaw's supposed deterrent effect. Plaintiffs nevertheless contend that "long-standing Delaware precedent" shows that they need not allege any stockholder is actually

chilled "for a defensive measure to have a deterring effect or a claim to be ripe." OB 43. Plaintiffs are wrong. The single quotation they put forth in support of that argument, OB 44, is drawn from the description of a bylaw where compliance was literally impossible because the bylaw required notice of nominations seventy days before a meeting scheduled just sixty-three days in advance. *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 912 (Del. Ch. 1980). Ripeness was not at issue in that case, as it involved a plaintiff who was actively "attempting to wage a proxy contest." *Id.* at 907. Nor was ripeness at issue in *Williams Companies Stockholder Litigation*, and the language quoted by Plaintiffs there, OB 43, is from the court's analysis of whether the deterrent effects of a poison pill allowed the plaintiff to assert a direct, rather than derivative, claim. 2021 WL 754593, at *20 & n.233 (Del. Ch. Feb. 26, 2021), *aff'd sub nom. Williams Cos. v. Wolosky*, 264 A.3d 641 (Del. 2021) (TABLE).

That exposes the fundamental problem with Plaintiffs' alleged-deterrence-therefore-ripeness theory. A deterrent depends, by definition, on the "bad consequences" it threatens. *Deterrent*, BLACK'S LAW DICTIONARY (12th ed. 2024). But Plaintiffs cite cases involving rights plans, dead hand proxy puts, and fee-shifting bylaws—provisions imposing catastrophic negative consequences on stockholders who trigger them. OB 38 & n.121, 43, 48. As the Court of Chancery correctly concluded, as compared to advance notice bylaws, "the consequences

associated with stockholder rights plans and dead hand proxy puts are altogether different in kind." AES Op. 19; OC Op. 13.

Take Plaintiffs' rights plan cases. Triggering the rights plan in *Moran v. Household International, Inc.* would have resulted in a "dilution of the acquiror's capital" that was "immediate and devastating." 490 A.2d 1059, 1066 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985). The rights plan in *Williams* had similar "dilutive effects." 2021 WL 754593, at *6; *see also id.* at *1, *4 n.38 (stating that the "flip-over feature of the *Moran* pill was augmented by a flip-in feature" in the challenged pill and explaining the flip-in feature's operation). Those negative consequences had a "present depressing effect" on the plaintiffs' "entitlement to receive and consider takeover proposals and to engage in a proxy fight." *Moran*, 490 A.2d at 1072. The Complaints alleged no analogous harm here. *See* A626-27. And in any event, the "consequences" of certain stockholder communications here—providing required disclosures under the Bylaws—are a far cry from the consequences of allegedly similar communications in a poison pill case like in *Williams* or *Moran*. AES Op. 17-19.

Plaintiffs' next case, *Solak v. Sarowitz*, involved a fee-shifting bylaw. 153 A.3d 729, 733 (Del. Ch. 2016). Applying a "common sense assessment," the court found that a facial validity challenge was ripe because of the "significant risk of personal liability" for "millions of dollars in attorneys' fees" that the bylaw

presented. *Id.* at 737-38. The *Solak* court's point was not that the fee-shifting bylaw imposed "*immediate* financial consequences" in a temporal sense as Plaintiffs contend. OB 48 (emphasis in original). It was that the consequences of the bylaw were automatic once it was triggered. *Solak*, 153 A.3d at 735, 738. Here, in contrast, Plaintiffs' speculative fears of the "costs of a campaign" or "costly litigation" are not built-in features of triggering the Bylaws. OB 46. The Bylaws are merely informational requirements that do not automatically trigger anything. Besides, Plaintiffs disclaimed the facial challenge the *Solak* court found to be ripe, and the ripeness analysis for a bylaw that cannot operate lawfully under any circumstances may differ from that of an as-applied challenge. *E.g.*, *Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2016 WL 5865004, at *13 (Del. Ch. Oct. 7, 2016) (dismissing as-applied challenge as unripe, but declining to dismiss facial challenge), *aff'd*, 186 A.3d 798 (Del. 2018) (TABLE); *Wright ex rel. Better Home & Fin. Hldg. Co. v. Farello*, 2025 WL 3012956, at *3 (Del. Ch. Oct. 27, 2025) (concluding that conditioning ripeness of facial challenge "on the presence of factors that would ripen an as-applied challenge" would mark "a change in Delaware law").

Finally, Plaintiffs cite *Pontiac General Employees' Retirement System v. Ballantine*, C.A. No. 9789-VCL, at 73 (Del. Ch. Oct. 14, 2014) (TRANSCRIPT), for their argument that, like a rights plan, an advance notice bylaw adopted preemptively but never challenged is a particularly effective deterrent. OB 38, 48.

But here too, advance notice bylaws are nothing like the provision in Plaintiffs' case. AES Op. 18 n.86. Under the "dead hand proxy put" in *Pontiac*, a replacement of a majority of the board constituted default by the company, and default "on any …loans in excess of $10 million" automatically triggered default on hundreds of millions of dollars of debt. *Pontiac*, C.A. No. 9789-VCL, at 69-70. The provision was essentially a "warning [to] stockholders" that if they supported "the insurgent slate," the company could end up defaulting on all of its debts. *Id.* at 20. The plaintiff's claim there was ripe for judicial consideration based on the specific "facts and circumstances," which included the "rise of stockholder opposition, the identified insurgency, the change from the historical practice in the company's debt instruments, the lack of any document produced to date suggesting informed consideration of this feature, the lack of any document produced to date suggesting negotiation with respect to this feature, etc." *Id.* at 75-76. Indeed, the *Pontiac* court specifically disclaimed any dependence "on any theory that entering into an agreement that contains a proxy put is a per se breach of fiduciary duty." *Id*. at 76.

Plaintiffs ask for just such a *per se* rule here. Plaintiffs identify no known insurgency and no change in either Company's historical practice. In fact, the materials incorporated into the Complaints reflect that the Boards considered the Bylaws against the current governance landscape, did not act out of step with the amendments adopted by other companies, and did not adopt requirements that had

been challenged as "draconian." A158-61. Instead, the directors thoughtfully considered each proposed change and the rationale for such change.

In sum, the burden of establishing ripeness is "demanding," *Maloney-Refaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 882 n.29 (Del. Ch. 2008), and cannot be satisfied where Plaintiffs fail to identify even a single stockholder who is deterred, *see Bebchuk*, 902 A.2d at 740; *In re Allergan, Inc. S'holder Litig.*, 2014 WL 5791350, at *7 (Del. Ch. Nov. 7, 2014).

c. Arguments About The Statute Of Limitations Or Declaratory Relief Do Not Cure Lack Of Ripeness.

Ignoring the fundamentally hypothetical nature of their claims, Plaintiffs argue that their claims must be deemed ripe because otherwise they will "evade judicial review" as as-applied challenges are typically "subject to a three-year statute of limitations." OB 66. This argument proves too much and would effectively prevent any claim from being dismissed as unripe, as every claim is subject to a limitations period. Just as Plaintiffs cannot invoke a standard of review as a substitute for ripeness, they cannot invoke the statute of limitations on a hypothetical future claim.

Plaintiffs' requests for declaratory relief do not save them either. That is because the "existence of an actual controversy between the parties is a jurisdictional fact in actions for declaratory judgments." *Ackerman*, 201 A.2d at 175. For an "actual controversy" to exist, Delaware courts have long held that a case must satisfy

a four-part test that, among other things, requires that the controversy "be ripe for judicial determination" and "be between parties whose interests are real and adverse." *XL Specialty*, 93 A.3d at 1217. Plaintiffs fail the test at the threshold because they have no "real" or "adverse" interest. They did not allege that they, or anyone else, are deterred from submitting a nomination or that compliance with the Bylaws would be difficult for them or any other identified would-be nominator. They did not allege that the Boards were using the Bylaws against them inequitably. An allegation that some hypothetical stockholder who might make a nomination in the future might be deterred by the Bylaws does not establish any "real and adverse" interest or "actual controversy" today. *Id.*; *see also Allergan*, 2014 WL 5791350, at *7 ("The dispute between the parties, therefore, must be actual, not hypothetical.").

But even the mere "existence of a controversy is not determinative." *Stroud I*, 552 A.2d at 480. The Court must also adjudge that "the interests of those who seek relief from the challenged action's ***immediate*** and ***practical*** impact upon ***them***" outweigh the Court's interest "in postponing review until the question arises in some more concrete and final form." *Id.* That balancing weighs conclusively in favor of postponing review here because, as the Court of Chancery observed, Plaintiffs failed to allege that the Bylaws have any immediate or practical effect on them, given that they did not allege that they, or any other stockholders, are actually deterred from nominating any director candidate. AES Op. 14; OC Op. 9-10.

By contrast, the Court's interest in postponing review until the question arises in a "more concrete and final form" is significant. OC Op. 12. By that time, "the Court will have some practical footing on which to ground equitable analysis." *Id.* at 9-10. Until then, "equitable review is ill-advised and ill-suited to the circumstances, like a lever without a fulcrum." *Id.* at 10. Furthermore, deciding Plaintiffs' disputes now, without any genuine controversy, would see already "limited" judicial resources "squandered on disagreements that have no significant current impact." *Stroud I*, 552 A.2d at 480. As the Court of Chancery queried, if Plaintiffs' claims "demand equitable review here, why not, as a practical matter, in essentially every other bylaw case as well?" AES Op. 17 n.80. In response, Plaintiffs argue that "the Court of Chancery has a variety of methods by which it can manage its docket," OB 69, but they miss the point. Finding that claims based on such flimsy, hypothetical allegations are ripe for judicial review would be inconsistent with *Kellner* and the weight of authority that preceded it. *Cf. Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023) (stating "Delaware policy does not encourage" "plaintiffs' counsel to pursue meritless claims" in hopes of a mootness fee).

Besides wasting party and scarce judicial resources, adjudicating Plaintiffs' unripe claims now risks "taking an inappropriate or premature step in the development of the law." *Stroud I*, 552 A.2d at 480. That development is supposed

to involve application of "common law principles to concrete factual circumstances that have created real and present controversies," *KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380, 382 (Del. Ch. 1997), not Plaintiffs' hypotheticals. That is why the Court exercises "special caution to ensure that matters that raise 'novel' and 'important' issues are ripe for adjudication." *Crescent/Mach*, 962 A.2d at 209; *see also* OC Op. 12 (crafting a rule based on "Plaintiff's hypothetical challenge" "risks an 'improvident or premature decision' in an important, complex and evolving area of our law"). Advance notice bylaws are just such an issue, as they continue to "evolve[] over time to meet changing market conditions and to adjust to evolving federal securities regulations." *Kellner*, 320 A.3d at 258.

Because the Court's interest in deferring resolution of the unripe claims raised in the Complaints far outweighs Plaintiffs' (supposed) interest in relief from the Bylaws' (nonexistent) impact on them, the Court should affirm dismissal.

4. Lack Of Ripeness Is A Jurisdictional Defect Properly Considered Under Rule 12(b)(1), And Plaintiffs Waived Any Argument To The Contrary.

a. Ripeness Is A Question Of Subject-Matter Jurisdiction.

Plaintiffs' "hypothetical and speculative" allegations are not enough to "carry [their] burden to establish subject matter jurisdiction." *COVID II*, 326 A.3d at 641-42. Delaware courts have long treated ripeness as a jurisdictional question. *E.g.*, *id.*; *Crescent/Mach*, 962 A.2d at 208; *Stabler v. Ramsay*, 88 A.2d 546, 553 (Del.

1952); *Bebchuk*, 902 A.2d at 740.[15] Plaintiffs' own authority recognizes that Rule 12(b)(1) is "a suitable vehicle" for challenging claims as unripe. *Gandhi-Kapoor v. Hone Cap. LLC*, 307 A.3d 328, 342 (Del. Ch. 2023), *aff'd sub nom. CSC Upshot Ventures I, L.P. v. Gandhi-Kapoor*, 326 A.3d 369 (Del. 2024) (TABLE).

Treating ripeness as a question of subject-matter jurisdiction makes sense. "The Delaware Court of Chancery is a court[] of equity," and therefore has "that limited jurisdiction that the Court of Chancery in England possessed at the time of the American Revolution, or such jurisdiction as has been conferred upon it by the Delaware General Assembly." *El Paso Nat. Gas Co. v. TransAmerican Nat. Gas Corp.*, 669 A.2d 36, 39 (Del. 1995). The English Court of Chancery lacked "jurisdiction to ascertain and declare rights before a party interested has actually sustained damage." *Ferrand v. Wilson* (1845) 67 Eng. Rep. 680, 697; 4 Hare 344, 385 (EWHC (Ch)). Accordingly, "injunctions against future wrongdoing are generally unavailable." *In re COVID-Related Restrictions on Religious Servs.*, 285 A.3d 1205, 1233 (Del. Ch. 2022), *aff'd*, 326 A.3d 626 (Del. 2024). Rather, Plaintiffs "must show a reasonable apprehension of future wrong in order to establish irreparable harm, which is a threshold for injunctive relief, ***and thus for subject matter jurisdiction in the Court of Chancery***." *COVID II*, 326 A.3d at 641.

[15] *See also, e.g.*, *VT S'holder*, 2023 WL 8597956, at *5; *Nask4Innovation Sp. Z.o.o. v. Sellers*, 2022 WL 4127621, at *3 (Del. Ch. Sept. 12, 2022).

That jurisdictional requirement exactly parallels the ripeness doctrine's requirement that cases "address 'real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones.'" *Kellner*, 320 A.3d at 259 n.139. Like the jurisdictional analysis generally, ripeness "asks whether an injury that has not yet happened is sufficiently likely to happen." *COVID II*, 326 A.3d at 642 n.117. Plaintiffs' requests for declaratory relief do not change this analysis. That is because the Declaratory Judgment Act "does not provide an independent basis for jurisdiction that would not otherwise exist." *250 Exec., LLC v. Christina Sch. Dist.*, 2022 WL 588078, at *4 (Del. Ch. Feb. 28, 2022).[16]

In short, the ripeness inquiry here *is* a subject-matter jurisdiction inquiry. And subject-matter jurisdiction challenges are considered under Rule 12(b)(1). Ripeness is therefore properly considered under Rule 12(b)(1), too, as the Court of Chancery correctly concluded.

[16] Although the Declaratory Judgment Act "may be employed as a procedural device to advance the stage at which a matter is traditionally justiciable, the statute is not to be used as a means of eliciting advisory opinions from the courts." *Stroud I*, 552 A.2d at 479. In other words, the Court of Chancery has subject-matter jurisdiction in a declaratory judgment action only "if there is an 'underlying basis for equity jurisdiction measured by traditional standards.'" *Abbott v. Vavala*, 2022 WL 3642947, at *5 (Del. Aug. 22, 2022).

b. Plaintiffs Waived Their Argument That Ripeness Must Be Reviewed Under Rule 12(b)(6).

But even if there were a question as to whether ripeness is reviewed under Rule 12(b)(6) rather than Rule 12(b)(1), Plaintiffs waived that argument. Defendants moved to dismiss Plaintiffs' unripe claims under Rule 12(b)(1). A307-08; A371. Defendants explained that ripeness is jurisdictional, A307, B621, B658; A370, B615, B652, and repeatedly (and exclusively) cast their ripeness arguments in jurisdictional terms. *E.g.*, A294-95 ("[T]he Complaint is not ripe for judicial review and must be dismissed because the Court lacks subject matter jurisdiction."); A356-57 (same); A309 (explaining that Delaware courts "lack jurisdiction" over an unripe challenge to bylaws); A372 (same). For their part, Plaintiffs never objected to the application of the Rule 12(b)(1) standard for ripeness, cited virtually none of the authorities upon which they now rely, and made no mention of their new "intertwined with the merits" theory. Plaintiffs' bare recitation of the Rule 12(b)(6) standard could not have put the Court of Chancery on notice of the theories they now raise on appeal.

"Only questions fairly presented to the trial court may be presented for review" in this Court. Supr. Ct. R. 8; *see also Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) ("It is axiomatic that an appellate court will generally not review any issue not raised in the court below."). In contravention of this Court's Rules, Plaintiffs never even attempted to explain why the interests of justice exception to

Rule 8 would apply to allow them to present this argument for the first time now. Supr. Ct. R. 14(b)(vi)(A)(1). Plaintiffs waived this argument, so it should be disregarded.

The conceded applicability of Rule 12(b)(1). Plaintiffs never contested the applicability of the Rule 12(b)(1) standard to the ripeness inquiry and never argued that ripeness was not jurisdictional. Plaintiffs nevertheless contend they preserved this argument. OB 50. But their self-serving say-so is not enough. This Court's rules require a "clear and exact reference to the pages of the appendix where a party preserved each question in the trial court." Supr. Ct. R. 14(b)(vi)(A)(1). And this Court "closely scrutinize[s]" Plaintiffs' "record citations where [they] claim[]" their argument was raised below. *Shawe*, 157 A.3d at 162. Plaintiffs' references cannot bear this scrutiny. Plaintiffs cite A439 and A495, but those pages make no mention of Rule 12(b)(1). Instead, those pages quote two cases decided under Rule 12(b)(6) for what Plaintiffs called the "motion to dismiss standard." A439 (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011), and *Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *7 (Del. Ch. Dec. 20, 2019)); A495 (same). Nor did Plaintiffs mention Rule 12(b)(1) or even the word "jurisdiction" anywhere in their briefing or at oral argument below.

Because Plaintiffs "did not argue" against ripeness as a jurisdictional defect considered under a Rule 12(b)(1) standard below, "they failed to preserve that

argument on appeal." *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022).

Bare recitation of Rule 12(b)(6) standard. Nor did Plaintiffs' "bald[]" recitation below of the Rule 12(b)(6) standard preserve their argument that Rule 12(b)(6) applies to a ripeness determination and Rule 12(b)(1) does not. *Equitable Tr. Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950). Plaintiffs failed to present their arguments at all, let alone "in a manner fairly calculated to put the [Vice] Chancellor on notice of the theor[ies]" they now advance. *Id.* Nevertheless, on appeal, Plaintiffs present three new arguments. *First*, that ripeness is not jurisdictional. OB 52. *Second*, that, even though Rule 12(b)(1) applies to ripeness sometimes, it does not apply here because the ripeness inquiry is supposedly "intertwined with the merits" of Plaintiffs' claims. OB 53-55. And, *third*, that the proper inquiry is not ripeness at all, but instead standing. OB 51, 56.

If Plaintiffs had any of this in mind below, it would be news to the Court of Chancery. Plaintiffs never used the words "jurisdiction" or "intertwined" anywhere in their briefs or at oral argument below. Plaintiffs' only reference to "standing" in their briefs was in their (inaccurate) description of *Williams*. *See* A453 & A510 (claiming that the court there "rejected the defendants' argument that the plaintiffs lacked standing"). In line with their briefing, Plaintiffs made no argument regarding any of this at the hearing on Defendants' motions to dismiss. A529-642.

Moreover, in the court below, Plaintiffs cited *just two* of the fifteen authorities on which they now rely as putative support for their ripeness arguments.[17] As for the two, Plaintiffs cited them only because Defendants cited them in their opening briefs. *E.g.*, A455; A512. Even now, Plaintiffs do not so much rely on those two cases as attempt to explain them away, given that one states that ripeness "goes to the very heart of whether a court has subject matter jurisdiction," *Bebchuk*, 902 A.2d at 740 (quoted at OB 52 & n.160), and the other describes a challenge to an advance notice bylaw "as it might apply in a hypothetical situation" as "a classic example of a request for an advisory opinion that is not ripe, and [may] never become ripe, for judicial review," *Allergan*, 2014 WL 5791350, at *7 (cited at OB 54 n.166).

Plaintiffs never mentioned the other thirteen cases they now cite. For example, Plaintiffs cite *Gandhi-Kapoor*, 307 A.3d at 333, for the notion that ripeness

[17] In Part II.C.1 of their Opening Brief, Plaintiffs cite thirteen cases they never raised below, though all but one had been decided long before Defendants filed their motions to dismiss the Complaints: *In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464 (Del. 2023); *CCSB Fin. Corp. v. Totta*, 302 A.3d 387 (Del. 2023); *Appriva S'holder Litig. Co. v. ev3, Inc.*, 937 A.2d 1275 (Del. 2007); *Dover Hist. Soc'y v. Dover Plan. Comm'n*, 838 A.2d 1103 (Del. 2003); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056 (Del. 1986); *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487 (Del. 1982); *Christiana Care Health Servs., Inc. v. Carney*, 2025 WL 1541638 (Del. Ch. May 30, 2025); *Cont'l Auto. Sys., Inc. v. Nokia Corp.*, 2023 WL 1370523 (Del. Ch. Jan. 31, 2023); *Kroll v. City of Wilmington*, 2023 WL 6012795 (Del. Ch. Sept. 15, 2023); *Gandhi-Kapoor*, 307 A.3d 328; *Klein v. ECG Topco Hldg., LLC*, 2022 WL 2659096 (Del. Ch. July 8, 2022); *CLP Toxicology, Inc. v. Casla Bio Hldgs. LLC*, 2021 WL 2588905 (Del. Ch. June 14, 2021); *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

is not jurisdictional. OB 51. They never made that argument below and therefore did not cite that case. Plaintiffs rely heavily on *Appriva*, including for their "intertwined with the merits" and standing theories, *e.g.*, OB 53-54, but they did not make those arguments or cite that case below either.

Rather than advancing any of these arguments regarding the appropriate standard, Plaintiff simply assumed Rule 12(b)(6) applied to their claims because they believed they "well-plead[ed] a *Unocal* claim," and therefore, "it follows that this dispute is ripe for adjudication." A445; A502. As a result, Plaintiffs did not make their arguments regarding Rule 12(b)(1) known "in a manner fairly calculated to put the [Vice] Chancellor on notice of the theory now relied upon so strongly." *Equitable Tr.*, 77 A.2d at 550. In light of this clear waiver, Plaintiffs' Rule 12(b)(1) arguments are not properly before this Court. *Id*.

c. Even If Not Waived, Plaintiffs' Argument That Rule 12(b)(6)'s Standard Applies To The Ripeness Inquiry Does Not Save Their Claims.

Even if not waived, Plaintiffs' arguments for a Rule 12(b)(6) ripeness standard lack merit. Plaintiffs concede that ripeness challenges may be assessed under Rule 12(b)(1), *see* OB 51, even as they insist the Court of Chancery instead should have applied Rule 12(b)(6) because the ripeness inquiry is supposedly "intertwined with the merits" of their claims. OB 53-58. Plaintiffs draw this test from cases analyzing standing and argue that, because ripeness and standing are both "justiciability" issues

and because courts have applied this "intertwined with the merits" test to standing, it also should apply to ripeness. OB 53-55. Tellingly, Plaintiffs identify no authority applying this "intertwined with the merits" test to ripeness. There is no reason for this Court to do so for the first time here.

Concerns about the justiciability inquiry becoming "intertwined with the merits" do not arise with ripeness as they do for standing. That is because standing asks "whether a particular interest or injury is adequate," whereas ripeness "***assumes*** that an asserted injury would be adequate" and "then asks whether an injury that has not yet happened is sufficiently likely to happen." *COVID II*, 326 A.3d at 642 n.117. In *Appriva*, for example, the plaintiffs' standing to maintain their breach of contract claims could be determined only by first interpreting the contract. 937 A.2d at 1285 (cited at OB 55). Thus, standing was "so closely related to the merits" that it was "properly considered under Rule 12(b)(6) rather than Rule 12(b)(1)." *Id.* at 1285-86.

Here, by contrast, Plaintiffs' asserted injury—hypothetical deterrence of a hypothetical stockholder from making a hypothetical nomination because of the hypothetical rejection of that nomination for failure to comply with the Bylaws' disclosure requirements—clearly "has not yet happened" to Plaintiffs or to anyone else and is not "sufficiently likely to happen," given Plaintiffs' admissions that they have no intention to submit a nomination. *COVID II*, 326 A.3d at 642 n.117. The

Court therefore need not assess the merits of Plaintiffs' claims to determine whether Plaintiffs raise "real-world and extant disputes, rather than hypothetical and imagined future ones." *Kellner*, 320 A.3d at 259 n.139. The "intertwined with the merits" test makes no sense in the ripeness context here.

Plaintiffs' other cases do not show otherwise. Rather, one expressly recognizes that ripeness "goes to the very heart of whether a court has subject matter jurisdiction." *Christiana Care Health Servs.*, 2025 WL 1541638, at *6 (dismissing claims as unripe because they "rest[ed] on a shifting foundation" and the "potential harm… [was] indefinite"). Another, *Klein*, treated ripeness as a question of subject-matter jurisdiction and dismissed several unripe claims under Rule 12(b)(1). 2022 WL 2659096, at *2-5. It is unclear how these cases are supposed to *help* Plaintiffs here.[18]

Moreover, even if Plaintiffs' "intertwined with the merits" test applied to ripeness, it would change nothing. Plaintiffs' theory appears to be that ripeness here is intertwined with whether the Bylaws have a deterrent effect, *see* OB 58, but Plaintiffs' ripeness problem is that they did not allege that anyone, including them,

[18] Plaintiffs' other cases are no more helpful. One concerned laches, which was a "predicate of defendants' motion" to dismiss for lack of subject-matter jurisdiction. *Harman*, 442 A.2d at 502. Here there is no laches issue or any other "affirmative defense" on which Defendants must "prevail[]" to "clear[]" the way for their ripeness arguments. *Id.*

is deterred at all, AES Op. 14; OC Op. 8. Instead, at most, hypothetical stockholders might hypothetically be deterred if they found themselves in a number of hypothetical circumstances. It requires no analysis of the Bylaws—much less of the Boards' purported motivations for adopting them—to determine that those allegations, and Plaintiffs' claims based on them, are purely hypothetical. A challenge to an advance notice bylaw "as it might apply in a hypothetical situation … is a classic example of a request for an advisory opinion that is not ripe, and [may] never become ripe, for judicial review." *Allergan*, 2014 WL 5791350, at *7.

II. EVEN IF PLAINTIFFS' CHALLENGES WERE RIPE, THEY STILL FAIL TO STATE A CLAIM.

A. Question Presented

If Plaintiffs' deficient facial claims challenging the clear-day adoption of the Bylaws are instead ripe, as-applied challenges, must they be dismissed because Plaintiffs did not allege sufficient facts to (i) rebut the business judgment rule, A330-40, B675-76; A393-404, B638-39, (ii) invoke enhanced scrutiny, A330-40, B666-75; A393-404, B629-38, or (iii) state a viable claim, A341-46, B676-79; A404-09, B639-42?

B. Scope Of Review

These questions of law are reviewed *de novo*. *Kellner*, 320 A.3d at 257.

C. Merits Of Argument

Even if Plaintiffs' claims are ripe for judicial review, dismissal should be affirmed because they are nothing more than deficient facial challenges. Plaintiffs waived any argument that the Bylaws are facially invalid, including the "Ownership Provisions." To the extent Plaintiffs' challenges are anything other than facial, Plaintiffs' claims still fail as a matter of law. *First*, Plaintiffs did not allege sufficient facts to rebut the business judgment rule. *Second*, even if Plaintiffs could invoke enhanced scrutiny, they fail to state a claim under that standard. While the Court of Chancery did not reach these issues below, Defendants raised them, so this Court may affirm dismissal of the Complaints on any of these alternative grounds. *See*

Ginsberg ex rel. Davis v. Harleysville Worcester Ins. Co., 329 A.3d 504, 511 (Del. 2024).

1. Plaintiffs' Claims Are Deficient Facial Challenges Under The Guise Of As-Applied Challenges.

Plaintiffs suffer from the "confusion" this Court diagnosed "between a 'validity' challenge and an 'enforceability' challenge" in *Kellner*. 320 A.3d at 262. The hypothetical nature of their claims and the relief Plaintiffs request confirm their challenges are facial in nature—challenges they expressly disavowed. A145 & n.3; A255 & n.3; *see also* AES Op. 12 ("But Plaintiff now expressly disclaims such a claim, almost certainly recognizing the limited scope of facial validity challenges after *Kellner []*."). To the extent Plaintiffs now attempt to assert a ripe facial challenge as to the Ownership Provisions, that challenge, if not waived, fails.

a. Plaintiffs' Hypothetical Claims Are Facial Challenges.

As the Court of Chancery astutely recognized: "The fact is that Plaintiff fails to plead a ripe basis to trigger equitable review and that Plaintiff's challenge remains what it always was: a facial validity challenge." AES Op. 12 n.54. Plaintiffs challenge how the Bylaws might apply to hypothetical stockholders in hypothetical scenarios. For example, Plaintiffs alleged that it is "impossible for a nominating stockholder to comply" with the Acting in Concert Provisions, A167; A277, and that no stockholder could "be reasonably expected to comply with" the Ownership Provisions, A169; A279. These sorts of "categorical" arguments confirm that

Plaintiffs' claims are facial, not enforceability, challenges. *See Burroughs v. State*, 304 A.3d 530, 540 (Del. 2023). Though Plaintiffs insist that their claims do not present facial challenges, OB 23, this Court is not required to accept Plaintiffs' characterizations.[19]

Plaintiffs' requested relief underscores the facial nature of their challenges. Plaintiffs sought declarations that the Bylaws are "unenforceable" and permanent injunctions against them against ***any*** nomination in ***any*** circumstance, A173; A284—relief that is indistinguishable from that they would obtain in a successful facial challenge, AES Op. 11 n.54; *see also* A614-616, A624. Plaintiffs downplay this, arguing that "different claims can lead to effectively the same remedies," OB 32, but their two cases both involved situations where there was no question about against whom and in what circumstances the bylaws would be unenforceable. *See Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1082 (Del. Ch. 2004) (finding bylaw amendments adopted by the chairman to disable the board were inequitable), *aff'd*, 872 A.2d 559 (Del. 2005); *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127

[19] For example, when it comes to statutes, this Court may "treat [a plaintiff's] claim as a facial challenge … despite his insistence that he is levying an as-applied attack." *Burroughs*, 304 A.3d at 540 n.39. Likewise, a plaintiff's "classification of the suit" as direct or derivative "is not binding" on the Court, which must engage in its own inquiry by "[l]ooking at the body of the complaint." *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1035-36 (Del. 2004).

(Del. 2003) (finding bylaw amendments to change the size and composition of the board's membership to thwart proxy contest were invalid).

b. Plaintiffs Never Argued That The Bylaws Are Facially Invalid, And They Are Not.

Plaintiffs never argued in the court below that the Bylaws are facially invalid, given their disavowal of that claim. AES Op. 11 n.54; OC Op. 6. For good reason: their Complaints came nowhere close to making the required showing.

When subject to a ripe facial validity challenge, "bylaws are 'presumed to be valid,'" and that presumption can be overcome only if the party asserting invalidity "demonstrate[s] that the bylaw cannot operate lawfully under any set of circumstances." *Kellner*, 320 A.3d at 258, 263. Plaintiffs did not. The Complaints did not allege that adoption of the Bylaws violated the DGCL, were inconsistent with the Companies' certificates of incorporation, or are "otherwise prohibited" on the ground that they "cannot operate lawfully under any set of circumstances." *Id.* at 258. Plaintiffs offer only a hypothetical parade of horribles. But when considering a facial challenge "the court should not consider hypotheticals or speculate whether the bylaw might be invalid under certain circumstances." *Id.* at 263.

Indeed, the Bylaws operate lawfully under plenty of circumstances. Plaintiffs themselves are a ready example. If, for example, Plaintiffs decided to act in concert on a nomination, Assad would disclose that he was working with Siegel, who would

confirm that he was not working with any others (consistent with his allegations), and that would be that. For another, the performance-related fees present no issue, as Plaintiffs did not allege that they even have such fees to disclose. AES Op. 14; *see* A169; A279. Because the Bylaws operate lawfully in both these circumstances and more besides, Plaintiffs fail to carry their burden "to demonstrate that the bylaw cannot be valid under any circumstance." *Kellner*, 320 A.3d at 263.

c. Plaintiffs Waived Their Deficient Challenge To The Bylaws As "Indecipherable."

To the unclear extent Plaintiffs seek to challenge the validity of the Ownership Provision, they waived that argument. While a bylaw that is "indecipherable" or "unintelligible" is "invalid under 'any circumstances,'" *Kellner*, 320 A.3d at 263, Plaintiffs never alleged or argued below that the Bylaws were indecipherable or unintelligible. They describe the Ownership Provisions as "indecipherable" and "incomprehensibl[e]" for the first time in their Opening Brief.[20] OB 4, 20. Plaintiffs therefore waived this argument. *See Shawe*, 157 A.3d at 155.

Even if Plaintiffs had preserved this argument, it still fails. It is precisely because Plaintiffs understand what the Bylaws require that they alleged compliance would be "unreasonably difficult," if not "impossible," or that stockholders may

[20] Plaintiffs do not include the Acting in Concert Provisions in this belated attack. apparently because the Court in *Kellner* held "acting in concert" language was valid. 320 A.3d at 263.

hesitate to disclose "commercially sensitive" information. A150, A167-69; A261, A278-80; *see also* A164, A167-69; A276, A278-80 (describing the requirements of the Bylaws).

In any event, *Kellner* did not hold, and even Plaintiffs do not contend, that a bylaw is facially invalid simply because it is "long," "complex," or contains allegedly "vague terms." *See Wright*, 2025 WL 3012956, at *10 & n.67 (finding "long, broad, and onerous" bylaw provision "not unintelligible"). In addition, Plaintiffs mischaracterize the Ownership Provisions. For instance, Plaintiffs complain that they require disclosure of information "over an unbounded time period," OB 41, but each part is limited to the present either explicitly or implicitly, *e.g.*, A185 (AES By-Laws §§ 2.16(A)(1) (beneficial ownership "as of the date of the notice"), 2.16(B)(8) (performance-related fees the person "***is*** entitled to"); A223, A227 (OC Bylaws § 1.7(a)(2)(A)(ii) & (ix) (same)).[21]

* * *

Because Plaintiffs did not and cannot show that the Bylaws cannot operate lawfully under any circumstance, dismissal of the Complaints—which asserted only facial challenges, regardless of how Plaintiffs style them—should be affirmed.

[21] For another example, Plaintiffs fail to acknowledge that, of the 1200 words in OC's "Ownership Provision," OB 18, the preamble and non-ownership-related provisions account for nearly 700 of them.

2. If Plaintiffs' Challenges To The Bylaws Were Equitable Challenges, The Business Judgment Rule Applies.

Even if Plaintiffs' claims are equitable challenges, they are not subject to enhanced scrutiny review. Plaintiffs conceded the absence of a proxy contest, and the Complaints failed to allege facts sufficient to invoke enhanced scrutiny. Because enhanced scrutiny does not apply and the Complaints' allegations do not rebut the business judgment rule, the Complaints must be dismissed.

a. The Business Judgment Rule Applies, And The Complaints Did Not Rebut It.

Because there is no basis to apply enhanced scrutiny here (*see infra* at 52-58), the business judgment rule applies. *E.g.*, *In re Ebix, Inc. S'holder Litig.*, 2018 WL 3545046, at *8 (Del. Ch. July 17, 2018) (advance notice bylaws are "subject to the business judgment presumption" in the absence of "any present or future threat" of a proxy contest). Plaintiffs' allegations fall well short of rebutting its presumptions.

Plaintiffs concede that advance notice bylaws are "commonplace" and serve to "ensure orderly meetings and election[s]." A146 (quoting *Strategic Inv. Opportunities, LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *9 (Del. Ch. Feb. 14, 2022)); A256 (same). Advance notice bylaws also serve important "information-gathering and disclosure functions, allowing boards of directors to knowledgeably make recommendations about nominees and ensuring that stockholders cast well-informed votes." *Kellner*, 320 A.3d at 258. The Complaints contained no well-

pleaded factual allegations that the Bylaws were not "rational in the sense of being one logical approach to advancing" these purposes. *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010). Nor did the Complaints plead any facts that would provide the "basis to question the board's good faith desire to attain the proper end," *id.* at 600, in light of the fact that the Complaints affirmatively alleged that the Bylaws were adopted on a clear day when there was no threat of a proxy contest, A148, A158; A258-59. Plaintiffs therefore fail to rebut the business judgment rule.

b. The Indisputably Clear-Day Adoption Of The Bylaws Is Not Subject To Enhanced Scrutiny Review.

Plaintiffs wrongly insist that their claims are subject to review under *Unocal*. As this Court clarified, advance notice bylaws "must be twice-tested—first for legal authorization, and second by equity." *Kellner*, 320 A.3d at 259. But equitable review is not synonymous with *Unocal* enhanced scrutiny. Rather, enhanced scrutiny is just one of "three standards of judicial review" that might apply to an equitable challenge to "actions by a board of directors." *Emerald P'rs v. Berlin*, 787 A.2d 85, 89 (Del. 2001).

Selection of the appropriate standard of review, which Plaintiffs called below the "Step 0 analysis," A441; A497, is not the same as the first prong of enhanced scrutiny. Instead, the "question of what causes enhanced scrutiny to serve as the operative standard of review is a ***different*** inquiry than what it takes to satisfy or fall

short of the parameters of the test." *Pell v. Kill*, 135 A.3d 764, 785 (Del. Ch. 2016). The "Step 0 analysis" looks at "the realities of the decisionmaking context" and asks whether those realities, in that context, "can subtly undermine the decisions of even independent and disinterested directors." *Id.* This focus on external realities makes sense: enhanced scrutiny is designed for situations with subtle but "[i]nherent" "structural and situational conflicts that do not rise to a level sufficient to trigger entire fairness review, but also do not comfortably permit expansive judicial deference." *Id*.

In the context of advance notice bylaws, the situation in which directors "confront a structural and situational conflict" is "a proxy contest." *Id.* at 786. As this Court reiterated in *Kellner*, "***[i]f*** a board adopts, amends, or enforces advance notice bylaws ***during a proxy conte[s]t***, *Coster* requires a two-part analysis." 320 A.3d at 259-60; *see also id.* at 259 ("in contests for control"); *id.* at 260 (same; quoting *Coster v. UIP Cos.*, 300 A.3d 656, 672 (Del. 2023)); *id.* at 267 ("[i]n the middle of a proxy contest").

That is why this Court and the Court of Chancery have consistently found enhanced scrutiny inapplicable to the adoption of advance notice bylaws on a "clear day." *See, e.g.*, *Maffei v. Palkon*, 339 A.3d 705, 733 n.187 (Del. 2025) ("This Court has … used the 'clear day' distinction to uphold advanced notice bylaws adopted prior to an imminent proxy contest."); *BlackRock Credit Allocation Income Tr. v.*

Saba Cap. Master Fund, Ltd., 224 A.3d 964, 980 (Del. 2020); *Stroud II*, 606 A.2d at 79, 83; *Carroll*, 2025 WL 2446891, at *4; *Strategic Inv. Opportunities*, 2022 WL 453607, at *16; *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *14 (Del. Ch. Oct. 13, 2021); *In re Ebix*, 2018 WL 3545046, at *8; *AB Value P'rs, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014); *Goggin v. Vermillion, Inc.*, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011); *Accipiter Life Scis. Fund, L.P. v. Helfer*, 905 A.2d 115, 126-27 (Del. Ch. 2006).

As below, Plaintiffs do not cite even one case applying enhanced scrutiny to the adoption of advance notice bylaws in the absence of an actual or threatened proxy contest. Defendants are aware of none. In fact, Plaintiffs essentially conceded the failure of the conditions precedent for enhanced scrutiny by alleging that the Bylaws "were not adopted in response to a legitimate threat." A172; A283. This Court has made clear that such an argument undermines "an *assumption* of the first prong of the *Unocal* test." *Kahn ex rel. DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 465-66 (Del. 1996) (emphasis in original). Without any "legally cognizable threat," as Plaintiffs affirmatively conceded here, "the *Unocal* standard should not be applied." *Id.*

Nevertheless, Plaintiffs insist enhanced scrutiny applies whenever a plaintiff attempts to allege "defensive purposes." OB 36. But Plaintiffs' cited authority does not bear such an expansive reading. They cite *Coster*, but that case makes clear that

"factual circumstances drive application of *Schnell*" and that triggering enhanced scrutiny based on the board's "purpose" "requires more than merely laying out the timeline of Defendants' conduct and speculating about bad intent or purpose," which is all Plaintiffs do here. 300 A.3d at 667 n.58 (first citing *Rosenbaum*, 2021 WL 4775140, at *15-17; and then quoting *Saba Cap. Master Fund, Ltd. v. BlackRock Credit Allocation Income Tr.*, 2019 WL 2711281, at *7 (Del. Ch. June 27, 2019), *aff'd in part, rev'd in part*, 224 A.3d 964 (Del. 2020)). Furthermore, the dispute in *Coster* itself arose on a day that was anything but clear—the company's two stockholders had "deadlocked after attempting several times to elect directors," so one, the plaintiff, "filed a petition for appointment of a custodian" for the company, in response to which the company issued stock, which "diluted [plaintiff's] ownership interest, broke the deadlock, and mooted the custodian action." *Id.* at 658.

Plaintiffs' other cases do not support their argument, either. In *Stroud II*, this Court ***refused*** to apply enhanced scrutiny because "there was no threat to the board's control." 606 A.2d at 83. Likewise, both *Ryan* and *Edgio* acknowledge that whether enhanced scrutiny applies depends on the external circumstances in which the challenged corporate action was taken. *Ryan v. Armstrong*, 2017 WL 2062902, at *7 (Del. Ch. May 15, 2017) ("*Unocal* attaches when the Complaint alleges '***threatened external action*** from which it could reasonably be inferred that the

defendants acted defensively.'"), *aff'd*, 176 A.3d 1274 (Del. 2017) (TABLE); *In re Edgio, Inc. S'holders Litig.*, 2023 WL 3167648, at *15 (Del. Ch. May 1, 2023) (enhanced scrutiny triggered when the "board '***perceive[d] a threat***' to corporate control ***and*** took defensive measures in response").[22] Given Plaintiffs' admissions that there was no actual or threatened proxy contest when the Bylaws were adopted, these cases confirm that enhanced scrutiny should not apply here.

Nor is "deterrent effect" a talisman for enhanced scrutiny. As explained above, the "negative consequences" of poison pills are nothing like the disclosure requirements of advance notice bylaws. *Supra* 27-28. Courts have adopted enhanced scrutiny "exclusively as the lens through which the validity of a contested rights plan is analyzed," *Williams*, 2021 WL 754593, at *21, precisely "because of its effect and its direct implications for hostile takeovers," *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 599 (Del. 2010). There is no comparable rule automatically and "exclusively" applying enhanced scrutiny to advance notice bylaws. That is why, as the Court of Chancery correctly concluded, Plaintiffs'

[22] *Ryan* and *Edigo* are further distinguishable based on their facts. *Ryan*, 2017 WL 2062902, at *1-2, *8 (dismissing complaint under Rule 23.1 where the defendants allegedly "engineered" an acquisition as a "defensive measure, designed to make [the company, as the target] harder for [the buyer] to swallow"); *Edgio*, 2023 WL 3167648, at *17 (alleging that, after "the well-founded observation that the Company was an activist target," the board negotiated a provision in a stockholders' agreement prohibiting the sale or transfer of stock to a specified list of investors deemed likely to launch an activist campaign).

reliance on cases involving stockholder rights plans and dead hand proxy puts is misplaced; "an advance notice bylaw is not like a stockholder rights plan or dead hand proxy put." AES Op. 18; OC Op. 13.

Plaintiffs' other cases are equally unavailing. *See* OB 43-44 & n.131. In *Lerman*, the directors set a meeting date sixty-three days into the future when they knew that the plaintiff was seeking a stocklist "for the express purpose of waging a proxy contest" and would be unable to comply with a bylaw requiring submission of nominations seventy days before the annual meeting. 421 A.2d at 913-14. The Court of Chancery found that the act of "fixing [of] the date for the annual meeting" was "invalid," *id.*, not the bylaw itself as Plaintiffs wrongly assert, OB 44. Similarly, in *MM*, the Court invalidated the board's decision to add two directors because the board's primary purpose was to prevent the plaintiff-stockholder from gaining control of the board. 813 A.2d at 1126. In *Giuricich v. Emtrol Corp.*, the parties (both 50% stockholders) were in a deadlock that "prevented the election of successor directors indefinitely," so a majority of the board (controlled by defendants) amended the bylaws to add two new seats and filled those seats with their relatives, all for the "primary purpose" of "perpetuating their control of the board" and getting "the governing hand" in executive compensation negotiations with plaintiffs. 449 A.2d 232, 234, 235, 239-40 (Del. 1982).

Plaintiffs alleged nothing of the sort here. Plaintiffs' meager allegations—the Bylaws adopted on a "clear day," A149, on which no "specific activist" had "surface[d] with a proxy challenge," A148, years after routine interactions with stockholders that did not involve proxy contests, *supra* 12-13, and the disclosure of potential environmental controversies, *supra* 13-14, by directors whom stockholder overwhelmingly support, *supra* 14—are insufficient to trigger enhanced scrutiny.

* * *

"No Delaware court has applied *Unocal* in the absence of a danger to corporate policy and effectiveness[.]" *Stroud II*, 606 A.2d at 83. This Court should not be the first. To the extent Plaintiffs asserted equitable claims at all (they did not) and even if those claims were ripe (they are not), the business judgment rule applies and dismissal of the Complaints should be affirmed.

3. The Complaints Fail To State A Claim.

Even if Plaintiffs could invoke enhanced scrutiny here, their claims still fail. Under *Coster*, courts must (1) "review whether the board faced a threat 'to an important corporate interest or to the achievement of a significant corporate benefit'" and, if so, (2) determine "whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise." 300 A.3d at 672-73. Plaintiffs' allegations fall short on both fronts.

a. Plaintiffs Failed To Allege That The Boards Acted Improperly In Response To Specific Threats.

The "clearest" circumstance that justifies enjoining an advance notice bylaw is where the board, "***aware*** of an imminent proxy contest, imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult, thereby thwarting the challenger entirely." *Kellner*, 320 A.3d at 267 n.199.

Plaintiffs acknowledged that neither Company faced an actual or imminent proxy contest when the Boards adopted the Bylaws. A148, A158; A258-59. Plaintiffs' allegations about long-ago, irrelevant proposals, speculation about a "stake" holder's potential plans, baseless concerns about the Companies' performance, mischaracterization of stockholder support for the directors, and disclosures of theoretical risks of environmental "activism" do not change that. OB 5-7. Rather, the Complaints' own allegations confirm that the Boards considered the Bylaws in the context of developments in the governance landscape and sought to adopt amendments in step with other companies. A158; B058; A270-71; B254. Such an ongoing review was far from being a fiduciary breach; as the Court of Chancery suggested, directors may have a duty to conduct such reviews. *See* A584-85, A588. The materials incorporated into the Complaints reflect that each Board conducted its review and adopted the Bylaws based on the rationale for the proposed changes, including "the benefits of the Proposed Bylaws for the Corporation and its stockholders, which included the advantages of earlier notice of dissident

stockholders to use a universal proxy card and greater disclosure about nominating stockholders and their nominees." A270; *see also* A159-60.

Nor did Plaintiffs adequately allege that the Bylaws were adopted for improper purposes. Plaintiffs selectively quoted board materials, ignoring important context, to argue that the Bylaws were amended to enable the Companies to mount a "more effective" or "stronger" defense, if necessary to a hypothetical future proposal. OB 60. But Plaintiffs are not entitled to such a strained, unreasonable inference, particularly where the rest of the document lays bare their mischaracterization. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006) (noting that "[t]he Court of Chancery was not obligated to accept as true allegations that misstated or mischaracterized" a document and could consider "the document at issue in its entirety" on a motion to dismiss). The board materials reveal these statements to be summaries of fact, market practice, and Delaware caselaw. A158-61; A270; *see also* AES Op. 16 ("a few slides with generic references to stockholder activism"); OC Op. 11 ("a handful of vanilla memorandum excerpts and meeting minutes"). Rather than supporting Plaintiffs' inferences, these statements reflect the Boards' careful consideration of the market context and other companies' practices to ensure the Bylaws allowed "well-informed votes." *Kellner*, 320 A.3d at 258.

Even if the Boards had adopted the Bylaws to "mount a defense" against some hypothetical future activist, Plaintiffs' claims still fail. Defending against activism is not *per se* inequitable—indeed, the whole point of enhanced scrutiny review is to determine ***whether*** a particular defensive action is inequitable. *See Kellner*, 320 A.3d at 261-62. The intent to engage in conduct that may be equitable in some circumstances "is not invariably an improper purpose." *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 560 (Del. 2014). Plaintiffs are not entitled to any inference that Defendants intended to engage in future ***in***equitable conduct.

Theoretical future inequitable conduct, however, seems to be precisely Plaintiffs' concern. Plaintiffs speculate that activists "anticipate the prospect of inequitable or defensive enforcement" of the Bylaws. OB 45. But a court cannot enjoin a facially valid bylaw based solely on such "hypothetical future events." *AB Value P'rs*, 2014 WL 7150465, at *7. "Because Delaware law does not permit challenges to bylaws based on hypothetical abuses," this Court need "not consider those scenarios." *Openwave*, 924 A.2d at 240.

But even Plaintiffs' hypothetical scenarios do not demonstrate that the Bylaws operate in an inequitable manner. Contrary to Plaintiffs' assertions, it would not be "impossible" for Person A to comply with the Bylaws, OB 40, where Persons A and B "do not know each other and have never spoken" but are each knowingly acting toward a common goal with Person C, OB 17-18. Person A need only ***ask*** Person C

if C is working with any other stockholder on the nomination, and C, who is knowingly working with Person B, can disclose B's existence. Plaintiffs do not seriously contend that such a request is always and necessarily an inequitable burden.

This game of hypotheticals equally confirms the many ways in which the Bylaws operate without any conceivable issue. For example, if Person D were working alone to nominate herself to the board, she would have nothing to disclose under the "Acting in Concert" provisions or definitions, and therefore the Bylaws could not possibly deter her nomination or present any obstacle to her submission. Or suppose Person E does not have any performance-related fees to disclose (like Plaintiffs), resulting in no required disclosures under the Ownership Provisions.

This academic exercise in dueling hypotheticals, besides underscoring just how unripe Plaintiffs' claims are, goes to show how utterly Plaintiffs have failed to show that the Bylaws are "inequitable and therefore unenforceable" in any and every potential application, as they must to justify their requested relief. *Kellner*, 320 A.3d at 267.

* * *

In the absence of any allegations of an intent to thwart an actual proxy contest or other extraordinary circumstances not alleged here, a board does not act improperly by amending bylaws to enhance the information required to be included

in nominations. *Cf. Kellner*, 320 A.3d at 264. The Complaints therefore failed to plead an improper purpose under the first prong of *Coster*.

b. Plaintiffs Failed To Allege That The Bylaws Are Preclusive To The Stockholder Franchise.

The Complaints also fail to satisfy the second prong of *Coster*, because they did not adequately allege that the Bylaws are "preclusive or coercive to the stockholder franchise." *Kellner*, 320 A.3d at 260.

Most fundamentally, the Complaints pleaded no facts that the Bylaws preclude—or have any effect at all on—the free exercise of the stockholder franchise. Plaintiffs never acknowledge that, if a stockholder were to submit a nomination that did not comply with the Bylaws, the directors could still choose to accept the nomination. The Bylaws are not self-effectuating; they merely impose disclosure obligations. Plaintiffs' allegations about an "ongoing diminution of the stockholder franchise," A170; A280, are thus exactly the sort of "conclusory allegations that are not supported by specific facts" that this Court need not "credit." *Norton*, 67 A.3d at 360.

Plaintiffs' other allegations of inequity are equally infirm. It is not *per se* inequitable for a bylaw to require a nominee to disclose whether performance-related fees would entitle her to a windfall in the event of a "decrease in the value of shares of the Corporation." A185; A227. Provisions like these "requiring the disclosure of potential conflicts and 'substantial interests'" promote the "disclosure function of

advance notice bylaws" because "'[s]tockholders are entitled to know that certain of their fiduciaries ha[ve] a self-interest that [is] arguably in conflict with their own.'" *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *13 & n.168 (Del. Ch. Nov. 30, 2023).[23]

So too with the Acting in Concert Provisions. *Kellner* did not find the words "acting in concert" *per se* unreasonable; rather, it was the definition of "Stockholder Associated Person" that was unreasonable because of its "interaction" with "acting in concert." 320 A.3d at 264-65. There is no similar "Stockholder Associated Person" definition in the Bylaws here. Moreover, "acting in concert" was undefined in the bylaws considered in *Kellner* and, as a result of other definitions not alleged (or existing) here, required an "ill-defined web of disclosure[s]." *Id.* at 265. By contrast, the Bylaws here define, and limit, "acting in concert" to knowing, conscious, and intentional decision-making, and further limit the required disclosures to those acting in concert with a much more limited class of individuals, *see supra* 10-12, with the agreements, arrangements, and understandings to be disclosed anchored to the nominating stockholder "on the one hand." A197; A228.

* * *

[23] Nor is it *per se* inequitable to require disclosure of ownership interests, *Kellner I*, 307 A.3d at 1034 (such provisions are "very common" and "perfectly legitimate"), or to be long or to use technical financial terminology, *cf. Ins. Comm'r of State of Del. v. Sun Life Assurance Co. of Canada (U.S.)*, 21 A.3d 15, 20 (Del. 2011).

In short, even if enhanced scrutiny were to apply to the adoption of the Bylaws, the Complaints pleaded no facts to support the assertions that the Boards adopted the Bylaws for an improper purpose or that the Bylaws are preclusive to the stockholder franchise. Plaintiffs' claims must be dismissed.

CONCLUSION

For any of the foregoing reasons, dismissal of the Complaints should be affirmed.

/s/ Blake Rohrbacher

Blake Rohrbacher (#4750)
Matthew W. Murphy (#5938)
John M. O'Toole (#6448)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801
(302) 651-7700
Rohrbacher@rlf.com
Murphy@rlf.com
OToole@rlf.com

Attorneys for Defendants-Appellees Brian D. Chambers, Eduardo E. Cordeiro, Adrienne D. Elsner, Alfred E. Festa, Edward F. Lonergan, Maryann T. Mannen, Paul E. Martin, W. Howard Morris, Suzanne P. Nimocks, John D. Williams, Owens Corning, Jay Morse, Gerard M. Anderson, Janet Davidson, Andrés Gluski, Holly Keller Koeppel, Julie Laulis, Alain Monié, Moisés Naim, Teresa Sebastian, Maura Shaughnessy, Tarun Khanna, and The AES Corporation

OF COUNSEL:

Marjorie P. Duffy
Elizabeth A. Benshoff
Daniel C. Loesing
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
(614) 469-3939

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