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Exhibit 1

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHCOCK,	§	Case No. 346, 2019
Defendants Below-Appellants,	§	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2017-0931-JTL
and	§	
BLUE APRON HOLDINGS, INC., STITCH FIX, INC., and ROKU, INC.,	§	
Nominal Defendants Below-Appellants,	§	
v.	§	
MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated,	§	
Plaintiff Below-Appellee.	§	

BRIEF AMICUS CURIAE OF THE COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

Of Counsel:

Ryan P. Bates
BATES PLLC
919 Congress Avenue, Suite 750
Austin, Texas 78701
[Tel.] (512) 694-5268

Jeffrey P. Mahoney
General Counsel
COUNCIL OF INSTITUTIONAL INVESTORS
1717 Pennsylvania Avenue NW, Suite 350
Washington, D.C. 20006
[Tel.] (202) 261-7081

Julia B. Klein (No. 5198)
KLEIN LLC
919 North Market Street, Suite 600
Wilmington, Delaware 19801
[Tel.] (302) 438-0456

Counsel for Amicus Curiae the Council of Institutional Investors

Dated October 25, 2019

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INTEREST OF AMICUS CURIAE

The Council of Institutional Investors (CII or Council) is a nonprofit, nonpartisan association of U.S. asset owners, primarily pension funds, state and local entities charged with investing public assets, and endowments and foundations, with combined assets of approximately $4 trillion. Its associate members include non-U.S. asset owners with more than $4 trillion in assets and a range of asset managers with more than $35 trillion in assets under management. The Council's hundreds of members share a commitment to healthy public capital markets and strong corporate governance. Those members include major long-term shareowners with duties to protect the retirement assets of millions of American workers, who work to protect those assets through proxy votes, stockholder resolutions, negotiations with regulators, discussions with management, and, when necessary, litigation. The Council is a leading voice for effective corporate governance, strong stockholder rights, and vibrant, transparent, and fair capital markets, and it regularly advocates on behalf of these goals to Congress, the Securities and Exchange Commission (SEC), and state and federal courts.

The issue before the Court directly implicates the interests of the Council and its members. Private enforcement of securities rules and corporate governance norms and the pursuit of compensation for meritorious claims is "fundamental to the success of our securities markets." S. Rep. No. 104-98, at 8 (quoting SEC Chairman

Arthur Levitt). American markets' institutional commitment to overlapping modes of enforcement, both public and private, weeds out disreputable potential issuers, lowers the cost of capital, and yields significant valuation premiums. John Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 245-46 (2007). Stockholder suits under the federal securities laws are thus an important and valuable—if last-resort—mechanism to enforce good corporate governance practices of precisely the type for which the Council consistently presses. Adoption of corporate bylaws or charter provisions to limit access to a judicial forum, however, curtails the value of litigation as an enforcement mechanism. Accordingly, the Council has a strong interest in ensuring that the interpretation of the sections of the Delaware General Corporate Law (DGCL) that govern the limits of bylaw and charter provisions serves the ends of fostering good corporate governance and preserving stockholder litigation as a backstop means of guaranteeing such governance.

Pursuant to Delaware Supreme Court Rule 28(b), the Council has contemporaneously filed a motion for leave to file this brief. All parties have consented to the granting of the Council's motion.

ARGUMENT

I. MERITORIOUS STOCKHOLDER LITIGATION FULFILLS A CRUCIAL ROLE IN CORPORATE GOVERNANCE.

Meritorious stockholder litigation, whether under state corporate or federal securities laws, is a vital and necessary method of ensuring managers' and directors' fidelity to the interests of the corporation and its stockholders. Congress and the SEC alike have long recognized such litigation as a critical adjunct to regulatory enforcement. *E.g.*, H.R. Rep. No. 104-369, at 31 (1995) (describing stockholder litigation as "an indispensable tool" to "promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs"); Br. of the United States as Amicus Curiae, *Halliburton, Inc. v. Erica P. John Fund, Inc.*, at 23 (U.S. Feb. 5, 2014) ("Meritorious private securities-fraud actions are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the SEC."). Because of this critical and valuable role for litigation in protecting stockholder interests, Council policies on corporate governance strongly discourage companies from actions that would throttle stockholder litigation's efficacy without regard to its merit. *See* CII, *Policies on Corporate Governance* § 1.4, http://www.cii.org/corp_gov_policies ("An action should not be taken if its purpose is to reduce accountability to shareowners.").

While recognizing that Delaware law permits corporate charter and bylaw provisions to control the venue for litigation of intra-corporate disputes, *see* 8 DEL. C. § 115, the Council believes that further extension of that authority is unwarranted and unwise. Channeling stockholder litigation to a single forum may yield greater predictability for corporate managers, but that marginal benefit is accompanied by significant costs—principally, limiting stockholders' ability to succeed in the pursuit of meritorious claims by allowing unilateral management selection of forums that directors perceive as better insulating the board from judicial scrutiny. Moreover, stockholders often have good reason to pursue Section 11 and other federal claims in Delaware or other state courts, such as taking advantage of state-judiciary expertise on predominating issues of state law while simultaneously asserting a companion federal claim in the same forum. And the disadvantages imposed by forum-selection provisions are further magnified by board discretion to waive enforcement case-by-case, making forum-selection provisions readily susceptible to plaintiff-shopping, reverse-auctioning of claim settlements, and other abuses. For these reasons, it has long been the Council's position and policy that "[c]ompanies should not attempt to restrict the venue for shareholder claims by adopting charter or bylaw provisions that seek to establish an exclusive forum." CII, *Policies on Corporate Governance* § 1.9.

Simply put, charter and bylaw provisions that limit the forums available to vindicate stockholder rights decrease the efficacy of a critical tool for promoting good corporate governance and ensuring accountability to investors. They should not be adopted, much less judicially validated.

II. ADOPTION OF FORUM-SELECTION PROVISIONS CONTROLLING FEDERAL SECURITIES CLAIMS EXCEEDS THE MANAGEMENT AUTHORITY STOCKHOLDERS DELEGATE THROUGH THE CORPORATE CONTRACT.

A. The Limited Nature of Stockholders' Consent Circumscribes Board Authority to Governance of Internal Affairs.

Delaware law conceives of a corporation's charter and bylaws as constituting a contract among all stockholders and the corporation itself. *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013). Unlike a traditional contract negotiated and agreed by counterparties at arm's length, however, stockholders' consent to the terms of the corporate contract is not express, but rather is deemed as a matter of law by virtue of their acquisition of shares while on notice of the provisions of the corporate charter and bylaws. *See* Verity Winship, *Contracting Around Securities Litigation*, 68 SMU L. REV. 913, 922 (2015) ("No one claims that shareholders have expressly agreed to negotiated terms. Instead, shareholders are deemed to consent.").

Because of the limited nature of that consent, and because of the directors' concomitant fiduciary obligations to protect the interests of their stockholder counterparties, the subject matter of the corporate contract is necessarily limited to the relationship between the corporation and the stockholder *qua* stockholder. *Boilermakers*, 73 A.3d at 951-52; *accord* Ann Lipton, *Manufactured Consent*, 104 GEO. L.J. 583, 600 (2016) ("In sum, to the extent corporate constitutive documents are a contract, that contract only extends as far as the realm of internal affairs.").

That is, the contract between corporation and stockholder is restricted *in its nature* to internal affairs; the corporation cannot validly extend that contract to regulate relations with individuals or entities that are external to those parties' capacities as stockholders.

On the basis of that contract, Delaware courts, buttressed by the Legislature, have greenlit the adoption of forum-selection provisions governing intra-corporate disputes. *E.g.*, *Boilermakers*, 73 A.3d at 951-52 (approving provisions limited to internal-affairs claims because "the subject matter of the actions the bylaws govern relates quintessentially to the corporation's business, the conduct of its affairs, and the rights of its stockholders *qua* stockholders" (alterations omitted)); *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 233-36 (Del. Ch. 2014) (approving provision designating state other than Delaware as forum for internal-affairs claims); 8 DEL. C. § 115. And commentators have offered theoretical justifications for that outcome. *E.g.*, Joseph Grundfest & Kristen Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions*, 68 BUS. LAW. 325, 370 (2012) ("[I]nasmuch as contract rights can legitimately be regulated through forum selection provisions, it follows that stockholders' rights to pursue intra-corporate claims can also be regulated through [forum-selection] provisions.").

However, management attempts to regulate *external* affairs through charter or bylaw provisions exceed the scope of the contractual authority derived from

stockholders' deemed consent. *See* Winship, *supra*, at 923 (deemed consent is reasonably limited "to the type of contracting over internal corporate governance that is the central subject of the intracorporate bargain"). In general, "managerial actions that impact the owners' ability to pursue the limited powers owners have to discipline managers"—namely, "sell, suffrage, or sue"—demand the most exacting of scrutiny. James Cox, *Corporate Law and The Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 285 (2015). When such actions constitute the alteration of matters beyond the proper subject matter of the corporate contract, however—and particularly with respect to rules "necessary to prevent opportunistic insider behavior"—they are rightly "beyond private ordering except pursuant to the most scrupulous attention to consent's being granted." *Id.* at 286. The mere deemed-by-law stockholder consent that undergirds the corporate contract does not suffice. Lipton, *supra*, at 600. Accordingly, a board lacks authority to purport to alter the corporate contract so as to govern matters beyond the corporation-stockholder relationship defined by state corporate law—i.e., what this Court has long labeled "internal affairs."

B. Federal Securities Claims Are Not Internal Affairs.

Claims arising under the federal securities laws fall outside the natural scope of the internal-affairs doctrine, as delimited by the minimal nature of stockholders'

consent. They are, therefore, not proper subjects for boards' control through charter or bylaw provisions.

The internal-affairs doctrine "governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders." *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987). In contrast, where corporations "enter into contracts, commit torts, and deal in personal and real property," the doctrine "has no applicability." *Id.* at 214-15. The character and subject-matter of the activity are determinative, not the stockholder identity of the counterparty; thus, rights and claims arising between the corporation and someone who happens to be a stockholder do not fall within the internal-affairs doctrine merely because of that happenstance. *See Boilermakers*, 73 A.3d at 952 ("[T]he bylaws would be regulating external matters if the board adopted a bylaw that purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company . . . or a contract claim based on a commercial contract with the corporation.").

The rights against fraud and misstatements conferred under Section 11 of the Securities Act and other federal securities laws are not "peculiar to" "the relationships *inter se*" between the corporation and stockholders within *McDermott*'s meaning. 531 A.2d at 215. In their origin, their nature, and their

content, these rights attach to, and flow from, a personal capacity that is distinct from—and external to—the rightsholder's capacity as an owner of shares.

Consider the elements of the claims themselves. In the generic case, the predicate misstatement causing a Section 11 violation occurs prior to accession to stockholder status, and the harm Section 11 remedies is complete at the instant such status attaches. True, some insiders (or even subsequent purchasers) may already be stockholders when they acquire Section 11 claims, but that status is immaterial to the claims. The heart of the statute's protections is, and has always been, a third-party share purchaser who is a stranger to the corporate contract prior to her acquisition. Claims arising as a result of a third party's purchase of shares on an open market are thus not internal affairs, as they do not implicate "the rights and powers of the plaintiff-stockholder *as a stockholder*." *Boilermakers*, 73 A.3d at 952; *accord, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) ("Tender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."); *Sanders v. Pac. Gamble Robinson Co.*, 84 N.W.2d 919, 922 (Minn. 1957) ("A court can exercise its jurisdiction in a matter affecting only an individual stockholder's rights under the contract by which the stock was issued without violating the rule that a court shall not exercise visitorial powers over foreign corporations or interfere with the management of their internal affairs.").

Likewise, it is widely recognized that securities-fraud claims are personal claims, akin to torts, that do not run with ownership of the share itself, as rights arising under the corporation-stockholder contract necessarily do. For both direct and derivative intra-corporate claims, "the right to assert the claim and benefit from any recovery is a property right associated with the shares." *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1044 (Del. Ch. 2015). In contrast, a cause of action "for fraud in connection with the purchase or sale of shares" is not "a property right carried by the shares, nor does it arise out of the relationship between the stockholder and the corporation itself." *Id.* at 1056. This has been the consistent rule, and the widespread judicial understanding, ever since the Securities and Exchange Acts were first enacted. *E.g.*, *Wogahn v. Stevens*, 294 N.W. 503, 505-06 (Wisc. 1940) (a Section 11 claim "is in the nature of an action for deceit" and so "of a penal or personal rather than of a contractual nature," such that it is not assignable to subsequent purchasers). By their nature as well, these claims are thus external to the contractual intracorporate relationship.

Moreover, by definition, federal securities-fraud laws are enactments of a different sovereign authority than any state of incorporation, and they implement a body of law composed principally of mandatory terms, rather than facilitative default rules such as many of those supplied by the DGCL. Any duty breached by violation of these laws "does not arise from a director or officer's duty to the corporation or

its stockholders," meaning any claim for such breach "should not be considered an 'internal corporate claim,'" whether under DGCL § 115 or the internal-affairs doctrine that it implements. Lawrence Hamermesh & Norman Monhait, *Fee-Shifting Bylaws: A Study in Federalism*, INST. OF DEL. CORP. & BUS. LAW (Jun. 29, 2015), at https://bit.ly/2MufknZ; *see* 8 DEL. C. § 115. This Court implicitly recognized as much in *Citigroup, Inc. v. AHW Investment Partnership*, when it suggested that plaintiffs' holder claim for fraud by nondisclosure would be subject to the internal-affairs doctrine only if it implicated a fiduciary, rather than Rule 10b-5, duty to disclose. 140 A.3d 1125, 1135-36 (Del. 2016).

Indeed, the Court long ago cleaved *state* securities regulation from the ambit of internal affairs, *see Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), and other state judiciaries concur, *e.g.*, *Friese v. Superior Court of San Diego*, 134 Cal. App. 4th 693, 710 (2006). There is no substantive basis for treating federal securities laws less favorably, particularly in light of the U.S. Supreme Court's insistence that those laws would not be construed to "overlap and quite possibly interfere with state corporate law," as by their enactment Congress "did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977). Thus, "[u]nlike conflict rules on the internal affairs of a corporation, conflict rules on disclosure regulations with respect to the issuance or trading of securities do not point to the law of incorporation." Marcel

Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1619-20 (2005); *accord* Grundfest & Savelle, *supra*, at 370 (numbering securities-fraud claims among those "causes of action that [a]re not intra-corporate in nature").

As a respected former vice chancellor recently observed, the "rationale for upholding forum selection provisions in corporate charters and bylaws is inseparably linked to the bedrock concept that boards must have some measure of control over litigation that relates to the company's internal affairs." Richard Rosen & Hon. Stephen Lamb, *Adopting and Enforcing Effective Forum Selection Provisions in Corporate Charters and Bylaws* 7 (2015), at https://bit.ly/2MuyLwX. In contrast, forum-selection provisions "that seek to regulate where stockholders can bring claims that are unrelated to the corporation's internal affairs," like federal securities claims, are invalid because they fall "outside the scope of the framework to which stockholders implicitly assent." *Id.* at 8. For similar reasons, as demonstrated below, such provisions are likewise "beyond the board's authority under [DGCL] § 109(b)," and its parallel provision governing charters, § 102(b)(1). *Id.*

III. ADOPTION OF FORUM-SELECTION PROVISIONS GOVERNING EXTERNAL AFFAIRS LIKEWISE EXCEEDS CORPORATE AUTHORITY UNDER THE DGCL.

Properly interpreted, DGCL § 102(b)(1), like § 109(b), respects the same internal/external boundary, precluding corporate attempts to unilaterally impose restrictions on rights created by other sovereigns and vested in rightsholders in their capacities other than stockholders. *See* 8 DEL. C. §§ 102(b)(1), 109(b). Two independent considerations strongly support this conclusion—the statutory context in which these provisions are situated and the necessary constraints on Delaware's extraterritorial lawmaking authority.

A. The Text and Context of the DGCL Confirm the Limits of Board Authority.

"Statutory construction is a holistic endeavor." *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 543 (Del. 2015). The dubious meaning of one provision's text "is often clarified by the remainder of the statutory scheme," and "[w]hen a statute is silent on a particular matter, the otherwise detailed nature of the statute in other respects can be significant." *Id.* at 543-44. Following these interpretive principles, the context provided by DGCL § 115 clarifies that the otherwise-broad grant of authority to allocate corporation-stockholder relations in § 102(b)(1) is bounded, with respect to litigation-management provisions, at the dividing line between internal and external affairs.

Section 115, embodying the legislative reaction to *ATP Tour, Inc. v. Deutscher Tennis Bund*, makes plain that the charter and bylaw authority conferred by the DGCL is limited to managing litigation only over intra-corporate affairs. *See* 8 DEL. C. § 115. Its specification of authority to enact forum-selection provisions for internal corporate claims is naturally read as barring such provisions for other claims. *Id.* The fact that the § 115 authorization exists at all implies that specific legislative language is necessary to promulgate litigation-management provisions of this type—and thus that §§ 102 and 109 are not in fact broad enough to do so on their own. Moreover, *expressio unius est exclusio alterius*, suggesting here that by supplementing §§ 102 and 109's authority to reach forum-selection provisions but specifically limiting that authority to "internal corporate claims," the Legislature intentionally disallowed such provisions if directed to other, external claims. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007). Learned commentators agree: "There is nothing [in § 115] to suggest any intention to endorse or accomplish, by negative implication, a validation of bylaws (or charter provisions, for that matter) purporting to regulate litigation arising under any body of law (tort, contract, federal securities law) other than Delaware corporate law." Hamermesh & Monhait, *supra*. Simply put, § 115 confirms that "the DGCL did not, and after the passage of SB 75 does not, authorize such bylaws." *Id.*

Contextually, this necessary implication of § 115's text operates as a limit on the interpretation of §§ 102 and 109 as well. *See, e.g.*, J. Robert Brown, *Staying in the Delaware Corporate Governance Lane*, 54 BANK & CORP. GOV. L. REP. 4, Univ. of Denver Legal Studies Research Paper No. 15-23, at 13 (May 30, 2015), at https://bit.ly/2MLMobn ("The authority granted to corporations in Sections 102 and 109 of the DGCL was not intended to, and does not, reach beyond 'internal corporate claims.'"). In light of § 115, §§ 102 and 109 "cannot be read, despite their breadth and the presumptive validity of provisions adopted pursuant to them, to authorize provisions regulating litigation under the federal securities laws." Hamermesh & Monhait, *supra*. In other words, the line drawn by the Legislature in § 115 provides "an outer limit" to board authority, "rather than just a safe harbor." Winship, *supra*, at 921.

B. Section 102 Should Be Construed as Limiting Board Authority to Internal Affairs to Forestall Potential Constitutional Concerns.

The Court ought interpret § 102(b)(1) to respect the line dividing internal from external affairs for numerous reasons. One of those—a first principle, as it were—is the need to construe statutory language so as to avoid potential constitutional problems. Delaware courts rightly maintain a "strong judicial tradition" of presuming the constitutionality of the Legislature's enactments. *Terex Corp.*, 117 A.3d at 549. Central to that tradition is the recognition that, "[w]here a possible infringement of a constitutional guarantee exists, the interpreting court should strive

to construe the legislative intent so as to avoid unnecessary constitutional infirmities." *Id.* Appellants' interpretation of § 102(b)(1), under which corporations are authorized to set, via charter or bylaw provisions, custom rules governing external-affairs claims that displace federal or other states' laws, would risk serious confrontations with the Commerce and Supremacy Clauses and thus should be rejected, so as to avoid them.

That the federal constitution sets boundaries on state power to legislate with extraterritorial effect is settled beyond cavil. "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Edgar*, 457 U.S. at 643. Likewise as to interference with federal law: "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy [that] Congress has announced." *Anderson v. Abbott*, 321 U.S. 349, 365 (1944).

Authorizing domestically chartered corporations to override other sovereigns' laws in disputes arising in foreign jurisdictions as to matters not governed by the internal-affairs doctrine could easily run afoul of these constitutional limits. The situation would be similar to that in *First National City Bank v. Banco para el Comercio Exterior de Cuba*, where "giving conclusive effect" to Cuba's domestic

law concerning the juridical existence of Bancec presented an intolerable result because it "would permit [Bancec] to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." 462 U.S. 611, 621-22 (1983). Compare the effect of honoring Cuban law in *First National* with the hypothetical outcome of appellants' arguments: Say Delaware law permits corporations to contract around disfavored provisions of state or federal law that govern external-affairs claims brought by stockholders in sister-state jurisdictions—by definition, claims that would otherwise be subject to those sovereigns' laws. Those corporations do so, moreover, under the guise of unilaterally altering an almost infinitely malleable corporate contract founded on a thin fiction of deemed stockholder consent. By virtue of exercising power purportedly conferred by one state's corporate law, a Delaware corporation would thus, just like Bancec, be able to "violate with impunity the rights of third parties" under other jurisdictions' laws while "effectively insulating itself from liability" in those jurisdictions' courts. *Id.* Just as in *First National*, such a result could not be countenanced in our federal system of co-equal state sovereigns.

By displacing sister-state or federal law in such a manner, Delaware would be "project[ing] its legislation into other States, and directly regulat[ing] commerce therein," in a manner far more intrusive than the Commerce Clause would countenance. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S.

573, 583-84 (1986). Not only would that approach raise serious constitutional doubts, such an arrogation of legislative power would certainly inspire backlash from other states' courts, one which might well undermine the internal-affairs doctrine itself. *See* Part IV *infra*.

The prospect of such potential conflicts, however, is readily avoided. The Court need do nothing but interpret § 102(b)(1) in a manner consistent with longstanding judicial and practitioner understanding—as authorizing no more than charter and bylaw provisions that govern matters within the internal-affairs doctrine. *E.g.*, *Boilermakers*, 73 A.2d at 951-52; Hamermesh & Monhait, *supra*. Doing so on the basis of constitutional avoidance, moreover, would redound to the benefit of Delaware law, because good fences make good neighbors. If the Court affixes the internal/external divide as a constitutional matter, it would require that Delaware forego regulating some corporate affairs, but only ones that are properly the domain of other sovereigns anyway. Conversely, however, doing so would ensure that other states cannot compete with Delaware by adopting a unduly expansive interpretations of "internal" affairs for their own domestically chartered corporations. *See* Mohsen Manesh, *The Contested Edges of Internal Affairs*, at 5 (Aug. 19, 2019), https://bit.ly/2MsRpp4 (forthcoming 87 TENN. L. REV.) ("[F]or Delaware courts to assert something is an 'external' matter—for example shareholder rights arising under federal securities law—is to say that no state's corporate law can address the

matter either."). "If the doctrine is only a choice-of-law rule, then any state is free to adopt or reject it." Hon. Jack Jacobs, *The Reach of State Corporate Law Beyond State Borders*, 84 N.Y.U. L. REV. 1149, 1164 (2009). But if the Court observes the doctrine both as insulating chartering-states' authority over internal affairs from external interference *and* as an outer limit to that authority as "a principle of constitutional law, no state is free to reject it." *Id.*

However facially broad the wording of § 102(b)(1), a necessary constraint on the private ordering it enables arises from inherent federalist limitations on efforts by a state to control the laws of other sovereigns, state or federal. Construction of § 102 should avoid those potential conflicts by limiting board authority to the regulation only of internal corporate affairs.

IV. PERMITTING CORPORATE CONTRACTUAL REGULATION OF EXTERNAL AFFAIRS WOULD INVITE FEDERAL INTERFERENCE AND RETALIATION BY OTHER STATES.

The risks of interstate competition and federalization pose omnipresent challenges to Delaware's continued primacy in corporate law. The best option for managing these risks is to "structure [Delaware] law in a manner adapted to preserve its scope and reduce the likelihood that it will become the target of systematic change." Kahan & Rock, *supra*, at 1590. To reframe the sage advice Justice Ridgely offered to boards considering litigation-management bylaws, the Court "should ask itself" whether, even if potentially valid, "is it wise" for Delaware to permit companies "to adopt [these] bylaw[s]?" Hon. Henry duPont Ridgely, *The Emerging Role of Bylaws in Corporate Governance* 24 (2015), at https://bit.ly/32x4pj7. To the extent such provisions purport to govern matters beyond the core internal-affairs scope of the corporate-governance contract, it is not.

Holding that Delaware law authorizes corporate boards to effectively contradict the laws of Congress and other states in matters beyond internal corporate affairs would heighten the risk of encroachment by federal regulators. Indeed, in 2015, the then-chair of the SEC noted commissioners' concern "about any provision in the bylaws of a company that could inappropriately stifle shareholders' ability to seek redress under the federal securities laws," specifically predicting that, "[i]f the Commission comes to believe that these provisions improperly hinder shareholders'

exercise of their rights, it may need to weigh in more directly." Mary Jo White, *A Few Observations on Shareholders in 2015* (Mar. 19, 2015), at https://bit.ly/35PXKTi. Nor would congressional action be out of the question, if an expansive interpretation of board authority to unilaterally craft the corporate contract led to interstate disputes over which state's law controls in external-affairs matters. *See, e.g.*, Jacobs, *supra*, at 1166 ("Were this state of affairs to become sufficiently disruptive, it could create pressure for Congress to eliminate the conflict by enacting some kind of preemptive uniform legislation.").

Equally problematic, the absence of interstate comity inherent in such a holding would inevitably invite backlash in other states' courts, likely in the form of diminished respect for the internal-affairs doctrine. "If Delaware is perceived as being overly aggressive in expanding its own law to areas that are not traditionally subject to laws of the state of incorporation, other states may respond by changing their conflict rules to limit the scope of the internal affairs rule." Kahan & Rock, *supra*, at 1616; *accord* Timothy Glynn, *Delaware's* VantagePoint, 102 NW. L. REV. 91, 134 (2008). For that reason, Delaware courts have, in the past, "specifically rejected invitations to extend Delaware corporate law into areas already under the control of other regulators." Brown, *supra*, at 15; *see, e.g.*, *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998); *Arnold v. Soc'y for Savings Bancorp, Inc.*, 678 A.2d 533, 539 (Del. 1996). Likewise, they have recognized that, "[i]f Delaware corporations

are to expect, after [*Boilermakers*], that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes," then Delaware law must, "as a matter of comity," reciprocally respect other sovereigns' right to regulate within their appropriate spheres of authority. *City of Providence*, 99 A.3d at 242. Authorizing bylaw or charter provisions "that interfere with causes of action in other states or at the federal level" would sharply depart from that tradition of interstate comity and respect. Brown, *supra*, at 15. The Court should reject appellants' invitation to do so, as it has wisely done in the past.

CONCLUSION

For these reasons, amicus curiae the Council of Institutional Investors respectfully requests that the Court affirm the merits ruling of the Court of Chancery and hold that Delaware corporations lack authority under DGCL § 102(b)(1) to adopt charter provisions restricting the forums in which stockholders may bring federal securities-fraud or other claims external to the core corporation-stockholder relationship governed by state law.

Respectfully submitted,

/s/ Julia B. Klein
Julia B. Klein (No. 5198)
KLEIN LLC
919 North Market Street, Suite 600
Wilmington, Delaware 19801
[Tel.] (302) 438-0456

Of Counsel:

Ryan P. Bates
BATES PLLC
919 Congress Avenue, Suite 750
Austin, Texas 78701
[Tel.] (512) 694-5268

Jeffrey P. Mahoney
General Counsel
COUNCIL OF INSTITUTIONAL INVESTORS
1717 Pennsylvania Avenue NW
Suite 350
Washington, D.C. 20006
[Tel.] (202) 261-7081

COUNSEL FOR AMICUS CURIAE
THE COUNCIL OF INSTITUTIONAL INVESTORS