Not All Facial Challenges Are Ripe

*By John Mark Zeberkiewicz and Robert B. Greco**

Delaware cases resolving facial challenges to corporate governance provisions, coupled with the ensuing wave of stockholder demands and litigation that followed, may have led some to overlook the issue of ripeness in connection with facial challenges. But historically, Delaware has taken a principled approach to ripeness and emphasized its importance in this context. This article reviews more than a decade of recent Delaware cases resolving facial challenges, and the case-specific factors that rendered underlying challenges ripe in those circumstances, to conclude that those cases have not departed from Delaware's traditionally cautious approach, which continues to extend to facial challenges involving Delaware corporations.

I. Introduction

Throughout the history of corporate law, governance innovations have emerged to address the pressing issues of the day. Many of these innovations have attracted the attention of the plaintiffs' bar, resulting in challenges to their facial validity. Indeed, since the turn of the century, some of the most notable cases in Delaware involved challenges to the validity of innovative corporate governance provisions, such as fee-shifting bylaws, forum selection bylaws, federal forum selection provisions, cutting-edge features of advance notice bylaws, and covenants not to sue, and waivers of appraisal and other statutory rights. Given that the overwhelming number of public corporations are incorporated in Delaware, it is no surprise that "[f]acial challenges to the legality of provisions in corporate instruments" are frequently brought and "regularly resolved" by the Delaware courts.[1]

Recently, Delaware corporations have faced a flood of stockholder demands and litigation contesting the facial validity of provisions in corporate charters, bylaws, stockholders' agreements, and governance policies. Many of the challenged provisions were adopted on a so-called "clear day" and only challenged

* John Mark Zeberkiewicz and Robert B. Greco are directors of Richards, Layton & Finger, P.A., in Wilmington, Delaware. Richards, Layton & Finger was involved in certain of the cases discussed in this article; however, the views expressed herein are those of the authors and are not necessarily the views of Richards, Layton & Finger or its clients.

1. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 947 (Del. Ch. 2013) (quoting Lions Gate Entm't Corp. v. Image Entm't Inc., No. 2011-N, 2006 WL 1668051, at *6 (Del. Ch. June 5, 2006)).

much later in response to questions raised by the court[2] or academics.[3] The Delaware courts' routine resolution of facial challenges throughout the past decade, coupled with this wave of recent challenges, have led some to overlook the issue of ripeness in connection with facial validity claims.

But a closer look at more than a decade of these cases illustrates that they have not disturbed longstanding Delaware case law holding that, even in the context of facial challenges, jurisdiction only exists over those justiciable cases that involve issues "ripe for judicial determination."[4] Facial challenges therefore remain subject to the ripeness requirements and other "justiciability rules" applicable to other claims asserted under Delaware law, which "closely resemble" the relatively stringent requirements "followed at the federal level."[5] In support of this conclusion, this article explores Delaware's historical ripeness doctrine and more than a decade of recent facial challenges, which, in our view, have not altered this doctrine's continued application.

Rather than being diluted, Delaware's traditional justiciability requirements are as important as ever. The recent surge in facial challenges has, in large part, been driven by "entrepreneurial plaintiffs' lawyers [who] monitor public filings,"[6] and is not always perfectly aligned with the specific interests, *qua* stockholder, of the stockholders these attorneys represent.[7] Recent facial challenges, for example, frequently involve provisions that have never been invoked, are under no impending threat of being invoked, and have no ongoing chilling effect on the current rights of stockholders. In our view, the overwhelming majority of recent facial challenges involve claims that are unripe for adjudication, and for which it is premature for either the judiciary or the corporate defendant to

2. Kellner v. AIM ImmunoTech Inc., 307 A.3d 998 (Del. Ch. 2023), *aff'd in part, rev'd in part*, 320 A.2d 239 (Del. 2024); W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) [hereinafter *Moelis II*].

3. *See, e.g.*, Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REG. 1124, 1148–54 (2021); Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 930–33, 946–53 (2021).

4. Siegman v. Tri-Star Pictures, Inc., No. 9477, 1989 WL 48746, at *4 (Del. Ch. May 5, 1989) (quoting Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479 (Del. 1989)).

5. Bebchuk v. C.A., Inc., 902 A.2d 737, 740 (Del. Ch. 2006).

6. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 310 A.3d 985, 998 (Del. Ch. 2024) [hereinafter *Moelis I*].

7. In a blog post principally focused on the challenges to alleged defects in the Activision board's authorization of its then-consummated merger with Microsoft, which survived a motion to dismiss in Sjunde AP-fonden v. Activision Blizzard, Inc., No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), one corporate law professor observed that the ruling gave rise to "grumblings" among corporate lawyers at the 2024 Tulane Corporate Law Institute, contending that "the spirit of the objection, and there's some truth to this, is that it feels like formalities being enforced without a corresponding shareholder benefit. There may be a systemic benefit from adhering to the technicalities—governance restrictions in the charter, not a shareholder agreement, and of course boards should have the details of a merger agreement when approving it—but it's hard to see the benefit to shareholders by enforcing them ex post in individual cases." *See* Ann Lipton, *Activision and Delaware*, BUS. LAW PROF. BLOG (Mar. 8, 2024), https://lawprofessors.typepad.com/business_law/2024/03/activision-and-delaware.html. The post concluded that this incongruity highlighted "the weakness of relying entirely on a system of private litigation." *Id.*

expend significant resources.[8] And in our view, these challenges generally do not serve the interests of those who seek to efficiently invest capital through the Delaware corporate form. Delaware has little interest in devoting its in-demand judicial resources to resolving academic questions often posed by academics themselves, much less an interest in encouraging the unnecessary litigation of novel corporate law issues that is costly for the State's corporate citizens to defend and may pose the risk of destabilizing consequences for other corporations not given the opportunity to be heard.

II. Delaware's Historically Measured Approach to Ripeness

Before exploring facial challenges throughout the past decade, this article first reviews the ripeness standard historically applied under Delaware law. This section provides an overview of this standard, Delaware's policy of applying special caution when assessing the ripeness of challenges implicating novel or important issues of Delaware corporate law, and select historical precedent illustrating Delaware's ripeness jurisprudence in this context.

A. Delaware's Ripeness Standard

For decades, longstanding Delaware case law has recognized that facial and statutory challenges generally face the same jurisdictional hurdles as other judicial actions and may only be heard if the claims present an "actual controversy" that is "ripe for judicial determination."[9] In this regard, Delaware courts apply ripeness and other "justiciability rules that closely resemble those followed at the federal level."[10]

These justiciability requirements apply even if a facial or statutory challenge seeks a declaratory judgment under Delaware's Declaratory Judgment Act.[11] As the Delaware Supreme Court has explained, although Delaware's Declaratory Judgment Act "may be employed as a procedural device to 'advance the stage at which a matter is traditionally justiciable,'" it cannot "be used as a means of eliciting advisory opinions from the courts."[12] For the Delaware courts to have jurisdiction over such a challenge, it must meet the following four "prerequisites of an 'actual controversy'" articulated by the Delaware Supreme Court more than fifty years ago:

8. While individual companies often elect the economically rational path of settling or mooting the claims instead of defending them in the past, defense firms have made efforts to consolidate facial validity challenges to similar provisions across multiple companies. *See In re* Irrevocable Resignation Bylaw Cases, No. 2024-0538-JTL (Del. Ch.). *In re Irrevocable Resignation Bylaw Cases* involves a consolidated defense to challenges to the bylaw provisions of multiple companies requiring an advance resignation from any director who is nominated and elected pursuant to a proxy access bylaw whose nomination is later determined to have been procured through misrepresentation.

9. *Stroud*, 552 A.2d at 479–80 (quoting Rollins Int'l, Inc. v. Int'l Hydronics Corp., 303 A.2d 660, 662–63 (Del. 1973)).

10. *Bebchuk*, 902 A.2d at 740.

11. *Stroud*, 552 A.2d at 479; Ackerman v. Stemerman, 201 A.2d 173, 175 (Del. 1964).

12. *Stroud*, 552 A.2d at 479 (internal quotations omitted).

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[13]

As the Delaware Supreme Court has explained in applying these limitations to decline jurisdiction over discrete questions of statutory compliance, these prerequisites are intended to prevent parties from seeking the type of advisory opinions that "[c]ourts in this country generally, and in Delaware in particular," decline to entertain.[14] "The underlying purpose of that principle is to conserve limited judicial resources and to avoid rendering a legally binding decision that could result in premature and possibly unsound lawmaking."[15]

"A ripeness determination requires a common sense assessment of whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form."[16] This involves "a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten," together with other considerations such as "the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute."[17]

As part of assessing whether an actual controversy exists, a "ripeness determination requires a common sense assessment of whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form."[18] Put simply, "the Court will weigh the interests of the party seeking relief in obtaining a prompt resolution of the question at issue, including the harm that would be suffered if the Court waits to hear the dispute, on one hand," against "the conservation of limited judicial resources and the risk of granting an unsound judgment by ruling on a procedurally or factually premature dispute, on the other."[19]

13. *Id.* at 479–80 (quoting *Rollins*, 303 A.2d at 662–63). This requirement is not limited to declaratory judgment actions and, as a result, the Delaware Court of Chancery's jurisdiction over "cases in which (i) 'a plaintiff states an equitable claim,' (ii) 'a plaintiff requests equitable relief and there is no adequate remedy at law,' and (iii) 'jurisdiction exists by statute' . . . still depends on the existence of 'actual controversy' between the parties." Nask4Innovation Sp. Z.o.o. v. Sellers, No. 2021-0406-MTZ, 2022 WL 4127621, at *3 (Del. Ch. Sept. 12, 2022) (quoting Delawareans for Educ. Opportunity v. Carney, No. 2018-0029-VCL, 2018 WL 4849935, at *5 (Del. Ch. Oct. 5, 2018)).

14. *Stroud*, 552 A.2d at 480.

15. XL Specialty Ins. Co. v. WMI Liq. Tr., 93 A.3d 1208, 1217 (Del. 2014) (citing *Stroud*, 552 A.2d at 480).

16. *Moelis I*, 310 A.3d at 1003 (quoting *XL Specialty*, 93 A.3d at 1217).

17. *Siegman*, 1989 WL 48746, at *4 (quoting Schick, Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1238 (Del. Ch. 1987)).

18. *Moelis I*, 310 A.3d at 1003 (quoting *XL Specialty*, 93 A.3d at 1217).

19. *Nask4Innovation*, 2022 WL 4127621, at *4; *accord Siegman*, 1989 WL 48746, at *4 (explaining that the assessment of ripeness involves "a practical evaluation of the legitimate interest of the plaintiff

B. Enhanced Caution in Novel Corporate Cases

Delaware law mandates that, in assessing ripeness, the considerations outlined above be weighed with "due respect" given to "identifiable policies of the law touching upon the subject matter of the dispute."[20] For claims that implicate "'novel and important issues to Delaware Corporate Law,'" this requires that the court "be especially cautious" in determining them ripe for judication.[21] As recent history has shown, discrete statutory and facial questions can arise in innumerable situations. This can include, for example, seemingly low-stakes fee award rulings and other circumstances in which parties may focus their arguments on other issues, while devoting relatively little attention to the substance of the statutory or facial questions raised in the case.[22] Unless a novel and important corporate law question is squarely presented in a ripe controversy that turns on the resolution of the question, Delaware has long recognized that the development of its corporate law is generally best served if the question is reserved for another day in which those circumstances are before the court.[23] Otherwise, the resolution of the question not only poses a risk of "an inappropriate or premature step in the development of the law,"[24] but may also have far-reaching consequences, perhaps not apparent from the context in which a question arises, for countless other corporations and their constituents who have no opportunity to be heard on the matter. Delaware courts strive to avoid the unnecessary resolution of novel and important corporate law issues in decisions that may have this type of cascading effect on other corporations, as "[p]romoting stability in [th]e DGCL is and remains of paramount importance," and the Delaware "'General Assembly has [ ] recognized the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interests of all

in a prompt resolution of the question presented and the hardship that further delay may threaten," together with other considerations, such as "the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute" (quoting Schick, Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1238 (Del. Ch. 1987))).

20. *Siegman*, 1989 WL 48746, at *4 (quoting *Schick*, 533 A.2d at 1238).

21. VT S'holder Rep., LLC v. Edwards Lifesciences Corp., No. 2023-0316-MAA, 2023 WL 8597956, at *5 (Del. Ch. Dec. 12, 2023) (quoting Energy Partners, Ltd. v. Stone Energy Corp., No. 2402-N, 2006 WL 2947483, at *11 (Del. Ch. Oct. 11, 2006)), *aff'd*, 2024 WL 3594457 (Del. July 31, 2024) (TABLE); *accord Bebchuk*, 902 A.2d at 740 ("Especial caution is appropriate, the court noted, in matters that raise 'novel and important [issues] to Delaware Corporate law.' To engage those subjects when the dispute is not yet in a 'concrete and final form' not only risks an improvident or premature decision, but also wastes judicial resources." (quoting *Stroud*, 552 A.2d at 480–81)); *see also Nask4Innovation*, 2022 WL 4127621, at *6 (explaining that "aspects of this case may touch on 'novel and important' issues of Delaware corporate law, . . . [and that t]he implication of such issues weighs heavily in favor of the Court waiting to resolve these questions until this dispute arrives before the Court in a more concrete form" (quoting *Stroud*, 552 A.2d at 481)).

22. *See, e.g.*, Crispo v. Musk, 304 A.3d 567, 571, 586 n.106 (Del. Ch. 2023) (deciding a novel merger and acquisition (M&A) issue in a mootness fee petition on which the "parties focused most of their arguments in briefing" on ripeness and anticipatory repudiation, and the complexities of the issue were raised by the court *sua sponte* in a request for supplemental briefing, after none of the parties elected to provide the supplemental briefing requested by the court).

23. *See Bebchuk*, 902 A.2d at 740.

24. *See id.* (quoting *Stroud*, 552 A.2d at 480).

stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities.'"[25] The unnecessary resolution of novel and important corporate law issues may also tend to limit other primary selling points for corporations, their investors, and other constituents utilizing or considering Delaware's flexible, "enabling," and adaptive corporate statutes.[26]

While a notable factor in balancing these considerations is whether the claim's resolution depends on additional factual development, which may not be necessary in the case of a facial challenge,[27] this is not in and of itself outcome determinative. If a novel facial challenge does not require further factual development, yet relates to a provision that poses little immediate harm, the scale should generally tip toward preserving judicial resources and avoiding the risk of a premature or imprudent ruling, especially after accounting for the enhanced restraint that should adhere to this type of corporate law challenge. Indeed, the Delaware courts have observed that the scale will generally only tip the other way and categorize a controversy as ripe where "the material facts are static" *and* "'litigation sooner or later appears to be *unavoidable*.'"[28] A dispute fails to satisfy these

25. Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323, 353–54 (Del. 2022) (quoting Salzberg v. Sciabacucchi, 227 A.3d 102, 136 (Del. 2020)); *see, e.g.*, Williams v. Geier, 671 A.2d 1368, 1385 n.36 (Del. 1996) (denying requested relief that would raise "the specter of impermissible judicial legislation" and, "if granted, would introduce an undesirable degree of uncertainty into the corporation law").

26. *See Why Businesses Choose Delaware*, DEL. DEP'T STATE, https://corplaw.delaware.gov/why-businesses-choose-delaware/ (last accessed Oct. 11, 2024) ("A number of factors have led to Delaware's dominance in business formation. First, the statute—the [DGCL] is the foundation on which Delaware corporate law rests. The DGCL offers predictability and stability. It is shaped by corporate-law experts and protected from influence by special-interest groups. The Delaware legislature every year reviews the DGCL to ensure its ability to address current issues. The DGCL is also an enabling statute. Delaware's corporate statute is not a detailed, prescriptive 'company law' such as exists in many nations. Instead, the DGCL includes a few important mandatory requirements to protect investors and otherwise provides flexibility for corporations to carry out their business."). For example, in order to fully take advantage of the flexibility and adaptiveness that arise from the annual review of the DGCL undertaken to ensure that it is able to adequately address modern issues, governance provisions can and sometimes do provide for matters that are not then permitted under the DGCL, with the intent that if the DGCL is later amended to permit the relevant matter, the provision will automatically take advantage of this newfound flexibility without the necessity of any further authorization or amendment. Pre-2022 charter provisions of public Delaware corporations purporting to exculpate officers for personal liability for monetary damages are one such example. *See, e.g.*, Knoll, Inc., Amendment No. 3 to Form S-1 Registration Statement, Ex. 3.1, art. SEVENTH, § 5 (Nov. 24, 2004); FCB Fin. Holdings, Inc., Current Report (Form 8-K), Ex. 3.1, art. 7, § (b) (May 15, 2018); Tenon Med., Inc., Form S-1 Registration Statement (Form S-1), Ex. 3.1, art. X, § 1 (Nov. 10, 2021). Although these charter provisions had no substantive effect on stockholders (or officers) prior to the 2022 amendments to section 102(b)(7) of the DGCL that authorized charter provisions providing for certain exculpation of officers, they each presumably extended exculpation to officers automatically upon the effectiveness of the 2022 amendments on August 1, 2022. The unnecessary resolution of facial challenges to these officer exculpation provisions prior to that time would have deprived these corporations of the flexibility needed to automatically take advantage of the DGCL's modernization through its annual review and amendment process.

27. *See, e.g.*, *Siegman*, 1989 WL 48746, at *4.

28. *Stroud*, 552 A.2d at 481 ("Other common sense reasons require dismissing . . . what we find to be an advisory opinion. The grant of declaratory judgment is always discretionary; and before a court should declare the rights of parties in a dispute, it must not only 'be convinced that litigation sooner or later appears to be unavoidable,' but also that the material facts are static and that the rights of the parties are presently defined rather than future or contingent." (emphasis added) (quoting Stabler v.

requirements and "will be deemed not ripe where the claim is based on uncertain and contingent events that may not occur, or where future events may obviate the need for judicial intervention."[29] Challenges involving contingent issues that depend upon "the occurrence of some future event" are only ripe if "the probability of that future event occurring is real and substantial, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[30] This generally requires the existence of "present harms . . . flow[ing] from the threat of [the] future action."[31] Put simply, even if the facts are settled, "Delaware courts do not address 'disagreements that have no significant current impact.'"[32]

C. *Ackerman v. Stemerman* (1964): Stock Option Plan Indemnification Provisions

Delaware courts have historically applied these principles in a relatively proscriptive manner[33] through a rigid approach to ripeness that pre-dates the adoption of the modern Delaware General Corporation Law (the "DGCL") in 1967. More than sixty years ago, the Delaware Supreme Court held that the courts lacked jurisdiction over a stockholder-plaintiff's challenge to the validity of a provision of Texas Instruments Incorporated's stock option plan that was alleged to have violated the DGCL.[34] The plan provided for the establishment of a board committee charged with recommending grants to employees under the plan. The challenged provision of the plan, Paragraph 21, entitled members of this committee to broad rights to indemnification for "any action taken or failure to act under or in connection with the Plan or any option granted thereunder," against "costs and expenses," "all amounts paid by them in settlement" approved by independent legal counsel, and amounts "paid by them in satisfaction of a judgment . . . , except a judgment based upon a finding of bad faith."[35] The stockholder-plaintiff challenged the provision and sought a declaration that it

Ramsay, 88 A.2d 546, 555 (Del. 1952))); *accord Kellner*, 320 A.3d at 259 n.139 ("A court should only hear bylaw adoption, amendment, and application claims that are 'ripe for judicial determination.' A bylaw dispute is ripe when litigation is 'unavoidable' and the 'material facts are static.'" (quoting *Stroud*, 552 A.2d at 480–81)); *Moelis I*, 310 A.3d at 1003 ("Generally, a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the material facts are static." (quoting *XL Specialty*, 93 A.3d at 1217)).

29. *XL Specialty*, 93 A.3d at 1217–18 (internal quotations omitted).

30. Villages of Five Points Ventures, LLC v. Villages of Five Points Prop. Owners Ass'n, Inc., No. 2019-0094-KSJM, 2020 WL 6689973, at *5 (Del. Ch. Nov. 13, 2020) (quoting *Energy Partners*, 2006 WL 2947483, at *7).

31. *Edwards Lifesciences*, 2023 WL 8597956, at *6 (quoting *Energy Partners*, 2006 WL 2947483, at *7).

32. Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Tex., 962 A.2d 205, 209 (Del. 2008) (quoting *Stroud*, 552 A.2d at 480).

33. *See generally Stroud*, 552 A.2d at 480 ("Courts in this country generally, *and in Delaware in particular*, decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate." (emphasis added)); *In re* Allergan, Inc. S'holder Litig., No. 9609-CB, 2014 WL 5791350, at *9 (Del. Ch. Nov. 7, 2014) (recognizing Delaware's "strong policy considerations against issuing advisory opinions").

34. Ackerman v. Stemerman, 201 A.2d 173 (Del. 1964).

35. *Id.* at 174.

was invalid under the DGCL, which, at the time, only expressly empowered corporations to indemnify their directors against expenses incurred by them in the defense of certain actions, suits, or proceedings, and only did so to the extent not "in relation to matters as to which any such director . . . shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty."[36] The Delaware Supreme Court reversed the ruling of the Court of Chancery that allowed the claim to proceed, holding that the claim did not amount to an "actual controversy" over which the Delaware courts had jurisdiction given that the challenged provision "had never been called into operation and there was no future prospect of it[] ever being utilized."[37] The Delaware Supreme Court explained:

> Since the Stock Option Plan went into operation no member of the Stock Option Committee has ever received a payment in the form of indemnity under Paragraph 21 of the Option Plan, nor has any member of the Stock Option Committee ever made a claim for an indemnity payment under Paragraph 21.
>
> It seems to be that there is no imminent or contemplated application of Paragraph 21 and, as a matter of fact, only two suits have ever been instituted involving in any way the members of the Stock Option Committee the first of which was the first action started by this plaintiff and dismissed, and the second is the instant case. . . .
>
> The existence of an actual controversy between the parties is a jurisdictional fact in actions for declaratory judgments under 10 *Del. C.* § 6501. . . . In other words, the Declaratory Judgment Act is not to be used as a means of eliciting advisory opinions from the courts. There must be in existence a factual situation giving rise to immediate, or about to become immediate, controversy between the parties. The court to entertain jurisdiction of the cause must be convinced that the "actual controversy" in all probability would result in litigation sooner or later. . . . It is obvious to us that there is no factual basis for the existence of any controversy between these parties in this cause. The plaintiff is the owner of 15 shares out of 4,000,000 shares of the corporate defendant. There is no action threatened or contemplated under Paragraph 21 and if such were the case the rights of the corporation and its stockholders could be protected by appropriate action at that time. Furthermore, the question of the validity of Paragraph 21 may raise important questions regarding the Delaware Corporation Law and its public policy. Courts have always refused to make a speculative inquiry upon a hypothetical basis which may never come to pass as to the validity of statutes the effect of which in actual circumstances may not be clearly perceived or thought of. We think fundamentally this case falls within this class. It is hypothetical, speculative and based upon no concrete situation giving rise to a justifiable attack upon the provision. . . .
>
> Plaintiff has cited to us a number of cases . . . [and] argues from them that whenever there is a difference of opinion as to the meaning of a provision of a statute or agreement, an actual controversy exists which is the jurisdictional fact under 10 *Del. C.*

36. DEL. CODE ANN. tit. 8, § 122(10) (1963).
37. *Ackerman*, 201 A.2d at 175.

§ 6501. All of these cases, however, are cases in which a controversy had arisen by reason of facts under which a claim for or against liability had been made. They are not authority for the plaintiff's position which, fundamentally, comes down to a request for an advisory opinion.[38]

D. *Stroud v. Milliken Enterprises, Inc.* (1989): Short-Form Notice of Stockholders' Meeting

Applying the same principles espoused in *Ackerman* twenty-five years later, the Delaware Supreme Court held in *Stroud v. Milliken Enterprises, Inc*. that it was premature to decide, in advance of a stockholders' meeting to consider the adoption of charter amendments, whether the corporation's bare-bones notice of the meeting—which did not provide any summary or explanation of the amendments but was given in circumstances where the corporation was not soliciting proxies—complied with sections 222 and 242 of the DGCL and directors' duty of disclosure.[39] Notwithstanding that all parties to the litigation deemed the matter was ripe for adjudication, the Delaware Supreme Court found that "both parties [sought] a final judicial determination of the legal sufficiency of management's statutory notice technique before putting such process into effect" and "thereby inappropriately dr[ew] the trial court into the granting of an advisory opinion upon a significant question of corporation law which . . . was clearly not ripe for judicial intervention."[40]

E. *Moran , Toll Brothers, Chrysler, and Other Rights Plan Cases* (1985–2000s): Rights Plans and Other Contractual Obligations

The Delaware Supreme Court's decision in *Stroud* came in the middle of a period in which the Delaware courts faced numerous challenges to corporate contractual obligations—and, in particular, rights plans—that were conditional in nature and had not yet invoked. In some of these cases, the Delaware courts did, in fact, entertain facial challenges brought by stockholders. But in doing so, the Delaware courts made clear that the underlying challenges in these cases were ripe because of the immediate and ongoing harm that the challenged rights plan (or provision) imposed on the stockholder-plaintiff challenging it.

For example, the Court of Chancery addressed the issue of ripeness in the 1985 case *Moran v. Household International, Inc*., the first Delaware case upholding the adoption of a rights plan, explaining:

38. *Id*. at 175–76. Echoing the opposition of many modern facial challenges, the Delaware Supreme Court deemed it sufficiently noteworthy to observe that "[t]e Stock Option Plan of the corporate defendant was first adopted in 1957 with the approval of 98.8% of its stockholders" and that "Plaintiff became a stockholder of the corporate defendant in 1957 shortly after the approval of the Stock Option Plan and voted his stock in 1960 in favor of an amendment to the Plan increasing the number of shares subject to the Plan." *Id*. at 175.

39. 552 A.2d 476, 479–81 (Del. 1989).

40. *Id.* at 481.

> Although plaintiffs' claims plainly are predicated on the triggering of the rights and the dilution associated with the flip-over provision, the plaintiffs have not initiated this action to prevent harm that may accrue to a potential acquiror as a result of the possible dilution of its capital. Rather, *plaintiffs are contesting the Plan's present effect* on their entitlement to receive and consider takeover proposals and to engage in a proxy fight for control of Household. They also are contesting the validity of the rights under the Delaware General Corporation Law. To this extent, *the plaintiffs' suit involves the alleged present depressing effect of the Rights Plan on shareholder interests*, regardless of whether the rights are in fact ever triggered.[41]

Contrasting this to other cases "instituted to resolve the future effect of contingent events," the court found that the plaintiffs challenging the rights plan in *Moran* were seeking "a declaration that the Rights Plan, because of its deterrent features, *presently affects shareholders' fundamental rights* and is illegal under Delaware Law."[42]

Likewise, the Delaware courts have resolved stockholder challenges to the validity of rights plans in later cases post-dating *Moran* and *Stroud*, such as *Carmody v. Toll Brothers, Inc.*[43] and *In re Chrysler Corp. Shareholders Litigation*.[44] In finding these challenges ripe, the Delaware courts again cited, and in fact emphasized, the same current and ongoing effect identified in *Moran* in relation to rights plans challenged in those cases.[45] And, despite entertaining other challenges to rights plans from time to time over the years, the Delaware courts have questioned whether the resolution of those challenges has always been necessary or justified the expenditure of precious judicial resources.[46]

41. 490 A.2d 1059, 1072 (Del. Ch. 1985) (emphasis added), *aff'd*, 500 A.2d 1346 (Del. 1985).
42. *Id.*
43. 723 A.2d 1180 (Del. Ch. 1998).
44. No. 11873, 1992 WL 181024 (Del. Ch. July 27, 1992).
45. *See Toll Bros.*, 723 A.2d at 1188 ("Here, as in *Moran*, the plaintiff complains of the Rights Plan's (specifically, its 'dead hand' feature's) *present* depressing and deterrent effect upon the shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals and to vote for a board of directors capable of exercising the full array of powers provided by statute, including the power to redeem the poison pill. Because of their alleged *current* adverse impact, the plaintiff's claims of statutory and equitable invalidity are ripe for adjudication, for the reasons articulated by the Supreme Court in *Moran*."); *Chrysler*, 1992 WL 181024, at *3 ("The plaintiffs may be viewed as complaining of 'the [Rights] Plan's *present effect* on their entitlement to receive and consider takeover proposals and to engage in a proxy fight for control.' Thus, the complaint fairly alleges an injury . . . that has a present and continuing adverse effect upon the shareholders' interests, and makes their claim . . . ripe for adjudication." (quoting *Moran*, 490 A.2d at 1072)); *see also* KLM Royal Dutch Airlines v. Checchi, 698 A.2d 380, 383 (Del. Ch. 1997) (denying a motion seeking to dismiss a claim challenging a rights plan on ripeness grounds where the challenge was brought by a stockholder who held a pre-existing option that, if exercised, would trigger the rights plan and alleged "both a present injurious effect" arising from, among other things, the ongoing depression in the value of its holdings "and a strong likelihood of future harm if it cannot now obtain a declaration concerning the application of the rights plan to the exercise of its option").
46. *See, e.g.*, Leonard Loventhal Account v. Hilton Hotels Corp., No. 17803, 2000 WL 1528909, at *10–12 (Del. Ch. Oct. 10, 2000) (finding a claim contesting the facial validity of a provision in a rights plan limiting directors' liability for actions, calculations, interpretations, and determinations made under the plan to be ripe to the extent it purported to limit directors' liability to stockholders in the exercise of their fiduciary duties in relation to the rights plan, but ultimately concluding that the claim was moot after defendant conceded that the rights plan only related to the rights of stockholders and holders of the rights issued pursuant to the

Indeed, applying the same reasoning articulated in *Moran*, *Toll Brothers*, and *Chrysler*, the Delaware courts have, in other cases, found it premature or unnecessary to consider challenges to rights plans. As the Delaware courts have explained in these cases, even when a rights plan is challenged, the existence of a "prospective, even if real, deterrent effect on the likelihood of an acquisition offer" in the future may not render a claim ripe in the absence of a present effect on the individual interests of stockholders.[47]

Outside of the rights plan context, past Delaware cases have likewise found challenges to the validity of contractual obligations unripe where the challenged provision has not yet been invoked.[48]

plan in their capacity as holders of rights (and not as stockholders), explaining that the "practical effect" of this concession was that the challenged provision "in no way bar[red] any claims Hilton stockholders may bring with regard to the Rights Plan and the Hilton Board's continuing fiduciary obligations to them as shareholders," and so "[p]ractically speaking," the provision had "no legal significance whatsoever" and the challenge was "unnecessary to analyze . . . further"), *aff'd sub nom*. Account v. Hilton Hotels Corp., 780 A.2d 245 (Del. 2001); *In re* Atmel Corp. S'holders Litig., No. 4161-CC (Del. Ch. May 19, 2009) (TRANSCRIPT) (finding ripe claims challenging the validity of a rights plan amendment on the basis that the amendment was allegedly "so indefinite and uncertain in its terms that neither shareholders nor [the corporation could] determine how it operates or when it has been triggered," but nevertheless declining to grant the preliminary injunctive relief sought by the stockholder-plaintiff, explaining that "[a]lthough improper rights plans can inflict current irreparable harm on shareholders by depriving them of their entitlement to receive and consider takeover proposals, there is no evidence that plaintiff in this case will suffer such harm in the short time between now and the ultimate trial in this case," which the court was willing to hold as soon as the parties could prepare for it). As further explained later in this article, cases challenging newly adopted rights plan have, from time to time, involved ripe fiduciary challenges premised on the validity of the provisions in the rights plan challenged in the case presenting an immediate deterring and defensive effect.

47. *In re* Gaylord Container Corp. S'holder Litig., 747 A.2d 71, 77–78 (Del. Ch. 1999) ("[T]he *Moran* test seems to turn on a distinction addressed more to the ripeness than to the nature of a *Unocal* claim—whether a rights plan has an imminent defensive effect or a prospective one. If a rights plan (or other defensive measure) has merely a prospective, even if real, deterrent effect, on the likelihood of an acquisition offer, its adoption by the board cannot be challenged in an individual action. If, however, a rights plan (or other defensive measure) is adopted in response to an actual acquisition proposal, the bidder and shareholders aligned with the bidder may challenge the rights plan (or other defensive measure) as affecting their individual interests as stockholders. Note that in either case, the effects on the stockholders are similar and the nature of the board action is identical. The only difference is that in the latter case a live competition for control is influenced, and in the former case the potential for a competition for control has been reduced."); *see also* Chrysogelos v. London, 1992 WL 58516, at *4 (Del. Ch. Mar. 25, 1992) ("[T]he complaint . . . does not allege, either expressly or inferentially, that the rights plan transactions harmed the corporation or the class in any legally cognizable way. It is not alleged that the adoption or amendment of the rights plan adversely affected the shareholders' ability to elect directors, and clearly those actions did not prevent [a hostile bidder] from making its proposal. The complaint alleges only that the directors could later deploy the rights plan to deter an unsolicited acquisition or corporate combination at some future time. However, that possibility—presently abstract and divorced from any actual or threatened use against a specific, impending proposal—does not give rise to an actionable claim.").

48. *See, e.g.*, A.R. DeMarco Enters., Inc. v. Ocean Spray Cranberries, Inc., No. 191-33-NC, 2002 WL 31820970, at *8 (Del. Ch. Dec. 4, 2002) (dismissing a challenge to the validity of involuntary contractual redemption provisions that were alleged to conflict with a corporation's certificate of incorporation, explaining that the corporation "has yet to ask for an involuntary redemption of Plaintiff's shares" and, "until that occurs[,] the issue is not ripe").

F. *Diceon Electronics, General DataComm, and Bebchuk* (1990–2006): Stockholder-Proposed Bylaw Amendments

This distinction, turning on the existence of an ongoing harm or threat presently affecting stockholder interests, is exemplified by a series of cases involving the validity of stockholder-proposed bylaw amendments. In three separate cases between 1990 and 2006, disputes over the validity of stockholder-proposed bylaws were found unripe prior to impending meetings at which the bylaws in question were to be voted on by stockholders.[49]

In each of these cases, the Court of Chancery found no "compelling reasons to justify judicial intervention" regarding the validity of the proposed bylaw in advance of the stockholder vote. Rather than finding the question of validity to warrant judicial intervention, the court reasoned that "[t]he requisite information can be provided by the parties themselves, by disclosing in their proxy materials their respective positions concerning the legality of the proposal."[50]

For example, in *Diceon Electronics, Inc. v. Calvary Partners, L.P.*, the Court of Chancery determined that it was premature to consider a corporation's request

49. *See, e.g.*, Diceon Elecs., Inc. v. Calvary Partners, L.P., No. 90-753-JLL, 1990 WL 237089 (Del. Ch. Dec. 27, 1990); *Bebchuck*, 902 A.2d at 741 (finding that a stockholder's declaratory judgment action seeking a ruling on the validity of a bylaw that was proposed by the stockholder and purported to, among other things, provide for the expiration of any stockholder rights plan no later than one year following its adoption unless ratified by the stockholders, and which bylaw the corporation asserted would violate Delaware law if adopted, "present[ed] a[] . . . clear example of an unripe action" in advance of an upcoming stockholders meeting to vote on the adoption of the proposed bylaw); Gen. DataComm Indus., Inc. v. State of Wis. Inv. Bd., 731 A.2d 818 (Del. Ch. 1999) (denying a corporation's motion to expedite its action seeking declaratory and injunctive relief in respect of a bylaw that was proposed by a stockholder for adoption at the corporation's upcoming annual meeting and, if adopted, would provide that the corporation "shall not reprice any stock options already issued and outstanding to a lower strike price at any time during the term of such option, without the prior approval of the shareholders," finding the action not ripe for judication in advance of the annual meeting); *see also* Kistefos AS v. Trico Marine Servs., Inc., No. 44-97, 2009 WL 1124477, at *2–3 (Del. Ch. Apr. 14, 2009) (denying a motion to expedite a stockholder's claims in respect of a bylaw amendment the stockholder intended to present at a corporation's upcoming annual meeting, which the corporation rejected on the basis that the bylaw amendment would be invalid if adopted, after it was agreed that the corporation would hold a vote on the proposed amendment at the meeting so that "if the proposal receives the required number of votes, then the issue will be preserved and ripe for judicial review," finding this agreement eliminated any irreparable injury faced by the stockholder in the interim).

50. *Diceon*, 1990 WL 237089, at *2–3 (Del. Ch. Dec. 27, 1990); *accord Gen. DataComm*, 731 A.2d at 820 ("As in *Diceon*, the stockholders can cast an informed vote if the proxy materials disclose that there are differing views regarding the validity of the Repricing Bylaw."); *Bebchuk*, 902 A.2d at 741 ("[T]his court has twice held that cases very similar to the present case were unripe. . . . [T]he court held [in *Diceon*] that . . . 'shareholders do not need an adjudication of the by-law proposal's validity in order to cast an informed vote. The requisite information can be provided by the parties themselves, by disclosing in their proxy materials their respective positions concerning the legality of the proposal.' To the same effect is [*Gen. DataComm*], [where] . . . [j]ust as in *Diceon*, the stockholders would be able to cast an informed vote as to the proposal, and if the bylaw passed, its validity could easily be adjudicated later."). While it was been speculated that there may be more of a basis for resolving similar disputes as to the validity of a proposed bylaw through a civil action "in advance of a vote in an effort to curb a wasteful proxy process" where the proposed bylaw is "obviously invalid," the Court of Chancery has indicated that such a scenario may require "unrealistic facts," such as "an attempt to adopt a bylaw that abolishes the board of directors, or . . . attempts to force the board to meet only at the North Pole in the dead of winter." *Bebchuck*, 902 A.2d at 742.

for a declaratory judgment on the validity of a stockholder-proposed bylaw amendment.[51] If adopted at an upcoming stockholders' meeting, the bylaw in question would impose director qualifications incumbent directors could not meet and allegedly contravened the provisions of the corporation's certificate of incorporation dividing its board into classes.[52] Despite the fact that the bylaw amendment was proposed by a hostile bidder who sought to acquire control of the corporation through a combined proxy solicitation and tender offer, and who contended that the bylaw would require that the incumbents be replaced with the bidder's own nominees, the court held that the action was not ripe for adjudication. Even in these circumstances, the court found that the corporation's challenge to the validity of the proposed bylaw "ought not to be entertained unless and until (a) the [corporation's] shareholders have approved the proposed by-law under attack, *and* (b) [the hostile bidder] has taken concrete steps to enforce it against those incumbent directors whose terms are otherwise protected by the board classification provisions."[53] At least two later Court of

51. *Diceon*, 1990 WL 237089.

52. *Id*.

53. *Id*. at *1 (emphasis added). Following these cases, the Delaware Constitution was amended in 2007 to empower the Delaware Supreme Court to resolve questions of law certified to it by the United Stated Securities and Exchange Commission (the "SEC"). 76 Del. Laws ch. 37, § 1 (2007) (amending DEL. CONST. art. IV, § 11(8)). Where a corporation seeks to exclude a stockholder proposal from its proxy materials under SEC Rule 14a-8 on the basis that the proposal is not a proper subject for stockholder action under Delaware law or would, if implemented, violate Delaware law, this now provides an avenue for the SEC to seek a ruling on the questions from the Delaware Supreme Court in advance of the meeting at which the stockholder intends to present the proposal. *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008). It does not, however, afford corporations or stockholder proponents with the same opportunity or otherwise disturb the application of traditional ripeness principles to civil actions regarding the validity of provisions in corporate charters, bylaws, and contracts. *See id*. at 238 (finding that a proposed bylaw would, if adopted, "violate the prohibition, which our decisions have derived from section 141(a), against contractual arrangements that commit the board of directors to a course of action that would preclude them from fully discharging their fiduciary duties to the corporation and its shareholders" in ruling on a certified question of law submitted by the SEC, but explaining that if this issue was instead "being presented in the course of litigation involving the application of the Bylaw to a specific set of facts, we would start with the presumption that the Bylaw is valid and, if possible, construe it in a manner consistent with the law," in connection with which "[t]he factual context in which the Bylaw was challenged would inform our analysis, and we would 'exercise caution [before] invalidating corporate acts based upon hypothetical injuries'" (quoting Stroud v. Grace, 606 A.2d 75, 79 (Del. 1992)); *Boilermakers*, 73 A.3d at 949 n.62 (explaining that, although *CA* may not have perfectly adhered to the "traditional" approach taken by the Delaware courts in cases challenging the validity of bylaws, "[t]he reason for this different approach may be intuited" because, "[i]n *CA*, the Supreme Court was operating under a novel constitutional amendment that gave it the authority to answer questions posed to it by the Securities and Exchange Commission on a limited paper record, without the full benefit of context that comes from traditional adversarial litigation," and even then: "The Supreme Court may have feared that by giving a federal regulatory body a flat indication that a bylaw was 'valid' or not based on a record consisting of a long letter, it would create the false impression that bylaws of the kind at issue were immune from challenge in all circumstances. Thus, rather than risk such an overbroad implication, the court took a different approach, finding that in that unusual context the variance from the settled standard was the more modest approach. In the more traditional context here of a facial challenge to the validity of a bylaw, the more modest, restrained, and prudent approach is the traditional one."). Even then, the Delaware Supreme Court may only resolve those certified questions of law for which "there exist important and urgent reasons for an immediate

Chancery rulings declined to resolve the validity of stockholder-proposed bylaw amendments in similar circumstances.[54]

G. *Wayne County Employees' Retirement System v. Corti* (2009–2010): Charter Provisions Broadly Renouncing Corporate Opportunities

The continuation of Delaware's tempered approach of ripeness through the early 2010s is perhaps best illustrated by *Wayne County Employees' Retirement System v. Corti*.[55] In the case, the court dismissed facial challenges to two separate charter provisions.

The first challenged provision was a corporate opportunity waiver purporting to renounce, pursuant to section 122(17) of the DGCL, any interest in corporate opportunities presented to any director or officer of the corporation who is an officer, director, or employee of the corporation's majority stockholder other than those "expressly offered to such person in his or her capacity as a director or officer of the Corporation."[56] The plaintiff, a former stockholder of the corporation, alleged that this provision failed "to comply with § 122(17) by not specifying the renounced corporate opportunities as required in the statute."[57]

The second challenged provision generally purported "to limit the liability of officers and directors of [the majority stockholder] and its affiliates for certain breaches of fiduciary duty, where the officer or director in good faith takes action under agreements or contracts" between the majority stockholder and the corporation."[58] The plaintiff contended that this provision "exceed[ed] the authority permitted under 8 *Del. C.* § 102(b)(7)" in purporting to "eliminate[] liability for any breach of fiduciary duty, including the duty of loyalty."[59]

In seeking declaratory judgments on the validity of these provisions, the plaintiff asserted that a ruling "could prevent harm before it actually occurs" and was

determination by th[e] Court" and no "facts material to the issue certified are in dispute." Del. Supr. Ct. R. 41(b).

54. *See, e.g.*, *Gen. DataComm*, 731 A.2d 818; *Bebchuk*, 902 A.2d 737.

55. No. 3534-CC, 2009 WL 2219260 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010) (TABLE).

56. *Id.* at *17.

57. *Id.*

58. *Id.*

59. *Id.* at *18. Interestingly, the Court of Chancery recently suggested, in *dicta* and without prompting from the plaintiffs, that it might be willing to entertain a facial validity challenge to a corporate opportunity provision containing language similar to the language in the provision at issue in *Corti*. *See* Seavitt v. N-Able, Inc., 321 A.3d 516, 531 n.21 (Del. Ch. 2024) ("Because the plaintiff has not challenged it, this decision does not address a provision in the Charter that purports to eliminate—*yes, literally eliminate*—an aspect of the fiduciary duties that SolarWinds, the Lead Investors, and their affiliates otherwise would owe, including when serving as officers and directors of the Company."). The provision referenced in the footnote in *N-Able*, like the one challenged in *Corti*, does not, in our view, purport to eliminate fiduciary duties, but is rather a mere declaration that, in circumstances where a corporation has renounced an opportunity, a person may not be liable for breach of fiduciary duty for taking (or failing to present to the corporation) the renounced opportunity. Accordingly, in our view, there can be no present harm from any such provision, further supporting that there is no claim ripe for adjudication.

"necessary so that corporate fiduciaries [be] given clear notice of the scope of their duties," arguing that this "could reduce the risk of harm to the corporation, particularly given [the] status [of the] controlling shareholder with designees constituting the majority of the [corporation's] board."[60] These arguments were nevertheless rejected by the court, which held "that the mere existence of the provisions [did] not threaten harm sufficient to warrant a declaratory judgment on their facial validity."[61]

In this regard, the court found that any uncertainty associated with the provisions challenged in *Corti* presented limited potential harm, if any, to stockholders. With respect to the corporate opportunity waiver, the court explained that "the issue of whether the corporate opportunities allegedly renounced . . . are sufficiently 'specified'" had limited application and stood in contrast to charter provisions challenged in other cases with far broader implications.[62] In addition, the court found that the second charter provision posed no threat of harm to the plaintiff by reason of its "mere existence," explaining that this provision "importantly [wa]s qualified by the phrase, '[t]o the fullest extent permitted by law,'" which "reduce[d] the probability of harm" through its "mere existence" "by arguably precluding an interpretation of the provision that would run afoul of Delaware law."[63]

The court also distinguished these challenges from claims contesting the validity of rights plans in past cases such as *Moran*, which, unlike the claims asserted in *Corti*, involved challenges to provisions with a current and ongoing adverse impact on the direct interests of stockholders. In this case, the court ruled that "the possibility that some future action may be taken under [the charter provisions] that will harm plaintiff and be contrary to Delaware law . . . [wa]s too

60. *Corti*, 2009 WL 2219260, at *18.

61. *Id.*

62. *Id.* In particular, the court distinguished the challenge to the corporate opportunity charter provision in *Corti* from the challenges to three charter provisions deemed ripe in *Siegman v. Tri-Star Pictures, Inc.*, which included a charter provision that, among other things, purported to eliminate the liability of a corporation's directors "for breaches of fiduciary duty in specified circumstances involving the taking of corporate opportunities belonging to" the corporation. 1989 WL 48746, at *5. As the Court of Chancery explained in *Corti*, "*Siegman* predated the enactment of § 122(17), which eliminated the uncertainty regarding the power of a corporation to renounce in advance any interest or expectancy in corporate opportunities." 2009 WL 2219260, at *18. In fact, section 122(17) was adopted for the express purpose of "eliminat[ing] uncertainty regarding the power of a corporation to renounce corporate opportunities in advance raised in *Siegman*." S.B. 363, 140th Gen. Assemb., 72 Del. Laws ch. 343, § 3 (2000). Thus, as the *Corti* court reasoned, "the 'fundamental policies' implicated by the provisions at issue [in *Siegman*], and the potential harm that could be caused by continued uncertainty regarding those issues," materially differed from that presented by the corporate opportunity provision challenged in *Corti*. 2009 WL 2219260, at *18. Moreover, in at least one other case, the Court of Chancery observed that the charter provisions for which a challenge was deemed ripe in *Siegman* "had been approved along with a business combination by a single vote" and were acknowledged by the court in *Siegman* to have been "'an integral part of the Combination presented to shareholders for their approval.'" R.S.M. Inc. v. All. Cap. Mgmt. Hldgs. L.P., 790 A.2d 478, 493 n.19 (Del. Ch. Apr. 10, 2001) (quoting *Siegman*, 1989 WL 48746, at *2). This business combination in *Siegman* was also the subject of separate fiduciary duty claims brought by the plaintiff in the case. As later explained in this article, those ripe fiduciary claims separately implicated the same facial validity issues raised by the charter provisions challenged in *Siegman*.

63. *Corti*, 2009 WL 2219260, at *18.

remote and speculative to justify rendering a declaratory judgment," and that plaintiff was not entitled to such relief "merely because it is able to conjure up hypothetical situations in which the challenged provisions may be applied contrary to Delaware law."[64]

III. The Intervening Decade of Facial Challenges (2013–2023)

Over there past several years, the Delaware courts have resolved facial challenges to governance provisions with some degree of regularity. The routine nature of these challenges may have led to some cloudiness surrounding the application of ripeness to facial challenges. Yet, Delaware's measures approach to ripeness endures, even in this context.

To arrive at this conclusion, this section explores more than a decade of modern Delaware cases, spanning from 2013 through late 2023, identified as involving facial challenges to corporate charter, bylaw, and/or contractual governance provisions. In this section, these cases are largely presented and reviewed in chronological order, with the exception of certain cases grouped together for the convenience of the reader because of shared facts or legal issues.

Upon reviewing this precedent, we conclude that the growing trend of facial challenges does not represent a fundamental shift in Delaware's assessment of ripeness. Instead, we believe that various case-specific facts have directly or indirectly presented the Delaware courts with justiciable statutory or legal issues since the early-to-mid 2010s. Notably, we believe the growing frequency with which cases have raised these statutory validity questions is the result of a heightened focus on statutory compliance among members of the plaintiffs' bar, which has arisen following decisions in the early-to-mid 2010s curtailing other avenues for opportunistic litigation in the M&A context[65] and precedent fee awards that now present the opportunity to collect awards approaching or exceeding $1 million for the identification of statutory and other legal defects.[66]

64. *Id.* at *19.

65. *See, e.g.*, Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304 (Del. 2015); *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884 (Del. Ch. 2016).

66. *See, e.g.*, Olson v. ev3, Inc., No. 5583-VCL, 2011 WL 704409 (Del. Ch. Feb. 21, 2011) (granting a $1.1 million fee award in connection with a settlement curing alleged statutory defects in a top-up option intended to facilitate a merger that may have otherwise been void); *In re* Cheniere Energy, Inc., No. 9710-VCL (Del. Ch. Mar. 16, 2015) (TRANSCRIPT) (granting a $1 million fee award based on *ev3*'s precedent in respect of the validation of challenged grants issued under an amendment to a corporation's equity plan that was allegedly not duly approved by its stockholders because the corporation incorrectly applied the applicable voting standard to the stockholders' vote on the amendment); *In re* Xencor, Inc., No. 10742-CB (Del. Ch. Dec. 10, 2015) (TRANSCRIPT) (looking to *ev3* and *Cheniere* as precedent and awarding $950,000 in connection with the validation of charter amendments and related restructurings that were challenged on the basis that they were not validly approved because certain consents approving them were sequenced or dated in contravention of the DGCL's technical requirements or lacked the appropriate exhibits); *see generally* John Mark Zeberkiewicz & Robert B. Greco, *Reassessing a Defused "Time Bomb": A Fresh Look at Corporate Foot Faults and the Benefits Conferred by Their Discovery*, 49 Del. J. Corp. L. 1 (2024) (reviewing recent fee awards for the identification of technical and statutory defects that could be seen as "disproportionate to the

We also observe that facial challenges to newly adopted governance innovations are often accompanied by equitable claims challenging the governance provision's adoption as a breach of fiduciary duty,[67] provided that those claims are capable of rebutting the presumptions of the business judgment rule through a "genuine, extant controversy."[68] This type of fiduciary claim is generally subject to a three-year statute of limitations[69] and, often, the resolution of the facial validity issues underlying this type of fiduciary claim is a necessary or integral component to resolving the ripe fiduciary claim.[70] In this circumstance, deciding these facial validity issues does not, in all cases, necessarily undermine Delaware's traditionally disciplined approach to ripeness.

A. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* (2013): Delaware Forum Selection Bylaws

First, and perhaps most notably, the Delaware Court of Chancery upheld the facial validity of forum selection bylaws in the 2013 landmark opinion *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*[71]

Importantly, the court ruled on the question of the facial validity of the forum selection bylaws adopted by multiple corporations while accompanying fiduciary claims contesting the adoption of the bylaws by those corporations' boards had been stayed. Additionally, the court did so only after a careful assessment of the ripeness questions raised by the facial challenges, which were the subject of a dispute between the parties many may find astounding today. Remarkably, it was "the defendants [who] asked the court to hear a consolidated action on the facial validity of the forum selection bylaws," which "[t]he plaintiffs" initially "objected to" on the basis that the defendants' position "attempt[ed] to truncate discovery and abruptly seek an advisory opinion on the theoretical permissibility of the director-adopted exclusive forum bylaws."[72]

The court ultimately determined that addressing the facial challenges first "would avoid unnecessary costs or delay," as the fiduciary challenges "could be determined after the core questions of facial [] validity . . . had been resolved" and would be mooted if the bylaws were held to be facially invalid.[73] As a result,

benefits actually conferred on the corporations ordered to pay them" and could risk "erod[ing] stockholder value without producing a meaningful return," such as one case in which a corporation ordered to pay a $850,000 fee award—representing approximately 6.3 percent of the corporation's equity value at the time of the fee award ruling—went bankrupt three months later).

67. *See, e.g.*, *Boilermakers*, 73 A.3d at 945 (explaining that "if the bylaws are statutorily and contractually valid and enforceable as a facial matter, then there would be a more concrete legal context for consideration of whether the plaintiffs' fiduciary duty . . . claims [challenging the bylaws' adoption] are meritorious").

68. Siegl v. Morse, No. 2024-0628-NAC, 2025 WL 1101624, at * 6 (Del. Ch. Apr. 14, 2025) (quoting Kellner v. AIM ImmunoTech, Inc., 320 A.3d 239, 258 (Del. 2024)).

69. Del. Code Ann. tit. 10, § 8106(a) (2025).

70. *See, e.g.*, Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 945 (Del. Ch. 2013).

71. *Id.* at 947.

72. *Id.* at 945.

73. *Id.*

the court exercised its discretionary power under Court of Chancery Rule 42(a), which permits the court to "consolidate any cases involving a 'common question of law' to decide 'any or all the matters.'"[74] Pursuant to this authority, the court ordered the consolidation of similar forum selection challenges and then resolved the shared issue of the challenged bylaws' "facial statutory and contractual validity and enforceability . . . under the DGCL."[75]

B. *City of Providence v. First Citizens BancShares, Inc.* (2014): Non-Delaware Forum Selection Bylaw

While the forum selection bylaws upheld in *Boilermakers* required that claims be adjudicated in the Delaware courts, in a 2014 decision (later statutorily overturned through the adoption of section 115 of the DGCL in 2015), the Court of Chancery upheld the facial validity of a forum selection bylaw specifying certain state and federal courts located in North Carolina as the exclusive jurisdiction for certain internal corporate claims.[76]

Importantly, the facts of that case made the facial challenge ripe for adjudication. The challenged forum selection provision was adopted on the same day that the corporation announced its entry into a merger agreement to acquire a bank holding company. This led the plaintiff to file two complaints consolidated in the action, which contested not just the facial validity of the forum selection bylaw, but also alleged separate breaches of fiduciary duty in connection with the adoption of the bylaw and proposed merger.[77]

C. *ATP Tour, Inc. v. Deutscher Tennis Bund* (2014): Nonstock Fee-Shifting Bylaw

Earlier in 2014, the Delaware Supreme Court upheld the facial validity of a fee-shifting provision in a nonstock corporation's bylaws in *ATP Tour, Inc. v. Deutscher Tennis Bund*.[78]

Ripeness had no bearing on the case, as it was presented to the Delaware Supreme Court as a certified question of law pursuant to the court's grant of authority under the Delaware Constitution separate and apart from its authority to resolve appeals of justiciable disputes litigated in the Delaware courts.[79] And in any event, the issues of facial validity decided in *ATP* were soundly ripe for adjudication and only raised in connection with litigation in which the corporation

74. *Id.* at 946 (quoting Del. Ct. Ch. R. 42(a)).

75. *Id.*

76. City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229 (Del. Ch. 2014).

77. *Id.* at 231 ("FC North adopted the Forum Selection Bylaw the same day it announced it had entered into a merger agreement to acquire . . . a bank holding company. . . . [Plaintiff] filed two separate complaints that have since been consolidated into this action. The first complaint challenges the facial validity of the Forum Selection Bylaw and asserts a claim for breach of fiduciary duty in connection with its adoption. The second complaint asserts claims against the FC North board of directors concerning the proposed merger.").

78. 91 A.3d 554 (Del. 2014).

79. *See supra* note 53.

sought to enforce its fee-shifting bylaw against members who had failed to prevail in litigation commenced against the corporation.

D. *Pontiac General Employees Retirement System v. Ballantine* (2014): "Dead Hand" Proxy Put

In an October 2014 transcript ruling in *Pontiac General Employees Retirement System v. Ballantine*, the Court of Chancery denied a motion to dismiss claims concerning the validity of a "dead hand" proxy put in a credit agreement.[80]

Based on the reasoning applied in *Moran* and other past cases challenging aspects of rights plan, the court viewed the challenged provision as a defensive measure with a substantial deterrent effect and found the dispute to be "ripe as a practical matter because the stockholders of the company [were] presently suffering a distinct injury in the form of the deterrent effect" or, as the court characterized it, "the Sword-of-Damocles concept."[81] Even then, the court carefully clarified the limited nature of its finding on ripeness, which did not necessarily extend to a purely facial challenge, stating:

> What I think is ripe now is a claim that, based on the facts of this case, the board of directors breached its duties in a factually-specific manner by adopting this . . . dead hand proxy put arrangement in the context of the facts and circumstances here, including 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. This is not a per se analysis. No one is suggesting that.[82]

In other words, the court's ripeness determination was based on the current and ongoing adverse effect the challenged measure was perceived to have on stockholders.

E. *In re Allergan, Inc. Stockholder Litigation* (2014): Special Meeting Request Bylaw

The following month, the Court of Chancery again addressed principles of ripeness in *In re Allergan, Inc. Stockholder Litigation*, albeit in the context of stockholders' claims seeking a declaratory judgment as to the meaning, rather than the facial validity, of newly adopted charter and bylaw provisions.[83] The stockholders

80. Pontiac Gen. Emps. Ret. Sys. v. Ballantine, No. 9789-VCL (Del. Ch. Oct. 14, 2014) (TRANSCRIPT).

81. *Id*. at 73–78.

82. *Id*. at 75–76; *accord id*. at 77 ("So in my view, I do think that the dispute is sufficiently ripe to state a claim as to the entry into a credit agreement with the proxy put."); *see also* San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc., 983 A.2d 304, 304 (Del. Ch. 2009) (dismissing a claim "seeking a declaration of the invalidity and unenforceability" of a proxy put provision in a credit agreement on the basis that it was rendered moot by the lenders' waiver of any event of default arising by virtue of an upcoming contested election), *aff'd*, 981 A.2d 1173 (Del. 2009) (TABLE).

83. No. 9609-CB, 2014 WL 5791350 (Del. Ch. 2014).

sought a ruling as to the meaning of a "Similar Item" limitation in a newly adopted bylaw governing the right of stockholders to request the holding of a special meeting and, specifically, a ruling on whether the limitation precluded stockholders from requesting that a special meeting be held to both remove the entire board and vote on the election of a new slate of directors. Applying Delaware's traditional ripeness principles, the court found that the claim constituted "a classic example of a request for an advisory opinion that is not ripe, and may never become ripe, for judicial review."[84]

In so concluding, the court soundly rejected the plaintiffs' assertion that "'Delaware courts . . . regularly recognize that restrictions to stockholders' rights to act under governing documents are ripe, even if there is no vote pending.'"[85] The court noted that, "[i]n support of this proposition, plaintiffs cite[d] several decisions in which this Court has found ripe for review challenges to the implementation of stockholder rights plans and proxy put provisions," such as *Moran* and *Ballantine*.[86] But as the court explained, and as discussed above, "[i]n each of these cases, the key consideration to the Court's finding of a ripe controversy was the present effect the provisions in question were deemed to have on stockholders because of their deterrent features."[87]

The court further explained that the plaintiffs' citation to *Boilermakers* in support of the same proposition was equally uncompelling. While acknowledging that "ripe legal issues" were presented in respect of the facial validity of forum selection bylaws in *Boilermakers*, the court explained that, "[i]n that case, Chief Justice Strine . . . cautioned against addressing hypothetical questions of the type raised here."[88] As the *Allergan* court observed, *Boilermakers* recognized that even when questions of facial validity are presented, to the extent these questions turn on "purely hypothetical situations," it is "imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts," as "Delaware courts 'typically decline to decide issues that may not have to be decided or that create hypothetical harm.'"[89]

F. *Chester County Employees' Retirement Fund v. New Residential Investment Corp.* (2016): Charter Provision Purporting to Limit and Govern Fiduciary Duties

In its 2016 opinion in *Chester County Employees' Retirement Fund v. New Residential Investment Corp.*, the Court of Chancery deemed ripe statutory challenges to certain charter provisions of New Residential Investment Corp. ("New Residential") brought by a New Residential stockholder.[90] The challenged

84. *Id.* at *7.
85. *Id.* at *8.
86. *Id.*
87. *Id.*
88. *Id.* at *9.
89. *Id.* (quoting *Boilermakers*, 73 A.3d at 940).
90. No. 11058-VCMR, 2016 WL 5865004 (Del. Ch. Oct. 7, 2016), *aff'd*, 186 A.3d 798 (Del. 2018) (TABLE).

charter provisions not only renounced various corporate opportunities, but also included a paragraph, titled "Agreements with Fortress Stockholders," which purported to govern other relationships (including fiduciary relationships) between New Residential and affiliates of Fortress Investment Group (collectively with their affiliates, "Fortress").[91] Notably, Fortress managed New Residential pursuant to a contractual management agreement and held a minority equity stake in New Residential.

In finding these statutory challenges ripe, the *New Residential* court did not cabin *Boilermakers* to the context of the consolidation of the unique equitable and statutory challenges to forum selection bylaws brought by stockholders of multiple corporations in that case. Instead, the *New Residential* court cited *Boilermakers* for the proposition that "this Court has held that stockholder challenges to the statutory validity of charter or bylaw provisions of a Delaware corporation will be considered ripe."[92] In support of this statement, the court cited, without further explanation, *Boilermakers*' observation that: "Facial challenges to the legality of provisions in corporate instruments are regularly resolved by this Court."[93] While this observation is undoubtedly true, it does not necessarily support the blanket conclusion that all facial statutory challenges to corporate charter, bylaw, or contractual provisions are necessarily ripe.

In our view, numerous other aspects of *New Residential* weigh against drawing such a broad conclusion from the case. Notably, the stockholder's statutory claims were brought together with two breach of fiduciary duty counts asserted directly and derivatively against certain New Residential directors and Fortress affiliates, based on allegations that Fortress was New Residential's controlling stockholder and caused New Residential to overpay in the acquisition for the purpose of increasing the annual management fee payable to Fortress (which was alleged to have been further increased through a renegotiated and amended management agreement between New Residential and Fortress). While these counts were ultimately dismissed on the basis that they stated derivative claims and the plaintiff had failed to adequately plead demand futility, the court dismissed them "with leave to replead" because, in the court's view, they were still "potentially viable claims" as pled in the complaint, albeit ones for which the stockholder could not directly seek recourse.[94] As a result, the court may have simply been performing the "common sense" assessment traditionally

91. New Residential Inv. Corp., Current Report (Form 8-K), Ex. 3.1, art. 12th, para. (f) (May 3, 2013).

92. 2016 WL 5865004, at *12.

93. *Id.* at *12 n.78 (quoting *Boilermakers*, 73 A.3d at 947). This observation was first made in the Court of Chancery's opinion in *Lions Gate Entertainment Corp. v. Image Entertainment Inc.*, in which the court resolved challenges to the statutory validity of certain anti-takeover provisions in a corporation's charter and bylaws brought by a competitor who was a significant stockholder of the corporation and publicly disclosed a proposal to acquire it. No. 2011-N, 2006 WL 1668051 (Del. Ch. June 5, 2006).

94. *New Residential*, 2016 WL 5865004, at *12–13; *see* DEL. CH. CT. R. 15(aaa) (providing that the Court of Chancery may dismiss claims without prejudice "for good cause shown" where it finds "that dismissal with prejudice would not be just under all the circumstances").

attendant to ripeness and concluded that litigation implicating the challenged provisions "sooner or later appears to be unavoidable."[95]

Although perhaps not readily apparent from the reasoning expressly stated in the opinion, outside of the facial statutory challenge to New Residential's charter, the court applied a relatively measured view on ripeness in *New Residential* based on the justiciability principles traditionally applied under Delaware law. In fact, the court dismissed the stockholder's statutory "as-applied challenge" to the same charter provisions, explaining that unlike the stockholders' "statutory validity claim" in respect of the charter, the as-applied challenge to the contested charter provisions was "not ripe because Defendants have not invoked [the provisions as a defense] in this case, and they may never invoke it."[96] In support of this conclusion, the court relied on and only cited to *Allergan*[97]—the same case discussed above in which the Court of Chancery: (i) found *Boilermakers* to support the continuation of Delaware's traditionally disciplined approach to ripeness; and (ii) explained that *Boilermakers* did not support the proposition, rejected in *Allergan*, that "'Delaware courts . . . regularly recognize that restrictions to stockholders' rights to act under governing documents are ripe, even if there is no vote pending.'"[98]

On the same basis, the *New Residential* court dismissed both facial and as-applied challenges to provisions of two additional contracts: (i) a management agreement between New Residential and its manager purporting to exculpate the "Manager, its members, managers, officers and employees" from liability to the Company and its stockholders except in the case of "'acts constituting bad faith, willful misconduct, gross negligence or reckless disregard of the Manager's duties under th[e] Agreement"; and (ii) a termination agreement, which was entered into between New Residential and the acquisition's target to terminate the initial merger agreement between them in connection with their entry into a new agreement pursuant to which New Residential later purchased substantially all of the target's assets, and purported to release a broad set of claims, including those belonging to New Residential stockholders, arising under the initial merger agreement.[99] In dismissing the challenges to these contractual provisions, the court explained: "To construe this contract when its provisions are not implicated by the litigation in this Court would be to render an advisory opinion."[100] Accordingly, the *New Residential* court employed same reasoning based on *Allergan*, with repeated citations to the case, to dismiss the as-applied challenge to the charter provision and facial and as-applied challenges to these contracts. Importantly, *New Residential* did so without specifically calling into question *Allergan*'s

95. *See New Residential*, 2016 WL 5865004, at *12 ("To determine whether a controversy is ripe, the court must balance the benefits to be derived from issuing a declaratory judgment against the desire to avoid advisory opinions. The Supreme Court recently stated that 'a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the material facts are static.'").

96. *Id.* at *13.

97. *Id.* at *13 n.81 (citing *Allergan*, 2014 WL 5791350, at *7).

98. *Allergan*, 2014 WL 5791350, at *8.

99. *New Residential*, 2016 WL 5865004, at *6.

100. *Id.* at *13.

view of *Boilermakers* and while finding *Boilermakers* as continued support for Delaware's traditionally measured approach to ripeness. Thus, the *New Residential* court's approach, in our view, cautions against an interpretation of that opinion that would expand *Boilermakers* beyond the narrower view of ripeness endorsed in *Allergan*.

Moreover, notwithstanding the court's denial of a motion to dismiss "as to the facial validity challenge to the certificate of incorporation" in *New Residential*, the stockholder did not, in fact, bring any stand-alone facial challenges to the New Residential charter or contractual provisions.[101] Rather, all of the statutory matters raised in the case were implicated by a single count in which the stockholder sought:

> a declaratory judgment that: (1) the New Residential certificate of incorporation article twelfth does not limit the fiduciary duties of the Defendants with respect to any conduct challenged in [the stockholder's fiduciary duty claims]; (2) the Management Agreement [provisions] do not limit Defendants' liability with respect to the same conduct; and (3) the Termination Agreement did not release the claims of New Residential stockholders against [the target in the acquisition].[102]

In other words, the stockholder only contested the validity of the charter and contractual provisions to the extent relevant to the recent breaches of fiduciary duty alleged by the stockholder. The question of whether a stockholder could challenge the validity of the same charter provisions on a clear day in the absence of "viable" fiduciary duty claims was not before the court or directly contested by the parties.[103] In fact, after its fiduciary duty claims were dismissed, the stockholder declined to litigate the facial challenge to the New Residential charter that the court allowed to proceed, amending its complaint after the ruling to assert re-plead fiduciary challenges without any claim seeking a declaratory judgment on the meaning or validity of the relevant provisions of New Residential's charter.[104] This history further weighs against relying on *New Residential* as support for a shift in Delaware's assessment of ripeness in the context of facial challenges.

G. *Sinchareonkul v. Fahnemann* (2015): Casting Vote Bylaw

In early 2015, the Court of Chancery granted expedition on claims seeking declaratory judgments invalidating certain provisions of a joint venture's bylaws.[105] Among the challenged provisions was a bylaw purporting to vest the chairman of the board with a casting vote to decide any matter on which the board was deadlocked. The court found that the suit stated a colorable claim that the challenged bylaws were void, as section 141(d) of the DGCL authorizes

101. *Id*.
102. *Id*. at *12.
103. *Id*.
104. *See* Pl.'s Second Am. Verified Class Action & Derivative Compl., Chester Cnty. Emps. Ret. Fund v. New Residential Inv. Corp., No. 11058-VCMR (Del. Ch. Feb. 27, 2017).
105. Sinchareonkul v. Fahnemann, No. 10543-VCL, 2015 WL 292314 (Del. Ch. Jan. 22, 2015).

charter provisions, but not bylaw provisions, conferring disparate voting power on directors.

Importantly, the plaintiff also challenged the validity of a resolution purportedly adopted by the directors affiliated with one of the joint venturers through the exercise of the casting vote. This resolution relying on the validity of the challenged bylaw was opposed by the plaintiff and directors affiliated with the other joint venturer, which rendered the facial validity of the bylaw squarely in dispute and ripe for judication.

H. *Gorman v. Salamone* (2015): Bylaw Empowering Stockholders to Remove and Appoint Officers

In a July 2015 opinion in *Gorman v. Salamone*, the Court of Chancery invalidated a stockholder-adopted bylaw that purported to allow stockholders to remove officers and fill any vacancies that resulted from the stockholders' removal of an officer.[106] The court ruled that this bylaw impermissibly intruded into the board's management authority under section 141(a) of the DGCL.

The case unquestionably involved an actual controversy between real parties in interest. The stockholder who adopted the bylaw then purported to remove and replace the corporation's CEO from his position as CEO pursuant to the bylaw and from his designated board seat reserved under the corporation's voting agreement. The validity of this action was disputed by the parties and turned on the validity of the bylaw.

I. *In re VAALCO Energy, Inc. Stockholder Litigation* (2015): "For Cause" Director Removal Provisions

Later in 2015, a transcript ruling in *In re VAALCO Energy, Inc. Stockholder Litigation* declared invalid charter and bylaw provisions that provided for the removal of directors serving on a non-classified board only "for cause" in contravention of section 141(k) of the DGCL.[107]

But importantly, there was an ongoing consent solicitation commenced by an activist to remove the corporation's directors without cause, and the corporation opposed the consent solicitation and sought consent revocations based on, among other things, its claim that the directors could only be removed for cause under the corporation's certificate of incorporation.[108]

106. No. 10183-VCN, 2015 WL 4719681 (Del. Ch. July 31, 2015).

107. *In re* VAALCO Energy, Inc. S'holder Litig., No. 11775-VCL, 2015 WL 9254885 (Del. Ch. Dec. 14, 2015) (TRANSCRIPT).

108. *See* Plaintiffs' Opening Brief in Support of Their Motion for Partial Summary Judgment, *In re* VAALCO Energy, Inc. S'holder Litig., No. 11775-VCL (Del. Ch. Dec. 14, 2015), 2015 WL 9254899; Opening Brief in Opp. to Plaintiffs' Motion for Summary Judgment & in Support of Defendants' Motion for Summary Judgment, *In re* VAALCO Energy, Inc. S'holder Litig., No. 11775-VCL (Del. Ch. Dec. 14, 2015), 2015 WL 9254885 (contesting the ripeness of the challenge not on the basis that there was no legitimate dispute or issue regarding the provisions' validity, but instead on the basis that the "Activist Stockholders' consent solicitation has not come to a conclusion, and it is possible that the [] Board will never be presented with the Removal Proposal"); *compare* Jones Apparel Grp.,

J. *Frechter v. Zier* (2017): Supermajority Director Removal Bylaw

In its early 2017 decision in *Frechter v. Zier*, the Court of Chancery relied on *VAALCO*'s interpretation of section 141(k) to declare invalid a Nutrisystem, Inc. bylaw purporting to impose, without a corresponding charter provision, a supermajority voting requirement applicable to the removal of directors.[109] As with other cases such as *Boilermakers* and *Ballantine*, *Frechter* involved a facial challenge that was coupled with an equitable challenge to a recent amendment of the bylaw by the Nutrisystem board.

Prior to the challenged amendment, the relevant bylaw stated:

> 4. Removal. Except as otherwise provided in the Certificate of Incorporation, no director may be removed from office by the stockholders of the Corporation except both (a) for cause and (b) by the affirmative vote of the holders of not less than sixty-six and two-thirds percent (66 2/3%) of the voting power of all outstanding shares of stock of the Corporation entitled to vote generally in the election of directors, considered for this purpose as a single class.[110]

After *VAALCO* was decided and invalidated a bylaw purporting to require cause for stockholders to remove directors serving on a non-classified board, the Nutrisystem board amended its director removal bylaw in the beginning of 2016 to specifically address the holding in *VAALCO*. Specifically, the amendment provided:

> Article III, Section 4 of the Corporation's Amended and Restated Bylaws is hereby deleted and replaced in its entirety to read as follows:
>
> "4. Removal. Except as otherwise provided in the Certificate of Incorporation, no director may be removed from office by the stockholders of the Corporation except by the affirmative vote of the holders of not less than sixty-six and two-thirds percent (66 2/3%) of the voting power of all outstanding shares of stock of the Corporation entitled to vote generally in the election of directors, considered for this purpose as a single class."[111]

The court held that, by purporting to mandate this supermajority vote without a corresponding charter provision, the amended bylaw was inconsistent with section 141(k) of the DGCL and purported to increase the minimum statutory vote required by section 141(k) in a manner not permitted by section 102(b)(4) of the DGCL, which expressly allows the charter (and, by implication, disallows

Inc. v. Maxwell Shoe Co., 883 A.2d 837 (Del. Ch. 2004) (upholding the validity of a charter provision providing that the record date for any solicitation of stockholder consents shall be the date on which the first consent is delivered to the corporation in an action commenced after a consent solicitation was announced by a hostile bidder to remove the corporation's directors); Crown EMAK Partners, LLC v. Kurtz, 992 A.2d 337 (Del. 2010) (invalidating bylaw amendments in a section 225 proceeding that were purportedly adopted by one of two opposing factions engaged in competing consent solicitations and found to contravene Delaware law).

109. No. 12038-VCG, 2017 WL 345142 (Del. Ch. Jan. 24, 2017).

110. Nutrisystem, Inc DE, Current Report (Form 8-K), Ex. 3.1, art. III, § 4 (July 22, 2009).

111. Nutrisystem, Inc., Current Report (Form 8-K), Ex. 3.1 (Jan. 7, 2016).

the bylaws) to increase any statutory-based stockholder vote. The court explained that Nutrisystem's arguments in support of the validity of the amended bylaw were based on an interpretation of section 141(k) that was "inconsistent not only with [its] statutory language, but with recent judicial consideration of the section as well," and, in particular, the court's "instructive" interpretation of section 141(k) in *VAALCO*.[112]

Accordingly, the stockholder's timely fiduciary claim challenged a stand-alone amendment to a director removal bylaw that was adopted by the Nutrisystem board in response to *VAALCO*, but nevertheless purported to retain a supermajority voting requirement that contravened the DGCL based on the same instructive interpretation of section 141(k) articulated in *VAALCO*. Moreover, the court ruled on the bylaw's validity as a means of fully resolving both the statutory claims and fiduciary claims presented in the case, with the court specifically explaining that its resolution of the facial challenge resulted in the withdrawal of the equitable claims because of plaintiff's representations "that, should I find in his favor on Count II [(the statutory claim)], he would not pursue Count I [(the fiduciary claim)]."[113]

K. *Solak v. Sarowitz* (2016): Stock Corporation's Fee-Shifting Bylaw

One month prior to *Frechter*, the Court of Chancery's late 2016 decision in *Solak v. Sarowitz* addressed the facial validity of a fee-shifting bylaw adopted by a stock corporation. Notably, the challenged amendment was adopted approximately six months following the enactment of the 2015 amendments to section 109(b) of the DGCL.[114] These amendments, adopted in response to *ATP*, imposed a statutory prohibition on bylaws imposing liability on stockholders for the attorneys' fees and expenses incurred by a corporation or other party in connection with an "internal corporate claim."[115]

Specifically, following the 2015 DGCL amendments, the board adopted both a new forum selection bylaw requiring that certain internal corporate claims be brought in Delaware and a new fee-shifting bylaw applicable to "Actions" commenced by stockholders outside of Delaware. The fee-shifting bylaw generally purported to impose liability for the corporation's attorneys' fees and other litigation expenses incurred in connection with any Action brought outside of Delaware on any "stockholder who brings, substantially assists, or has a direct financial interest in" any such Action "unless the stockholder obtains a judgment on the merits that substantially achieves the full remedy sought."[116]

In *Solak*, the court held a stockholder's facial challenge to the fee-shifting bylaw to be ripe by applying traditional ripeness principles, finding that the

112. *Frechter*, 2017 WL 345142, at *4.
113. *Id.* at *2, *4.
114. 153 A.3d 729 (Del. Ch. Dec. 27, 2016).
115. Del. S.B. 75, 148th Gen. Assemb., 80 Del. Laws ch. 40, § 3 (2015).
116. *Frechter*, 153 A.3d at 735.

bylaw imposed a "substantial deterrent effect" in relation to the present rights of stockholders analogous to that caused by a rights plan or dead hand proxy put.[117] In drawing this analogy, the court explained that "the practical reality is that, so long as the Fee-Shifting Bylaw remains in place, it is highly unlikely that any rational stockholder . . . would file an internal corporate claim outside of Delaware because of the significant risk of personal liability that triggering the Fee-Shifting Bylaw presents."[118]

That is, analogous to a rights plan threatening dilution to any acquiring person who triggers it, the fee-shifting bylaw was found to threaten any stockholders who triggered it with the potential burden of bearing corporate litigation expenses and deterred challenge by its nature. And as with a rights plan, if the fee-shifting bylaw could only be subject to a facial challenge if it was triggered, it posed the risk of evading review by virtue of this built-in deterrent. As the court explained, this deterrent effect had been expressly recognized in connection with the Delaware legislature's adoption of the 2015 amendments to section 109(b), as the Council of the Corporation Law Section of the Delaware State Bar Association stated, in explaining the rationale for the amendments, that "few stockholders will rationally be able to accept the risk of exposure to millions of dollars in attorneys' fees to attempt to rectify a perceived corporate wrong, no matter how egregious."[119] Indeed, the court distinguished the facial challenge in the case from that deemed unripe in *Corti*, reasoning that *Corti* was "distinguishable" because "[t]he plaintiff in *Corti*, unlike the plaintiff here, did 'not allege any *present* negative or detrimental effect on shareholders that warrants granting declaratory relief.'"[120]

L. *Cedarview Opportunities Master Fund, L.P. v. Spanish Broadcasting System, Inc.* (2018): Charter Provision Suspending Section 220 and Other Rights of Stockholders

The Court of Chancery's August 2018 decision in *Cedarview Opportunities Master Fund, L.P. v. Spanish Broadcasting System, Inc*. considered issues of ripeness in relation to challenges to the validity of certain charter provisions of a media and entertainment company operating radio and television stations throughout the United States.[121] In order to ensure compliance with the Communications Act of 1934 and its limitations on foreign investment in entities controlling U.S. broadcast licenses, the relevant charter provisions replicated the Communi-

117. *Id*. at 737 ("This Court repeatedly has recognized disputes to be ripe for review when stockholders challenge measures that have a substantial deterrent effect." (citing *Allergan*, 2014 WL 5791350, at *8; *Moran*, 490 A.2d at 1072; *KLM Royal Dutch Airlines*, 698 A.2d at 384; *Toll Brothers*, 723 A.2d at 1188; *Hilton Hotels*, 2000 WL 1528909, at *2–3, *10–11; and *Ballantine*, No. 9789-VCL, at 72–77.

118. *Id*. at 738 (quoting Council of the Corporation Law Section of the Delaware State Bar Association, Explanation of Counsel Legislative Proposal 4 (2015)).

119. *Id*. (quoting *Corti*, 2009 WL 2219260, at *19).

120. *Id*. (emphasis added).

121. No. 2017-0785, 2018 WL 4057012 (Del. Ch. Aug. 27, 2018).

cations Act's restrictions on ownership by certain foreign "aliens" and provided that no more than 25 percent of the corporation's outstanding shares of capital stock shall at any time be owned of record by or for the account of such foreign aliens or their representatives. The charter provisions further provided that if the corporation discovered that any shares of its capital stock represented by a Domestic Share Certificate were held by or for the account of any such foreign alien,

> then such Domestic Share Certificate shall be canceled and a new certificate representing such Capital Stock marked "Foreign Share Certificate" shall be issued in lieu thereof, but only to the extent that after such issuance the Corporation shall be in compliance with [the 25% limitation on alien ownership]; provided, however, that if, and to the extent, such issuance would violate [such limitation], then, the holder of such Capital Stock shall not be entitled to vote, to receive dividends, or to have any other rights with regard to such Capital Stock to such extent, except the right to transfer such Capital Stock to a citizen of the United States.[122]

Stockholders of the corporation filed suit seeking a declaratory judgment that the above charter provision was "invalid on the theory that it impermissibly 'purport[ed] to permit the suspension of all rights of stockholders of a Delaware corporation,'" arguing that "the broad suspension of rights, in and of itself, [wa]s unenforceable facially and as-applied."[123] The court dismissed the facial challenge, finding that the stockholders failed to meet their burden required to overcome the presumed validity of the charter provision because they did not attempt to explain how the provision could not operate "lawfully or equitably under any circumstances."[124]

The defendants also sought dismissal of the as-applied challenge, contending that it was "not ripe because plaintiffs 'd[id] not allege that any . . . stockholder attempted to exercise [its] rights (or want[ed] to) and was denied' through the operation" of the challenged charter provision. The court gave some credence to this argument, noting that it was "[t]rue enough" given that the stockholders' complaint merely alleged that the corporation "'appear[ed] to preclude Plaintiffs from exercising statutory inspection rights or bringing [derivative] actions on behalf of the corporation,' without pleading that they intended to exercise such rights or attempted to do so but were denied."[125] Nevertheless, the court explained that it may "look outside of the pleadings to determine whether it has jurisdiction" and decide questions of ripeness and that, in their answering brief and at oral argument, the stockholders represented that one of them had made a section 220 demand that the corporation rejected on the basis that the stockholder lacked standing to assert section 220 rights.[126] While the court observed that a corporation may not eliminate stockholders' section 220 rights by provision of its certificate of incorporation, it was only upon ascertaining

122. *Id.* at *17.
123. *Id.* at *20.
124. *Id.* (quoting *Boilermakers*, 73 A.3d at 948).
125. *Id.* at *21.
126. *Id.*

the existence of this actual dispute regarding the charter provision's application that the court found the as-applied challenge to the disputed charter provision to be ripe.

M. *Salzberg v. Sciabacucchi* (2018–2020): Federal Forum Selection Charter Provisions

A December 2018 Court of Chancery decision, and an early 2020 decision issued by the Delaware Supreme Court on appeal, in *Salzberg v. Sciabacucchi*, addressed the facial validity of forum selection provisions included in the charters of three corporations.[127] The challenged forum selection provisions generally required that claims arising under the Securities Act of 1933, as amended, be brought exclusively in the U.S. federal district courts.

The Court of Chancery initially found the charter provisions to be facially invalid and granted summary judgment in favor of the plaintiff, a stockholder of the three corporations who brought the case seeking a declaratory judgment that the federal forum selection provisions were invalid. In declaring the charter provisions invalid, the court rejected the ripeness arguments raised by one of the defendant corporations, Blue Apron, but not the others. The Court of Chancery's analysis of these arguments looked to traditional ripeness principles, and at outset of this analysis, the court stated that Blue Apron's ripeness arguments were "an interesting position, because multiple actions under the 1933 Act are pending against defendants affiliated with Blue Apron, including an action filed in state court that is stayed."[128] While the Court of Chancery acknowledged that "[t]he ripeness doctrine permits a court to postpone review until the disputed issue 'arises in some more concrete and final form,'" it found that there was "no point in doing so here" because the "facial challenge present[ed] a pure question of law[,] [t]he material facts [were] static, and litigation over the validity of the Federal Forum Provisions appear[ed] likely," based on representations that the "Blue Apron defendants [were] expected to move to dismiss the state court [Securities Act] action on forum selection grounds once stay is lifted" in that case.[129]

127. Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018), *rev'd*, 227 A.3d 102 (Del. 2020).

128. *Id*. at *23.

129. *Id*. at *24 n.159 (quoting *Stroud*, 552 A.2d at 480). Although this alone satisfied the court that the challenge to Blue Apron's charter provision was ripe, the Court of Chancery continued to state that: "Even without the existence of these actions, the challenge to the Federal Forum Provision is ripe . . . because the Federal Forum Provisions 'have a substantial deterrent effect.'" *Id*. at *23–24 (quoting *Solak*, 153 A.3d at 737). In support of this conclusion, the Court of Chancery explained:

> The Federal Forum Provisions should cause a plaintiff to think twice before filing a 1933 Act claim in state court, facing a motion to dismiss on jurisdictional grounds, and incurring the costs and delay that a plaintiff who filed in federal court would not have to bear. Few stockholders would pursue that course. Instead, plaintiffs will abide by its requirements, enabling the provision to evade review. Declining to review the Federal Forum Provisions could also encourage other corporations to adopt similar provisions to take advantage of their deterrent effect.

Id. at *23. While the adequacy of this secondary stated basis for establishing ripeness was ultimately rendered immaterial by the existence of the pending state court Securities Act action, the existence of

In other words, one of the corporate defendants in the case faced securities law litigation currently pending in state court directly implicated by its challenged forum selection provision.

N. *Manti Holdings, LLC v. Authentix Acquisition Co.* (2021): Advance Contractual Appraisal Rights Waivers

The Delaware Supreme Court's 2021 opinion in *Manti Holdings, LLC v. Authentix Acquisition Co.* upheld the ability of "sophisticated and informed stockholders . . . represented by counsel and [with] bargaining power" to voluntarily agree to advance contractual waivers of appraisal rights in connection with future drag-along transactions meeting specified terms.[130]

In contrast to at least one prior case in which this issue was raised but not decided because it was not directly presented in a manner ripe for adjudication,[131] *Authentix* finally resolved this question after it was squarely presented, in a post-merger appraisal proceeding that was commenced by former stockholders who had agreed to an advance appraisal rights waiver and defended against by a corporation who sought to enforce the waiver against these stockholders.

O. *New Enterprise Associates 14, L.P. v. Rich* (2023): Advance Covenants Not to Commence Fiduciary Challenges to Drag-Along Sales

In 2023, the Court of Chancery's opinion in *New Enterprise Associates 14, L.P. v. Rich* ruled on the facial validity of a contractual not to sue covenant included as part of an NVCA-style voting agreement.[132] Under the covenant in question, in the event of certain qualifying drag-along transactions, the stockholder parties to the voting agreement were obligated to refrain from asserting claims challenging the transaction or alleging a breach of any fiduciary duty of certain electing stockholders (or any affiliate or associate thereof) in connection with the transaction.[133]

Notably, similar questions as to the ability of stockholders to prospectively waive fiduciary claims under a drag-along covenant had been raised, but ulti-

this action raises questions as to whether the challenged federal forum provision did, in fact, have the "substantial deterrent effect" ascribed to it by the court.

130. 261 A.3d 1199, 1204 (Del. 2021).

131. *See* Halpin v. Riverstone Nat'l, Inc., No. 9796-VCG, 2015 WL 854724, at *8 (Del. Ch. Feb. 26, 2015) (observing that "this case raises an interesting legal issue as to whether a common stockholder may contractually waive its statutory appraisal rights for consideration to be set later by a controlling stockholder," but nevertheless finding unnecessary "to resolve that legal question" here because a "contractual waiver of a statutory right, where permitted, is effective only to the extent clearly set forth in the parties' contract" and "[h]ere, construction of the unambiguous contract provision does not clearly demonstrate that the Company is entitled to force a waiver of appraisal").

132. 295 A.3d 520 (Del. 2023).

133. *Id.*

mately were deemed unnecessary to decide, in at least one prior Court of Chancery case.[134] But in *New Enterprise Associates*, the question was ripe for resolution, as stockholders who had agreed to such a covenant challenged a drag-along sale as a breach of fiduciary duty, and the defendants in the case moved to dismiss these claims on the basis of the covenant. This led the court to rule on the question, ultimately finding that the covenant could bar future fiduciary claims challenging drag-along transactions except those claims asserting "an intentional breach of fiduciary duty."[135]

P. *Politan Capital Management LP v. Masimo Corp.* (2023): Change of Control Severance Provisions in CEO Employment Agreement

In a 2023 transcript ruling in *Politan Capital Management LP v. Masimo Corp.*, the Court of Chancery found it reasonably conceivable, based on the allegations made by an activist challenging the change of control severance provisions in a CEO's employment agreement during a proxy campaign, that the challenged provisions could "preclude the board from exercising its statutory and fiduciary duties to manage the corporation in the best interests of the corporation and its stockholders," and thereby amount "to abdication, *ultra vires*, and/or some form of waste" and potentially violate section 141(a) of the DGCL.[136] The challenged change of control severance provisions were subject to a single trigger that could entitle the beneficiary to terminate his employment agreement and receive severance compensation with a value that allegedly could approach $1 billion if, among other triggering events, there was a change in only one-third of the corporation's board of directors.

In this case, the challenge was brought as one-third of the board was up for election at an upcoming annual meeting, and the activist threatened to conduct a proxy contest and seek the election of its own nominees at the meeting. Based on these circumstances, the challenge to the change of control severance provisions presented an actual controversy ripe for judication.[137]

134. *See* Manti Holdings, LLC v. Carlyle Grp. Inc., No. 2020-0657, 2022 WL 444272, at *3–4 (Del. Ch. Feb. 14, 2022) (finding that, regardless of whether such a covenant may be enforceable under Delaware law, a less robust contractual drag-along covenant that made "no reference to fiduciary duties" and merely obligated stockholders to "consent to and raise no objections against [a drag-along] transaction" was "not sufficient to evince a knowing waiver of fiduciary rights, to the extent such would be enforceable," and did not prevent stockholders from challenging a drag-along transaction as a breach of fiduciary duty, and stating that: "Because I find that the parties did not effectively waive the right to enforce such duties via the Stockholders Agreement, I need not pass on whether such a waiver of duty is permissible under [Delaware] law.").

135. *New Enterprise Assocs.*, 295 A.3d at 593.

136. Politan Cap. Mgmt. LP v. Kiani, No. 2022-0948-NAC (Del. Ch. Feb. 3, 2023) (TRANSCRIPT).

137. *Compare* Grimes v. Donald, No. 13358, 1995 WL 54441, at *1, *7, *11 (Del. Ch. Jan. 11, 1995) (holding that employment agreements between a corporation and its CEO, which entitled the CEO to terminate the agreements and collect up to tens of millions in severance payments if "he unilaterally determine[d] in good faith that the company's board of directors . . . unreasonably interfered

IV. *Kellner*, *Moelis*, and a New Wave of Facial Challenges (Late 2023–Present)

In early 2024, a new wave of facial challenges emerged. This wave arose in the aftermath of Court of Chancery decisions invalidating certain provisions of the advance notice bylaws of one corporation, and the stockholders' agreement of another. Contrary to the positions taken by the proponents of many of these new-age facial challenges, a closer review of these cases once again illustrates that they do not represent a departure from the tempered principles of ripeness traditionally applied under Delaware law.

A. *Kellner v. AIM ImmunoTech Inc.* and the Ensuring Wave of Facial Challenges (2023–2024)

The recent wave of facial challenges has included innumerable challenges to corporate bylaws brought following the Court of Chancery's late 2023 opinion in *Kellner v. AIM ImmunoTech Inc.*[138] *Kellner* involved a dissident group's challenges to a board's adoption and enforcement of amended advance notice bylaws, which were adopted by the board prior to the opening of the advance notice window for the corporation's 2023 annual meeting. The board adopted the amended advance notice bylaws after successfully rejecting the dissident group's nomination notice as deficient in 2022 and with the expectation that the dissident group would return and run another proxy contest in 2023. In addition to addressing new SEC Rule 14a-19 and various other updates, the amendments bolstered the disclosures and other requirements required of stockholders seeking to make director nominations, resulting in a "lengthy" and "dense" amended advance notice bylaw that required "meaningful effort" for a stockholder to satisfy its requirements.[139] Upon finding that the dissident group's

with his management of the corporation," did not involve sufficient "financial consequences" to render the employment agreements "a *de facto* abdication of directorial obligation" inconsistent with section 141(a) of the DGCL, and observing that there were also "obvious ripeness issues" with the stockholder-plaintiff's challenges to the employment agreements, "both as they relate to a possible future declaration of termination and to any possible future change in control transaction," because "no current obligation for [the corporation] to make any of the payments that are claimed to be excessive has been alleged" and there was no allegations of "any interest of any person to acquire control of [the corporation] that is impeded by the termination rights that the [employment a]greements contemplate"), *aff'd*, 673 A.2d 1207, 1214, 1215 n.4 (Del. 1996) (affirming the Court of Chancery's holding that the challenged employment agreements did not involve sufficient financial consequences to give rise to an abdication claim, and while noting that the CEO's employment agreements may have used an "unfortunate choice of language," explaining that "[t]his poor choice of language in the [a]greements is not actionable *per se*" because "[w]hat actually may happen in the future may or may not ever become a litigable issue that is ripe for adjudication" and, even if "the payments could amount to a *de facto* abdication in possible future circumstances . . . [s]uch a set of facts has not been pleaded, is not before this Court, is based on speculation, and is not ripe for adjudication"). In addition, although the count of the activist's complaint challenging the change of control severance provisions in *Politan* sought relief through a declaration that the provisions were "void and unenforceable," this count was framed as a breach of fiduciary duty claim. Verified Compl., Politan Cap. Mgmt. LP v. Kiani, No. 2022-0948-NAC (Del. Ch. Oct. 21, 2022).

138. 307 A.3d 998 (Del. Ch. 2023).

139. *Id.* at 1027.

nomination notice failed to comply with the amended requirements, the board once again rejected the dissident group's nomination notice. In response, a dissident stockholder filed suit challenging the adoption of the amended bylaws and the board's application of the amended bylaws to reject the nomination notice.

The Court of Chancery conducted a trial on an expedited basis and issued an opinion during the week between Christmas and New Year's Day to provide a ruling in advance of the corporation's December 29th annual meeting. Although the Court of Chancery upheld the board's rejection of the nomination notice, it nevertheless found that four provisions of the amended advance notice bylaw failed to "afford stockholders a fair opportunity to nominate candidates," ran "afoul of Delaware law," and were "of no force and effect."[140] And while the Court of Chancery invalidated these provisions after analyzing each of them under enhanced scrutiny, a sentence in the opinion, at the beginning of this analysis, characterized the analysis as an "assess[ment of] whether the Amended Bylaws at issue are facially valid."[141]

Relying on these statements, some characterized the Court of Chancery's opinion in *Kellner* as a ruling on the facial validity of the four invalidated advance notice provisions and sent demand letters to (and ultimately brought litigation against) countless public Delaware corporations seeking the removal of similar provisions from their respective advance notice bylaws.[142] These challenges have now extended to other types of advance notice bylaws, bylaws, governance policies, and corporate agreements.[143]

After *Kellner* was appealed, the Delaware Supreme Court issued an appellate decision in July 2024. The Delaware Supreme Court's ruling has, in large part, stemmed the tide of the wave of facial advance notice bylaw challenges that emerged following the Court of Chancery's opinion. In its decision, the Delaware

140. *Id*. at 1036 (internal quotations omitted).

141. *Id*. at 1021.

142. *See, e.g.*, Siegel v. Morse, No. 2024-0628-NAC (Del. Ch. June 26, 2024) (TRANSCRIPT) (arguing on behalf of a stockholder-plaintiff in support of a motion to expedite a purported facial challenge to advance notice bylaws following the Court of Chancery's decision in *Kellner*: "On the issue of the timing of the bylaws relative to the filing of the complaint, there is no doubt that it was the *Kellner* ruling in the end of December that, I will say, opened the door for a—the potential for a facial challenge to advance notice bylaws. As Ms. Duffy notes, the case law previously under Boilermakers made clear or clear enough that—and there's one other, but the name is escaping me for a moment—where the path for a facial challenge to advance notice bylaws did not previously exist or appear to exist. And there's no doubt that the *Kellner* ruling changed that. That's why the Court has seen what they have seen with the—what we all know is the flood of filings."); *see also* Lenin Lopez, *The Plaintiffs' Bar's Shiny New Object Loses Its Luster: Advance Notice Bylaw Provisions*, Woodruff-Sawyer & Co. (July 17, 2024), https://woodruffsawyer.com/insights/advance-notice-bylaw-provisions ("Since Vice Chancellor Will's *Kellner* opinion was issued in December 2023, the plaintiffs' bar has made a cottage industry out of making demands and filing complaints against companies that include two types of advance notice bylaw provisions: 'wolf-pack' and 'daisy-chain' provisions."); *Sunshine Breaking Through the Clouds: Delaware Supreme Court Sheds Light on Standard of Review for Challenges to Advance Notice Bylaws*, Sidley Austin LLP (July 15, 2024), https://www.sidley.com/en/insights/newsupdates/2024/07/delaware-supreme-court-sheds-light-on-standard-of-review-for-challenges-to-advance-notice-bylaws (observing "the wave of facial challenge litigation that followed the *Kellner* trial court ruling").

143. *See, e.g.*, *In re* Irrevocable Resignation Bylaw Cases, C.A. No. 2024-0538-JTL (Del. Ch.).

Supreme Court observed the "apparent . . . confusion . . . in the Court of Chancery between a 'validity' challenge and an 'enforceability' challenge," explaining that "instead of undertaking a facial validity analysis, the [Court of Chancery] employed enhanced scrutiny review to declare four of six Amended Bylaws invalid."[144] The Delaware Supreme Court explained that, although it was proper for the court to conduct a reasonableness analysis of the amended bylaws to assess the equitable challenges to their adoption and enforcement, in the context of a facial challenge, "[a] bylaw is presumed valid, and the court should not consider hypotheticals or speculate whether the bylaw might be invalid under certain circumstances. Instead, the burden is on the party asserting invalidity to demonstrate that the bylaw cannot be valid under any circumstance."[145] Thus, "[w]hen a bylaw is challenged in court, it is insufficient for a plaintiff to simply assert that 'under some circumstances, a bylaw might conflict with a statute, or operate unlawfully.'"[146] Applying this standard to the facial challenges in the case, "with one exception," the Delaware Supreme Court had "no trouble concluding that the Amended Bylaws are valid."[147] The "one exception" found facially invalid by the Supreme Court was a "1,099-word single-sentence provision" that the Court of Chancery deemed "indecipherable," explaining that "[a]n unintelligible bylaw is invalid under 'any circumstances.'"[148]

Ripeness was neither disputed by the parties in *Kellner* nor an impediment to ruling on the facial validity of this bylaw given the context of the "prolonged proxy contest" between the parties, which was ongoing at the time of the amended bylaws' adoption and remained in dispute.[149] But perhaps due to the wave of facial challenges to bylaws following the Court of Chancery decision, the Delaware Supreme Court still deemed it appropriate to weigh in on the issue of ripeness in relation to bylaw challenges. When initially summarizing the process for assessing bylaw challenges, the Supreme Court carefully characterized this as the approach that should be used "[i]n a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance notice bylaws *that is ripe for judicial review*."[150] In a later footnote, the Delaware Supreme Court quoted *Stroud*—the seminal Delaware Supreme Court case that has been relied on through decades of case law adhering to Delaware's traditionally tempered approach to ripeness—and explained: "A court should only hear bylaw

144. 320 A.3d at 262. As the Supreme Court further explained, "[s]ome of that confusion might be attributed to how courts, including this Court, have used different words or expressions to describe the outcome of a successful bylaw challenge," which "stems from the use of different words or expressions like invalid, void, inequitable, unenforceable, nullified, struck down, and no force and effect." *Id.* at 262 & n.153. The Supreme Court also added that it appeared "the parties were less than clear about the nature of their claims." *Id.* at 262 n.156. Accordingly, the Supreme Court deemed it important to note that "fault" should not be ascribed to the Court of Chancery for this confusion. *Id.*

145. *Id.* at 263.

146. *Id.* at 258 (quoting *ATP*, 91 A.3d at 557–58).

147. *Id.* at 263.

148. *Id.*

149. *Id.* at 259 n.139.

150. *Id.* at 246 (emphasis added).

adoption, amendment, and application claims that are 'ripe for judicial determination.' A bylaw dispute is ripe when litigation is 'unavoidable' and the 'material facts are static.'"[151]

Accordingly, *Kellner* did not "open the floodgates" for facial challenges or alter Delaware's traditional view of ripeness. Far from it, *Kellner* involved an actual, real-time controversy over the adoption and enforcement of advance notice bylaws by real parties in interest.

Indeed, following the Delaware Supreme Court's opinion in *Kellner*, the Court of Chancery has recognized that *Kellner* did not represent the fundamental shift ascribed to it by some members of the plaintiffs' bar.[152] The Court of Chancery, therefore, has since declined to entertain even equitable challenges to advance notice bylaws brought in the aftermath of *Kellner* where the challenge failed to present "'a genuine, extant controversy involving the adoption, amendment, or application of [the] bylaws.'"[153] As the Court of Chancery has explained, this is "[i]n line with our courts' practice of adjudicating only ripe disputes, [as] 'Delaware law does not permit challenges to bylaws based on hypothetical abuses.'"[154] Following *Kellner*, the Delaware Supreme Court has also re-endorsed traditional ripeness principles in *Maffei v. Palkon*.[155]

B. *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* (2024–Present)

In *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, the Court of Chancery found that various provisions of a longstanding stockholders' agreement among Moelis & Company and affiliates of Ken Moelis—Moelis's founder, CEO, and Chairman—contravened section 141 of the DGCL and were facially invalid on that basis.[156] The court addressed the validity of these provisions in the second of two decisions issued in the case, the first of which, *Moelis I*, rejected the defendant's ripeness and laches defenses to the facial challenges.

As with some other past cases discussed in this article, *Moelis I*'s ripeness analysis could leave readers with the impression that facial challenges to corporate contracts (or charter or bylaw provisions) are always ripe. As has been recognized in other cases, *Moelis I* observed: "A facial challenge contends that an act is invalid under any set of circumstances. It does not require factual development; it presents a pure question of law. 'Facial challenges to the legality of provisions in corporate instruments are regularly resolved by this

151. *Id.* at 259 n.139 (quoting *Stroud*, 552 A.2d at 480–81 (internal citations omitted)).

152. *See, e.g.*, Siegel v. Morse, No. 2024-0628-NAC, 2024 WL 3791683 (Del. Ch. Aug. 12, 2024) (ORDER); *see also* Assad v. Chambers, No. 2024-0688-NAC, 2024 WL 3791684 (Del. Ch. Aug. 12, 2024) (ORDER).

153. Siegl v. Morse, No. 2024-0628-NAC, 2025 WL 1101624, at * 6 (Del. Ch. Apr. 14, 2025) (quoting *Kellner*, 320 A.3d at 258); Assad v. Chambers, No. 2024-0688-NAC, 2025 WL 1554609, at *3 (Del. Ch. June 2, 2025).

154. *Siegel*, 2025 WL 1101624, at * 6 (quoting Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 240 (Del. Ch. 2007)).

155. No. 125, 2024, 2025 WL 384054, at *26–27 (Del. Feb. 4, 2025).

156. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 310 A.3d 985 (Del. Ch. 2024).

Court.'"[157] The court then found the facial challenges in *Moelis I* ripe based on the 1956 Court of Chancery decision *Abercrombie v. Davis*[158] and three rights plan cases discussed earlier in this article, *Moran*, *Toll Brothers*, and *Chrysler*.

But a sweeping conclusion as to the ripeness of facial challenges should not be drawn from *Moelis I*. *Moelis I* both recites the ripeness principles traditionally applied under Delaware law and relies on these past Delaware cases in assessing the ripeness of facial challenges. And a deeper look at these cases relied on in *Moelis I* shows that their respective ripeness findings do not bear on the ripeness of facial challenges generally.

For example, although *Moelis I* relies on *Abercrombie*, the opinion's discussion of that case is relatively brief and makes no mention of the underlying facts giving rise to the parties' dispute. In this regard, *Moelis I* simply states:

> This court has rejected similar efforts to defeat facial challenges with ripeness arguments. In *Abercrombie*, the plaintiffs mounted a facial challenge to a provision in a stockholders agreement that the parties called the agents agreement. As in this case, the defendants argued that "plaintiffs do not show that the Agreement has been or will be used and so their complaint should be dismissed as premature." Chancellor Seitz held that the provision was facially invalid.[159]

The lack of detail regarding the context in which *Abercrombie* was decided could lead to the incorrect inference that the context is irrelevant to a facial challenge.

But as Chancellor Seitz's opinion expressly stated in *Abercrombie*, his decision merely "conclude[d] that *under the present facts* plaintiffs may attack the legality of the Agreement."[160] In fact, the court assessed ripeness in *Abercrombie* as follows:

> Defendants say that plaintiffs do not show that the Agreement has been or will be used and so their complaint should be dismissed as premature. This is an action for a declaratory judgment and there is clearly an actual controversy concerning the validity of the Agreement. Moreover, defendants' directors raised the question of a violation of the Agreement . . . in connection with the December directors' meeting. I conclude that *under the present facts* plaintiffs may attack the legality of the Agreement.[161]

Importantly, the "present facts" included an alleged breach of the challenged agreement at a past board meeting, which resulted in separate litigation in California over the alleged breach in which the corporation was preliminarily enjoined from recognizing any action taken at the disputed board meeting, and another party was enjoined from violating the agreement.[162] In other words, there

157. 310 A.3d at 1004 (quoting *Lions Gate*, 2006 WL 1668051, at *6).
158. 123 A.2d 893 (Del. Ch. 1956), *rev'd*, 130 A.2d 338 (Del. 1957).
159. *Moelis I*, 310 A.3d at 1004 (quoting *Abercrombie*, 123 A.2d at 1004).
160. 123 A.2d at 896 (emphasis added).
161. *Id.* (emphasis added).
162. *Abercrombie*, 130 A.2d at 341 ("The Ashland directors, it was charged, had violated the Agents' Agreement. Counter moves were made by Davies. Litigation was instituted in California by Davies, Signal, Hancock, Globe and Lario against Ashland and its two directors. American, named as a defendant, was preliminarily enjoined from recognizing any action taken at a board meeting

was undisputedly an ongoing actual controversy over the challenged agreement and its validity, and the facial challenge was found ripe on that basis.

Similarly, *Moelis I* summarily discusses the rights plan cases relied on in its ripeness analysis, placing a greater focus on the fact that these cases involved legal challenges to provisions alleged to violate the DGCL, and deemphasizing the specific bases upon which these challenges were deemed ripe, stating:

> This court rejected a similar ripeness argument in *Carmody v. Toll Brothers, Inc*. The plaintiff mounted a facial challenge to the validity of a rights plan with a "dead-hand" feature that allowed only the incumbent directors who adopted the plan or their designated successors to redeem the rights. The defendants argued that the challenges were not ripe until there was a specific hostile takeover proposal involving a proxy contest in which the acquirer sought to replace its own nominees and those nominees wanted to redeem the pill. Justice Jacobs, then a Vice Chancellor, rejected that argument:
>
> > Stripped of its bells and whistles, this argument boils down to the proposition that the adoption of a facially invalid rights plan, on a "clear day" where there is no specific hostile takeover proposal, can never be the subject of a legal challenge. Not surprisingly, the defendants cite no authority which supports that proposition, nor could they, since the case law holds to the contrary.
>
> Instead, he relied on *Moran*, where the defendants argued that a facial challenge to the legal validity of the rights plan was not ripe until the directors faced a hostile bid and refused to redeem the rights. Justice Walsh, then a Vice Chancellor, explained that the plaintiffs were "contesting the validity of the rights under the Delaware General Corporation Law," resulting in a ripe claim regardless of whether the rights were ever triggered. Vice Chancellor Jacobs reached the same conclusion in *Toll Brothers*, holding that "the plaintiff's claims of statutory and equitable invalidity are ripe for adjudication."
>
> As in *Abercrombie*, *Moran*, and *Toll Brothers*, the plaintiff here seeks a declaration that the Challenged Provisions are facially invalid. That claim is ripe.[163]

Given this focus, readers less steeped in the history of Delaware cases challenging rights plans may infer that the ripeness findings in these cases turned on the statutory nature of the challenges as opposed to the significant and immediate adverse impact and deterrent effect on stockholders threatened by the rights plans in those cases. As explained earlier in this article, however, the rights plan cases focused on the *current* adverse impact and deterrent effect posed to stockholders by the challenged plan or provision. Indeed, the court's opinions in *Moran*, *Toll Brothers*, and *Chrysler* each specifically focused on this aspect of a challenged rights plan and applied analogous reasoning to find a facial challenge to the plan ripe in that case, with *Toll Brothers* and *Chrysler* even placing specific emphasis on the words "current" and "present" in concluding that such

of December 16, and Ashland was enjoined from violating the Agents' Agreement. In the meantime, the suit below was filed by Abercrombie, Phillips and Sunray against the other shareholders and the Agents.").

163. *Moelis I*, 310 A.3d at 1004–05 (internal citations omitted).

potential effects on stockholders rendered the applicable facial challenges ripe.[164] For example, in finding a facial challenge ripe in *Toll Brothers*—the case cited most extensively throughout *Moelis I*'s ripeness analysis—Justice (and then–Vice Chancellor) Jacobs repeatedly emphasized the *present* and *current* effect on stockholders of the "dead hand" provisions of the rights plan challenged in the case, stating:

> Here, as in *Moran*, the plaintiff complains of the Rights Plan's (specifically, its "dead hand" feature's) *present* depressing and deterrent effect upon the shareholders' interests, in particular, the shareholders' *present* entitlement to receive and consider takeover proposals and to vote for a board of directors capable of exercising the full array of powers provided by statute, including the power to redeem the poison pill. Because of their alleged *current* adverse impact, the plaintiff's claims of statutory and equitable invalidity are ripe for adjudication, for the reasons articulated by the Supreme Court in *Moran*.[165]

To repeat, the emphasis placed on the words "*present*" and "*current*" in the above excerpt was not added by the authors, but rather comes directly from then–Vice Chancellor Jacobs' own opinion in *Toll Brothers*.[166] Similar emphasis was placed by the court itself in its opinion in *Chrysler*.[167] And as reviewed earlier in this article, even in the context of a challenge to a rights plan, the Court of Chancery has questioned stockholders' ability to bring such a challenge where the only alleged deterrent effects implicating stockholders' interests are "prospective, even if real, deterrent effect[s]," as opposed to those that are "imminent."[168]

In *Moelis I*, the Court of Chancery may have viewed the challenged stockholders' agreement as one imposing a present and ongoing deterrent effect on stockholders' individual interests. That is, in *Moelis I*, the court may have viewed the totality of restrictions in the board's powers (and the concomitant effects on stockholders' rights) as comparable to the restrictions on the board's range of authority imposed by a dead-hand pill, even if this rationale was not expressly set forth or explained in *Moelis I*'s ripeness analysis.[169] This is also not explained in

164. *See supra* note 45.

165. 723 A.2d at 1188 (emphasis in original).

166. *Id.*

167. *Chrysler*, 1992 WL 181024, at *3 ("The plaintiffs may be viewed as complaining of 'the [Rights] Plan's present effect on their entitlement to receive and consider takeover proposals and to engage in a proxy fight for control.' Thus, the complaint fairly alleges an injury . . . that has a present and continuing adverse effect upon the shareholders' interests, and makes their claim . . . ripe for adjudication." (emphasis in original) (quoting *Moran*, 490 A.2d at 1072)).

168. *Gaylord*, 747 A.2d at 77; *see Chrysogelos*, 1992 WL 58516, at *4. Notable Delaware cases in recent years have also included the invalidation of a rights plan that was not designed to protect net operating losses and included, among other features, a 5 percent trigger threshold in Williams Cos. Stockholder Litigation, No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. Feb. 26, 2021), *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (TABLE). This case was not decided as a facial challenge and was instead resolved through a ruling on the plaintiff's equitable challenge, under which the challenged rights plan was found to constitute an unreasonable defense measure under *Unocal*.

169. This is not to say, however, that this is a foregone conclusion. For example, any practical ongoing adverse effect that may have been posed to the individual interests of stockholders from the stockholders' agreement challenged in *Moelis* was likely mitigated, to a large degree, by Ken

subsequent Court of Chancery decisions declaring comparable aspects of other stockholders' agreements facially invalid, in which the court has not specifically reconsidered the question of ripeness but generally followed its reasoning set forth in *Moelis*.[170] But given the reliance on the aforementioned rights plan case in *Moelis I* (and the reliance on *Moelis I* in these later cases), these cases should not be construed as a fundamental shift in Delaware's view of ripeness in facial validity challenges. Rather, these cases, if upheld on appeal, are better seen as instances in which the court may have found challenged provisions to present an immediate deterrent effect on stockholders' individual interests analogous to that which may be posed by a rights plan adopted in response to the threat of a hostile takeover.[171]

Moelis's equity stake carrying nearly 40 percent of the voting power of Moelis's outstanding stock. *See* Moelis & Co., Proxy Statement (Schedule 14A), at 70 (Apr. 25, 2024). The fact that the challenged stockholders' agreement was publicly disclosed and in place for nearly ten years before it was challenged by any Moelis stockholder (including, the plaintiff in the case, who acquired his shares shortly after Moelis's IPO) further undermines the argument that the agreement posed a real and immediate threat to the individual interests of Moelis stockholders. *See Moelis I*, 310 A.3d at 992. The stockholders' agreements challenged in *Moelis* and other recent cases are also fundamentally different from the rights plans challenged in cases like *Moran*, *Toll Brothers*, and *Chrysler* (and even the fee-shifting bylaw challenged in *Solak* and dead hand proxy put challenged in *Ballantine*) given that they lack a built-in deterrent feature that dissuades challenge. In fact, unlike any of these rights plans or fee-shifting bylaws, which a stockholder could unilaterally implicate (by accumulating stock or bringing a challenge in a different jurisdiction) if it had the means and desire to do so, the stockholders' agreements challenged in these cases are not instruments that the stockholder-plaintiffs have any means of implicating or bringing into issue. In our view, these considerations weigh against finding the challenge in *Moelis* ripe for judication. In fact, one of the authors of this article represents a group of esteemed law professors who have filed a brief as *amici curiae* in the *Moelis* appeal arguing in favor of reversal of *Moelis I* on the basis of ripeness. *See* Brief of Professors Joseph A. Grundfest, Lawrence A. Hamermesh, Jonathan R. Macey & Charles R.T. O'Kelley as *Amici Curiae* in Support of Reversal, Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund, No. 340, 2024 (Del. Oct. 31, 2024) (citing earlier draft of article).

170. *See, e.g.*, Wagner v. BRP Grp., Inc., 316 A.3d 826 (Del. Ch. May 28, 2024); *N-Able*, 321 A.2d 516. Although the court addressed the related issue of mootness in *Wagner*, as the court explained in that case, "mootness doctrine addresses cases where *a controversy existed at the time the plaintiff commenced litigation* but the controversy later dissolves." 316 A.22d at 850 (quoting Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A., 312 A.3d 597, 608–09 (Del. 2024)). Accordingly, the mootness analysis in *Wagner* did not address the question of ripeness and was instead premised on the facial challenges in that case being ripe. Moreover, in resolving other issues not addressed in *Moelis I* and finding that the stockholder could bring its facial challenges in *Wagner*, the court relied on the distinction between derivative fiduciary claims and direct facial challenges drawn in *Grimes*. *Id.* at 846 ("In *Grimes I*, Chancellor Allen emphasized the distinctive nature of the two types of challenges. There, a plaintiff contended that a CEO's employment agreement violated Section 141(a) by preventing the board from overseeing and, if necessary, terminating him. The defendants tried to recharacterize the claim as a derivative action for breach of fiduciary duty that should be dismissed under Rule 23.1. Chancellor Allen rejected that characterization."). As noted herein, both the Court of Chancery and Supreme Court questioned the ripeness of the statutory challenges presented in *Grimes*. *See supra* note 137.

171. As noted in an earlier footnote, this article does not necessarily concede that these agreements present such a deterrent effect or that they should be properly analogized to a rights plan. In addition, the ripeness issues discussed herein are not the sole justiciability questions raised by recent challenges to stockholders' agreements. There is also reason to believe that non-party stockholders are generally barred from bringing facial challenge to existing corporate contracts under section 124 of the DGCL. In ruling that a corporation could not have validly entered into a challenged agreement in any circumstance as a matter of corporate law in *Moelis*, the Court of Chancery effectively held that the entry

into the contract was outside of the power of the corporation and *ultra vires*. *Compare Moelis II*, 311 A.3d 809, *with* Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 652 (Del. Ch. 2013) (finding section 124 inapplicable to a challenge asserting that a corporate act was not duly authorized, as opposed to an act that the corporation was incapable of undertaking); *see also* DONALD W. GLAZER ET AL., GLAZER AND FITZGIBBON ON LEGAL OPINIONS § 8.3.1 (3d ed. 2023) (explaining that, under modern "statutes and corporate charters [that] authorize a corporation to engage in all 'lawful' activities . . . [and] are intended to be expansive in the power they convey, . . . the fact that an activity covered by a corporate power opinion violates a law (*other than the governing corporation statute*) does not prevent the giving of that opinion" (emphasis added)); *cf. id.* § 13.1 (suggesting that the issues raised in *Moelis* are not within the scope of the "'no violation of law' opinion" commonly given as part of closing legal opinions, stating that a no violation opinion only "addresses the concern of opinion recipients that the transaction not result in a violation of a legal requirement that exposes the company to a fine, penalty or other governmental sanction"). This conclusion is bolstered by the Delaware General Assembly's adoption of section 122(18) of the DGCL in response to *Moelis*, which clarifies the *corporate power* of corporations to enter into the type of agreements challenged in that case. Allowing a stockholder to bring this type of challenge to the validity of a corporate contract and seek its invalidation on this basis contravenes Delaware's abolishment of the *ultra vires* doctrine decades ago. Indeed, the innumerable issues and complexities that have arisen in the aftermath of cases such as *Moelis*, *Wagner*, and *N-able* are precisely the issues that arose during a prior era of corporate law before they were eliminated through the abolishment of the *ultra vires* doctrine. Delaware's abolishment of the *ultra vires* doctrine is codified in section 124 of the DGCL, which provides, in relevant part, that:

> No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted: (1) In a proceeding by a stockholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation. If the unauthorized acts or transfer sought to be enjoined are being, or are to be, performed or made pursuant to any contract to which the corporation is a party, the court may, if all of the parties to the contract are parties to the proceeding and if it deems the same to be equitable, set aside and enjoin the performance of such contract, and in so doing may allow to the corporation or to the other parties to the contract, as the case may be, such compensation as may be equitable for the loss or damage sustained by any of them which may result from the action of the court in setting aside and enjoining the performance of such contract, but anticipated profits to be derived from the performance of the contract shall not be awarded by the court as a loss or damage sustained.

DEL. CODE ANN. tit. 8, § 124(1)(2025), By its terms, section 124 of the DGCL only permits a stockholder to bring a suit challenging a corporate contract for lack of requisite corporate power or capacity when brought to enjoin a new contract, and does not permit a stockholder to bring a corporate power challenge to a contract entered into a decade ago. This is apparent not only from the face of section 124, but also the statute's legislative history. Section 124 was adopted as part of the 1967 amendments to the DGCL, after the *ultra vires* doctrine had already been effectively abolished in Delaware, upon the recommendation of Professor Ernest Folk. "Professor Ernest Folk modeled his proposed version of Section 124 on Section 6 [of the Model Business Corporation Act]. As adopted, Section 124 parallels Section 6 with only incidental differences." *Bloodhound*, 65 A.3d at 652. And as Professor Folk stated in his report to the 1967 Delaware Corporation Law Study Committee, the Model Act provision replicated by section 124 "leaves ultra vires effective only in three situations: (1) *a strictly limited class of shareholders' suits to enjoin a contract not yet executed*, (2) a suit by, or in the right of, the corporation against directors and officers for their unauthorized acts, and (3) an Attorney General's suit." ERNEST L. FOLK, III, REVIEW OF THE DELAWARE CORPORATION LAW 47–48 (1967), https://delawarelaw.widener.edu/files/resources/folkreport.pdf [hereinafter Folk Report] (emphasis added). As Professor Folk explained, the adoption of this statutory provision was consistent with Delaware's prior rebuke of the *ultra vires* doctrine under existing case law at the time, under which "Delaware [did] not allow the ultra vires defense to a suit on a fully executed contract." *Id.* at 47 (citing Demarva Poultry Corp. v. Showell Poultry Corp., 179 A.2d 796, 799 (Del. 1962)). Thus, rather than allowing a stockholder to challenge a corporation's power and capacity to enter

As Delaware law has long held, and as recent cases have confirmed, stockholders who are a party to a contract cannot seek a declaratory judgment as to the contract's validity and the enforceability of their own future obligations under the contract where "any . . . dispute between the parties is hypothetical, and litigation regarding the . . . enforceability [of the obligations] specifically is not inevitable."[172] "Under these circumstances," the claim is not ripe, and "waiting to adjudicate the [obligations'] enforceability until they are otherwise before the Court is a better use of judicial resources."[173] This is the case even when, for example, a stockholder contests the validity of its own obligations in corporate agreements based on novel and important issues of Delaware corporate law, and applies with equal (if not greater) force when the obligations that a stockholder contests are not its own but those of the corporation.[174] It cannot be the case that all facial challenges to corporate contracts (or all facial challenges to charter or bylaw

into a contract well after it has been executed, the DGCL leaves this to the Delaware Attorney General. *See* DEL. CODE ANN. tit. 8, § 124(3)(2025). *See* also Folk Report, *supra*, at 47 ("However, 'the right to question the validity of corporate acts beyond the powers of the corporation could, of course, be exercised by the sovereignty by whom the corporation was created.'" (quoting Graham v. Young, 167 A. 906, 908 (Del. Super. ct. 1933)). Moreover, despite recent characterizations of Professor Adolf Berle's "twice tested" premise from his seminal article *Corporate Powers as Powers in Trust*, which have characterized this premise as a sword for attacking issues of corporate power and statutory compliance, the full context of Professor Berle's article in fact reinforces the conclusion that corporate law developments at the time shielded corporations from stockholder challenges to corporate power. Professor Berle's article was written in response to the evolution through which "general corporation laws . . . multiplied powers and made them increasingly absolute," as compared to a prior era of corporate law marked with pages of limitations in corporate charters. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). The thesis of Professor Berle's article was that the emergence of enabling corporate statutes through this extension in corporate power would not cause the sky to fall, as the exercise of corporations' newly found expansive corporate powers remained constrained in equity. As Professor Berle explained in his article, the grant of virtually unbound corporate power did not "permit untrammeled exercise of these powers" because "the use of the power is subject to equitable limitation." *Id*. at 1049, 1073. The stark contrast between Professor Berle's article and recent characterizations of his renowned work and "twice tested" premise is illustrated by his article's suggestions that many historic statutory limitations "protecting shareholders . . . are in reality not 'rights' but equitable remedies, to be used, molded, or discarded as the equities of the case may require," as this transition in corporate law marked by the enabling grant of broad corporate powers was intended to "permit [corporate management], when the action is actually necessary or beneficial, to do things in the doing of which they are now unduly hampered by technical rules." *Id*. at 1049–50, 1074. While Delaware case law has developed in manner that has not fully embraced this last point, it highlights Professor Berle's enabling view of corporate law and that he did not intend for his now-infamous premise to be used as support for invalidating corporation action based on belated and technical statutory challenges from stockholders.

172. *Nask4Innovation*, 2022 WL 4127621, at *5.

173. *Id*.

174. *Id*. (dismissing a stockholder's challenge to a broad release of "all known and unknown claims—including claims for breach of fiduciary duty—against the seller and its directors and officers, among others," included in letter of transmittal that the stockholder was forced to execute as a condition to receiving the merger consideration it was owed on the basis that the challenge was not ripe and involved questions that "would not be an issue" until the stockholder commenced a fiduciary or other claim within the scope of the release and the release was raised as a defense to that claim, and after concluding that the challenge was not ripe, further noting "that aspects of this case may touch on 'novel and important' issues of Delaware corporate law, including the viability of a stockholder waiver of the duty of loyalty in a letter of transmittal," and that "[t]he implication of such issues weighs heavily in favor of the Court waiting to resolve these questions until this dispute arrives before the Court in a more concrete form" (quoting *Stroud*, 552 A.2d at 481)).

provisions viewed as contractual in nature under Delaware law) are ripe for judication, and such a conclusion should not be derived from *Moelis I*.

V. Conclusion

Neither *Moelis* I nor the preceding decade of Delaware case law resolving corporate facial challenges has altered Delaware's traditionally disciplined approach to ripeness. Instead, the ripeness standard applicable to facial challenges under Delaware law continues to closely align with the principled justiciability standards applicable in U.S. federal courts, especially in relation to novel corporate law questions. Under this settled framework, many recent attorney-driven stockholder demands and lawsuits contesting, on a clear day, the facial validity of corporate charter provisions, bylaws, contracts, and governance policies raise issues not ripe for judication. In this case, it will be premature for the Delaware judiciary, and will often be premature for the corporation receiving the demand or defending the lawsuit, to expend resources resolving the issues raised.