

March 4, 2025

VIA EMAIL & U.S. MAIL

Delaware General Assembly
411 Legislative Avenue
Dover, DE 19901

Re: Senate Bill 21

Dear Distinguished Members of the Legislature:

We are Delaware lawyers. Our law firms are Delaware employers. Our clients are ordinary investors, unions, and public pension funds that serve teachers, nurses, firefighters, police officers, and tradespeople from across the country.

We write to respond to the February 25, 2025 letter sent to you by Lisa Schmidt, the President of Richards, Layton & Finger, P.A. (“Richards Layton”). We are writing because Richards Layton is wrong when it says that SB 21 makes “common-sense changes to balance Delaware corporate law.” In truth, SB 21 is a dangerous and radical change to Delaware corporate law. It is a direct attack on our courts that will destroy Delaware’s reputation for balance, eliminate Delaware jobs, and hurt Delaware residents by putting the corporate franchise at grave risk.

We share the goal of protecting Delaware. There are changes that could be made to curb or eliminate frivolous lawsuits, such as meritless challenges to ordinary-course transactions that burden corporations but seldom achieve any meaningful recovery for shareholders. We would support those changes, and we would welcome the opportunity to sit down at the table and work out a bill that actually protects Delaware and is aimed at curbing frivolous litigation.

But as we explain below, that is not what this bill does.

SB 21 Undermines Delaware’s Judiciary

The Secretary of State’s website has a page that explains “Why Businesses Choose Delaware.” Two of the top three reasons are “the courts” and “the case law”:¹

[T]he courts—as important as the statute itself are the courts that interpret it. Delaware is known worldwide for its judicial system and the expert and impartial

¹ *Why Businesses Choose Delaware*, STATE OF DELAWARE, <https://corplaw.delaware.gov/why-businesses-choose-delaware/> (last visited Mar. 3, 2025).

judges that decide its corporate cases. . . . The Delaware Court of Chancery is a specialized court of equity with specific jurisdiction over corporate disputes. Without juries, and with only seven expert jurists selected through a bipartisan, merit-based selection process, the Court of Chancery is flexible, responsive, focused and efficient. Cases from the Court of Chancery are appealed directly to the Delaware Supreme Court, which is the ultimate word on Delaware law. . . .

[T]he case law—the Court of Chancery and the Delaware Supreme Court both have a historical tradition of issuing reasoned written opinions supporting their decisions, thus allowing a significant body of precedent to accumulate over many decades. Judges, not juries, decide all corporate cases and must give reasons for their rulings. The resulting body of case law provides detailed and substantive guidance to corporations and their advisors.

If the General Assembly passes SB 21, neither of those claims will be true.

A leading corporate law professor from Columbia Law School, Eric Talley, has found that more than thirty key decisions of the Delaware Supreme Court would be overturned by SB 21.² The cases that SB 21 will overturn go back to the 1980s. They are famous decisions that establish the most fundamental rules of Delaware’s corporate law. SB 21 will eliminate those rules and take rights away from stockholders to eliminate accountability for billionaire executives.

When Supreme Court Chief Justice Collins Seitz met with the Joint Finance Committee on February 20, 2025, he said: “Along with our respect for your legislative judgments, I ask you to consider the importance of judicial independence.” Chief Justice Seitz was talking about SB 21.

Professor Talley and other law professors have said: “These amendments amount to a direct rebuke of the Delaware judiciary. They impose a legislative clampdown on the very judicial discretion that, for decades, has defined Delaware’s distinctive brand of corporate governance. Critics of Chancery may celebrate the move, but in doing so they risk undermining Delaware’s greatest asset[.]”³

² Eric Talley, LINKEDIN, https://www.linkedin.com/posts/eric-talley-808b52b_del-supreme-court-cases-overturned-by-sb21-activity-7299162202542886912-F71H/ (last visited Mar. 3, 2025).

³ Eric Talley et al., *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/>.

Rushing to overturn dozens of Supreme Court precedents is a bad idea—bad for investors and bad for Delaware. Passing this bill will send a message that the General Assembly does not trust the Court of Chancery and it does not trust the Supreme Court. This bill says that the Supreme Court and the Court of Chancery have been getting it wrong for forty years.

Rebuking the Delaware judiciary is bad for another reason. Every day, companies draft contracts that apply Delaware law and choose the Delaware courts to decide any future disputes. Why do they do this? Because Delaware’s Court of Chancery, Superior Court, and Supreme Court are seen as expert business courts that will decide cases neutrally on the merits, without fear or favor. If the Governor and the General Assembly are willing to bow to political pressure and undo decades of court decisions, that reputation will be harmed. Why should we expect contract negotiators to choose Delaware law and the Delaware courts for their contract disputes if Delaware is seen as a place where powerful people can change the law?

Advocates of this bill say that Delaware is at risk of losing corporate business because Delaware law is too unpredictable. But erasing forty years of case law would not make Delaware look like a stable or predictable place to do business. It would make Delaware look like a state where Elon Musk can change the law because he lost a case. That might be attractive to Elon Musk but it is not attractive to anyone else.

There Is No Evidence Of A Serious Threat To Delaware’s Franchise

Richards Layton says that SB 21 is “an overdue response to issues that have been brewing for several years.” It says there is a “concerning trend” of corporations leaving or considering leaving Delaware to incorporate in other states.

There is no evidence to support this claim. There is no evidence of a “Delaware Exit” or “DExit” trend.

Professor Stephen Bainbridge from UCLA has studied the data. He says “that DExit is a trickle not a flood.”⁴ Less than a month ago, Professor Bainbridge wrote: “I remain unpersuaded that

⁴ Stephen Bainbridge, *DExit Civil War? The Governor and Legislative Leaders Fire Shots Across Chancery’s Bow*, PROFESSORBAINBRIDGE.COM (Feb. 5, 2025), <https://www.professorbainbridge.com/professorbainbridgecom/2025/02/dexit-civil-war-the-governor-and-legislative-leaders-fire-shots-across-chancerys-bow.html>.

DExit poses a serious threat to Delaware’s dominance of the market for corporate charters.”⁵ On Monday, Professor Bainbridge commented on an important new academic study into the data and history of where firms choose to incorporate:

To my mind, Andrew's findings suggest that there will not be a domino effect. If DExit becomes a real phenomenon rather than clickbait, it will still take decades for Delaware to be overtaken.⁶

Professor Dael Norwood of the University of Delaware has also studied the data. And he says the same thing. Professor Norwood writes that “[t]he data does not support the panicked narrative that SB 21’s supporters have been promoting[.] . . . [P]rivate and public data sources agree: there is no observable decline in incorporations in Delaware, and no evidence that ‘DExit’ is occurring in response to Chancery Court rulings. Further, the advisors specifically tasked with forecasting future franchise tax revenues – that is, a body of people mostly not employed by Elon Musk – do not see evidence for dramatic change.”⁷

Every year, 7,000 new companies are created in Delaware. There are more companies incorporated in Delaware today than ever before. The number of corporate tax filers has increased every year for the past ten years.

Just two weeks ago, the Delaware Department of State presented data showing that, in 2024:

- More than 400,000 corporations chose to incorporate in Delaware;
- More than 80% of all initial public offerings (“IPOs”) were in Delaware; and

⁵ *Id.*

⁶ Stephen Bainbridge, *DExit is a trickle not a flood and is unlikely to become a cascade*, PROFESSORBAINBRIDGE.COM (Mar. 3, 2025), <https://www.professorbainbridge.com/professorbainbridgecom/2025/03/dexit-is-a-trickle-not-a-flood-and-is-unlikely-to-become-a-cascade.html>.

⁷ Dael A. Norwood, *The Data Does Not Support the Narrative*, DAELNORWOOD.COM (Feb. 23, 2025), <https://daelnorwood.com/2025/02/23/the-data-does-not-support-the-narrative/>.

- Delaware experienced a **net gain** of 85 publicly traded companies.⁸

These are facts. This is evidence. And against all of the facts, data, and evidence, Richards Layton and the other supporters of SB 21 can offer only speculation and wild rumors. That is not a good basis for taking the extreme and risky steps that they are demanding.

The only examples of a “Delaware Exit” that SB 21 proponents can identify are complaints from people like Elon Musk, Mark Zuckerberg or Phil Shawe, and the companies they control. These are people who have had to pay large judgments, sanctions, or settlements in Delaware courts for breaching their duties to investors or otherwise violating the law.

A handful of angry billionaires causing their companies to leave Delaware does not pose a threat to the Delaware franchise. This has happened before. In 2015, the CEO of Dole Foods advocated for changes in Delaware law because he was mad about lawsuits challenging his buyout of Dole. Delaware held firm. Governor Markell expressed support for the courts. The General Assembly passed laws that reaffirmed the importance of investor protections. Reporting on the Dole CEO’s complaints, a headline in the *Wall Street Journal* read, “Dole and Other Companies Sour on Delaware as Corporate Haven.” The story quoted William Chandler of Wilson, Sonsini, claiming that clients were thinking of leaving Delaware:

Now in private practice, [Chandler] says clients are increasingly frustrated by Delaware’s legal landscape.

“Some of them are saying, ‘Why are we in Delaware in the first place?’” Mr. Chandler said.

Later that same month, the Court of Chancery found that Dole’s CEO had defrauded Dole’s investors and ordered him to pay \$148 million in damages. The Court of Chancery was not intimidated by Dole’s threats to leave Delaware. Dole left. Everyone else stayed. The Delaware franchise continued to thrive.

If Delaware can hold firm again today, the same will still be true.

⁸ DELAWARE DEP’T OF STATE, FY 2026 JOINT FINANCE COMMITTEE HEARING PRESENTATION at 6 (Feb. 13, 2025), https://legis.delaware.gov/docs/default-source/jfcdocuments/jfcagencypresentations/20-00dosfy26jfc hearing.pdf?sfvrsn=a5da8838_2.

Corporate franchise taxes are capped at \$250,000 annually. So even though Tesla has a large value in the stock market, its exit from Delaware only reduced the state's budget by \$250,000. That is less than 0.0036% of the state's approximately \$7 billion budget.⁹ Even if twenty companies that were Tesla's size decided to leave, Delaware would lose less than 0.1% of its budget.

One or two high-profile founders getting mad and deciding to leave for Nevada is not a threat to Delaware. Those disgruntled founders are 0.1% of Delaware's customer base. The way to protect Delaware's franchise tax revenue is to protect investors and serve the needs of the 99.9%.

The 99.9% of Delaware's customer base are the companies and investors that trust Delaware to be stable and predictable. Those are the companies and investors that will be concerned if they see Delaware throw out forty years of case law to make one or two people happy.

SB 21 Eliminates Protections For Pensioners and Other Investors

Richards Layton says that SB 21 restores "balance" to Delaware corporate law. That is not true. SB 21 overturns more than a half-century of Delaware law, including the most important legal decisions from the highest court in Delaware: the Delaware Supreme Court.

Professor Charles Elson, the founder of the University of Delaware's Weinberg Center for Corporate Governance, warns that SB 21 would "destroy the typical traditional balance" between public stockholders and managers or controlling stockholders, and it would invite future federalization of corporate law. He says:

"[SB 21] doesn't just tip the balance; it completely tilts it. It's a terrible signal to send to the business world."

"[Delaware has] always been known for our neutrality. That's not the way business has been done here."

"If the goal is to attract a controlling shareholder like that, you absolutely destroy the whole point of the law."

"The whole reason institutions came to Delaware is that it was an exclusive forum for resolving disputes, and with that, it gained a great gift in the neutrality of the

⁹ STATE OF DELAWARE, ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2024 at 12, <https://accountingfiles.delaware.gov/docs/2024acfr.pdf>.

system. This would shift the balance to majority shareholders and it would end our reputation.”¹⁰

At a high level, SB 21 will make it easy for billionaire controllers and other corporate insiders to take money from other, smaller investors through conflict-of-interest transactions. SB 21 does this by creating so-called “safe harbors”: simple steps that a controller can take to eliminate any risk of being sued for an unfair conflict-of-interest transaction. The bill would require the Court of Chancery to automatically dismiss any claim brought by an investor where the “safe harbor” applied, even if the controller or corporate insider had taken advantage of minority investors. SB 21 also ties the hands of the courts in deciding whether a director is deemed to be independent of the controlling stockholder.

SB 21 also prevents investors from learning the facts about unfair actions. Under current law, stockholders have the right to obtain internal emails and text messages from the corporations they are invested in if those documents are “necessary and essential” to investigate wrongdoing. SB 21 eliminates that right.

Together, these changes will block investors in Delaware corporations from “their day in court,” and the Court of Chancery will become unable to regulate corporate misconduct.

SB 21 Will Harm Delaware’s Economy and State Budget

Richards Layton’s letter ignores the harm that SB 21 will do to our local economy. Lawsuits involving Delaware corporations are big business in Delaware. Lawsuits brought by investors over unfair deals create jobs for hundreds of lawyers, staff, and vendors; they fill seats in restaurants and beds in hotels.¹¹ This economic activity generates hundreds of millions of dollars in tax revenue each year.

SB 21 will reduce the number of Delaware lawsuits, which means fewer lawyers, fewer office managers, paralegals, assistants, couriers, copy vendors, restaurant workers, caterers, drivers, and

¹⁰ Katie Tabeling, *Corporate law amendments propose major shift in shareholders rights*, DEL. BUS. TIMES (Feb. 18, 2025), <https://delawarebusinesstimes.com/news/corporate-law-amendments-proposed/>.

¹¹ Paul Larson et al., *The Contributions of the Legal Industry to the Delaware Economy* at 11-23 (June 2019), <https://media1.dsba.org/public/Publications/LegalIndustryEconomicImpactStudy.PDF>.

hotel workers. These are the people that serve our community and depend on a robust legal industry.

In 2019, the Delaware State Bar Association published an economic impact study. That study found that the legal industry accounts for more than \$2.4 billion in economic activity in Delaware annually:

The legal industry contributes \$2.4 billion to Delaware's economy, with legal sector jobs contributing to the state's gross domestic product at double the rate of other major sectors. . . . The legal industry helps generate one-third of the state's total annual revenue for fiscal year 2018, approximately \$1.8 billion.¹²

By eliminating investor lawsuits, SB 21 will do serious harm to Delaware's legal industry. We know this first-hand. Because of the threat of SB 21, job offers have already been rescinded. Unfilled job openings have been closed. Lawyers from our firms have recently participated in panel discussions at leading law schools. Law students are already asking whether SB 21 should make them rethink a legal career in Delaware. The answer is yes.

The Forces Behind SB 21

Three lawyers from major law firms had critical roles in drafting SB 21:

- John Mark Zeberkiewicz from Richards Layton (headquartered in Delaware);
- Leo E. Strine Jr. from Wachtell Lipton (headquartered in New York); and
- William B. Chandler III from Wilson Sonsini (headquartered in Silicon Valley, California).

Notably, Elon Musk and Tesla are clients of Richards Layton. Wilson Sonsini advised Tesla on Musk's challenged compensation package. Mark Zuckerberg and his controlled company, Meta (formerly Facebook), are represented by Wachtell Lipton and Wilson Sonsini.¹³

Chandler is a former Chancellor and Strine is a former Chancellor and Chief Justice. But Chandler has been in private practice since 2011, and Strine has been in private practice since 2020. They

¹² *Id.* at 4.

¹³ Jacob Owens & Karl Baker, *Landmark Delaware corporate law changes aim to stem exits*, SPOTLIGHT DELAWARE (Feb. 19, 2025), <https://spotlightdelaware.org/2025/02/19/delaware-corporate-law-change-sb-21/>.

are highly paid lawyers who are seeking to overhaul Delaware law in a manner that will help the clients of their firms, who represent some of the most prominent defendants in the Delaware courts. No investors or lawyers who represent investors were involved in the drafting process.

During last year's debate over amendments to the Delaware General Corporation Law, Chandler made the following statement on the floor of the House:

We've had an institution in Delaware for decades, that institution is the Delaware Corporate Law Council. It has served this state remarkably well for all of those decades. . . . So that's why I believe deeply—and I did this while I was Chancellor—I believe deeply in the Corporate Law Council process. These are experts who have only one mission: to keep Delaware up to date, to keep our law predictable, certain, reasonable and fair, that's their job. That's their only job and they spend countless hours doing it. So, I believe in placing my trust in that institution, because it has worked so well.

Until this year, the Corporation Law Council drafted proposed legislative changes to the General Corporation Law. The Council had no role in drafting SB 21. SB was drafted in secret, presented publicly, and then provided to the Council for review.

The Council's review process was a sham. Members of the Council were told that they could not reject SB 21 or make any material changes to it.

To its discredit, the Council accepted these limitations on its role. This is not surprising. Corporate defense lawyers hold most of the spots on the Council, and they all represent corporate-controller clients who will benefit from SB 21.

Notably, the Council's proposed edits to SB 21 would make it fully retroactive except for cases that had already been filed by February 17, 2025—the day that the legislation was announced.

Why does this matter?

There are major unfair corporate transactions that harmed investors, which are currently being investigated by our law firms and others on behalf of investors. Many investors are in the process of seeking "books and records" (documents) to support a breach of fiduciary duty lawsuit. By doing an investigation, these investors are following the instructions of the Delaware courts. For years, Delaware judges have told investors that they should do their homework and conduct investigations before filing a lawsuit against corporate executives.

But because investors did what they were told, those investigations are still ongoing. The retroactivity language proposed by the Corporation Law Council means that investors would lose the ability to enforce their rights by filing future lawsuits about transactions that are currently under investigation.

This is a clear conflict of interest. Defense lawyers on the Council with clients who are under investigation should not be allowed to draft legislation that bars claims against their firms' clients. The General Assembly should not accept the Council's proposed retroactivity provision.

Elon, Elon, Elon

SB 21 is happening because of Elon Musk and his pending appeal of Chancellor McCormick's decision rejecting the \$56 billion package he obtained from Tesla.

When SB 21 was introduced, Senate Majority Leader Townsend stated that he had "no reason to believe it has any impact" on Musk's appeal because "it's not retroactive, so it's not about affecting any kind of pending litigation."¹⁴

But SB 21 creates defenses that Musk's lawyers can point to for purposes of Musk's appeal. Professor Bainbridge analyzed how the text and history of SB 21 justify an outcome favorable to Musk:

I start with the premise that *Tornetta v. Musk* was the decision that triggered SB 21. After his \$50 billion-plus compensation plan was struck down by the Delaware Chancery Court, Musk fired off a now notorious social media post recommending that one should "[n]ever incorporate your company in the state of Delaware." Tesla subsequently reincorporated in Texas. Subsequently, other controllers started making noises about moving, which triggered Delaware to respond with SB 21 to provide controllers with greater insulation from liability. Presumably the drafters would have ensured that the triggering case would be covered by the statute.¹⁵

¹⁴ *Id.*

¹⁵ Stephen Bainbridge, *A Comment on Larry Cunningham's Weinberg Center Program on SB 21: Would Tornetta Come Out the Same Way?*, PROFESSORBAINBRIDGE.COM (Feb. 25, 2025), <https://www.professorbainbridge.com/professorbainbridgecom/2025/02/a-comment-on-larry-cunninghams-weinberg-center-program-on-sb-21-would-tornetaa-come-out-the-same-way.html>.

The Council's recommended synopsis to SB 21 makes clear that Musk's lawyers will argue that the new "safe harbors" in SB 21 are a guide for how the Delaware Supreme Court should interpret current Delaware law for purposes of Musk's appeal:

The lack of retroactivity to pending actions and proceedings shall not in any way affect the ability of a court, by reference to existing case law, to reach an outcome consistent with one that would be dictated by this Act.

Professor Brian Quinn of Boston College Law School writes that the above-quoted language is the "whole game." He explains:

This legislation - the whole thing - appears to be about dictating an outcome for the *Tornetta* appeal. Not content to sit by and wait for the Delaware Supreme Court to reach that outcome on its own, which it very well could have done on its own, the sponsors of this bill appear to want to ensure the court comes to this conclusion. The Synopsis clarifies the question of retroactivity in a way that signals to the Court how it should decide on a pending case. Wow. I mean, seriously? Wow.¹⁶

The Delaware Supreme Court should be allowed to decide Musk's appeal without this kind of interference. These are critical, fundamental decisions about Delaware's corporate law. We should not be making them in a rush driven by a frenzy of tweets by Musk. Delaware law should not be rewritten to protect Musk or to protect unfair, conflict-of-interest transactions by controllers of other Delaware corporations who want to be like Musk.

Last week, the President of the American Federation of Teachers, Randi Weingarten, sent letters to six large investment firms—BlackRock, Vanguard, State Street, T Rowe Price, Fidelity, and TIAA. In those letters, Ms. Weingarten called on these firms to reconsider whether it was a good idea to invest in Tesla. She pointed, among other things, to the decision by Tesla's board of directors to try to overturn Chancellor McCormick's decision invalidating Musk's pay package.¹⁷ These letters are a reminder that ultimately Delaware law must serve all investors in Delaware corporations, not just the controlling stockholders.

¹⁶ Brian Quinn, *Corporate Vandalism*, M & A LAW PROF BLOG (Mar. 3, 2025), <https://lawprofessors.typepad.com/mergers/2025/03/corporate-vandalism-1.html>.

¹⁷ Rana Foroohar, *What Tesla's tarnish tells us about America Inc.*, FIN. TIMES (Mar. 3, 2025), <https://www.ft.com/content/809cd697-8f3e-459a-bb2f-82754282ace5>.

We Can Support A More Responsible Bill

We all recognize the importance of protecting Delaware and the corporate franchise. We support a bill that is designed to meet that goal. But this one-sided legislation is not that bill. SB 21 hurts corporate law and it hurts Delaware.

As noted above, we believe that there are appropriate changes that could be made to eliminate frivolous lawsuits and provide greater predictability for ordinary-course transactions. We would support a bill that made those changes.

But SB 21 is not about eliminating weak claims; it is about eliminating strong claims. SB 21 takes away rights from investors who trusted in Delaware to protect them. It means that controlling stockholders and senior executives will have every incentive and opportunity to take advantage of minority investors. And it tells companies around the world that Delaware is not a safe or predictable place to do business because a party who loses in court can bully Delaware into changing the law.

We are prepared to sit down at the table and negotiate a fair and responsible bill that serves the interests of everyone. We would welcome the opportunity to do so.

Respectfully,

/s/ Gregory V. Varallo

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