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STATE OF NEW YORK

NIGEL JOHN ECCLES, LESLEY JAYNE ROSS ECCLES, THOMAS GORDON GRIFFITHS, ROBAT JONES, CHRIS STAFFORD, ASHEK AHMED, ANDREW ALLAN, ALEXANDRA AMOS as Personal Representative of the Estate of Jay Amos, JEANNICE ANGELA, KEN BERMAN, ALEX BIRD, DUNCAN BLAIR, CAMERON BOAL, EHI BORHA, JESSE BOSKOFF, GEOFF BOUGH, MICHAEL BRANCHINI, DANIEL BROWN, KELLI BUCHAN, CHARLENE BURNS, WILLIAM CARROLL, DAVE CAVINO, SHREE CHOWKWALE, CORAL HOUSE SERVICES LIMITED, CHRIS CORBELLINI, JIM CROFT,CYRUS DAVID, DAVIDSON FAMILY REVOCABLE TRUST, JAMES DOIG, RYAN DONER, KEVIN DORREN, PAYOM DOUSTI, CARL EKMAN, RYAN FABER, JASON FARIA, VICTORIA FARQUHAR, RORY FITZPATRICK, ADRIANA ESTRADA GENAO, MITCHELL GILLESPIE, ALAN GOLDSHER, WILL GREEN, MELANIE GRIER, JUSTIN HANKE, RYAN HANSEN, PETER HENDERSON, MATTHEW HEVIA, ANDREW

(*Caption continued on inside cover*)

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Plaintiffs-Appellants,

—against—

SHAMROCK CAPITAL ADVISORS, LLC, SHAMROCK CAPITAL GROWTH FUND III, LP, SHAMROCK FANDUEL CO-INVEST LLC, SHAMROCK FANDUEL CO-INVEST II, LP, KKR & CO., INC., FAN INVESTOR LIMITED, FAN INVESTORS L.P., MICHAEL LASALLE, EDWARD OBERWAGER, ANDREW CLELAND, MATTHEW KING, CARL VOGEL, DAVID NATHANSON, FASTBALL HOLDINGS LLC, FASTBALL PARENT 1 INC., FASTBALL PARENT 2 INC., PANDACO, INC., FANDUEL INC., and FANDUEL GROUP, INC.,

Defendants-Respondents.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are 47 U.S. law professors who teach or publish scholarship on corporate law and governance.[1] Collectively, they have decades of experience in the areas of law at issue in this case, including comparative corporate law, as well as knowledge of New York corporations and commerce. One of the arguments in this case is that the internal affairs doctrine—under which the law of the state of incorporation applies to disputes concerning the corporation's internal affairs—should be discarded for an interest-balancing approach to choice of law. Given their deep expertise and professional commitment to the orderly development of corporate law, *amici* seek to offer for the Court's consideration additional perspectives and arguments relating to the purpose and application of the internal affairs doctrine and the destructive implications of adopting an interest-balancing approach in place of this well-settled doctrine.

PRELIMINARY STATEMENT

New York has long followed the bedrock choice-of-law principle that the law of the state of incorporation governs the internal affairs of the corporation. This principle is known as the "internal affairs doctrine," and U.S. state and federal courts

[1] *Amici* are named in the Appendix to the Motion for Leave to File. No party or its counsel contributed to the content of this brief or otherwise participated in the brief's preparation. No person or its counsel contributed money intended to fund preparation or submission of this brief.

generally consider this doctrine to be the law of the land, a foundation of modern corporate law on which shareholders, directors, and officers rely. In light of New York's prominence in U.S. and global commerce, if this Court were to disturb that foundation, it will draw into question this core tenet of corporate law on which some of the world's largest corporations have relied in assessing the legal rights, responsibilities, and liabilities of their shareholders, directors, and officers. In fact, were New York to adopt a balancing test, it will likely become the sole outlier state to do so.

The internal affairs doctrine is rooted in the application of conflicts-of-law principles to the internal activities of, and corporate disputes arising among, shareholders, directors, and officers. Fiduciary duties, and the alleged breach of those duties, are an integral part of those internal activities. By their nature, these interactions—mergers and acquisitions, paying dividends, and so forth—are recurring, and so subjecting them to different states' laws will create uncertainty at best, and at worst will subject corporations and directors to different and irreconcilable duties for the same activities.

The internal affairs doctrine is intended to prevent such disorder. With predictability, corporate planners can plan ahead and grow an organization with a settled expectation of which state's legal regime to follow. The internal affairs doctrine sensibly protects the settled expectations of the corporation's shareholders,

directors, and officers, respecting the purposeful choice of a particular state's approach to internal corporate law.

Discarding the internal affairs doctrine for an inapt interest-balancing approach will destabilize the corporate law expectations of those businesses that have significant contacts with New York, with practical, negative consequences. No doubt, those corporations will have a harder time attracting talented directors if the law governing the nominees' future obligations and liabilities is uncertain. Shareholder expectations will be unsettled and, worse yet, bedrock corporate relationships may become governed by the fortuity of where a shareholder has decided to locate. And given the unique omnipresence of New York contacts for corporations—scores of headquarters, institutional investors, and formal stock ownership are located in New York—future plaintiffs can push droves of disputes into already strained New York courts. As we discuss below, that disruption to free commerce is not only problematic, in and of itself, but raises serious constitutional concerns, including by "adversely affect[ing] interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987).

The Court should not invite such gamesmanship. It should instead affirm the decision of the Appellate Division to follow the settled internal affairs doctrine.

ARGUMENT

I. THE SETTLED INTERNAL AFFAIRS DOCTRINE PROMOTES AND PROTECTS CORPORATE STABILITY.

The internal affairs doctrine is a choice-of-law rule that provides that "the local law of the state of incorporation" applies "almost invariably" to issues involving the "internal affairs" of a corporation—that is, the "relations *inter se* of the corporation, its shareholders, directors, officers or agents"—except in the "extremely rare situation." Restatement (Second) of Conflict of Laws ("Restatement") § 302 (1971) cmts. a, g (1971).[2] This is the law for good reason: "the needs of the interstate and international systems, certainty, predictability and uniformity of result, [and] protection of the justified expectations of the parties" all point towards applying the law of the state of incorporation. *Id.*, cmt. b. Experience and decades of precedent bear out this rationale, which this Court should affirm here.

A. The Internal Affairs Doctrine Promotes Uniformity.

The internal affairs doctrine ensures that internal corporate relationships are governed by a uniform set of laws, promoting equal treatment and preventing

[2] This rule is subject to two clearly defined exceptions. *See* Restatement § 302 cmt. g. First, the doctrine does not apply in the context of a "local statute that is explicitly applicable to the situation at hand." *Id.*, cmt. a. Examples include state laws governing the offering and sales of securities within a state (known as "Blue Sky" laws) and "statutes regulating the activities of public utilities." *Id.* Second, the law of the state of incorporation does not apply "when the corporation has little or no contact with this state other than the fact that it was incorporated there." *Id.*, cmt. g. These exceptions are narrow by design and intended to apply only in rare cases.

inconsistent and conflicting outcomes. As the U.S. Supreme Court recognized more than thirty years ago, the "beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction." *CTS*, 481 U.S. at 90. To that end, the internal affairs doctrine "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Absent the internal affairs doctrine, the same transaction could be held valid in one state but invalid in another due to conflicting state laws governing, for example, shareholder voting and director liability. *See Hart v. Gen. Motors Corp.*, 129 A.D.2d 179, 183–84 (1st Dep't 1987); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1115–16 (Del. 2005). In recognition that such outcomes are untenable, the law has long been clear that the "[u]niform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." Restatement § 302 cmt. e.

The internal affairs doctrine rests on a conceptual distinction between corporate acts (that is, acts "peculiar" to a corporation) and acts that are not limited

to corporations. Restatement § 302, cmt. a. Acts in that latter category include making contracts and committing torts. Those acts are defined by two features. First, to the extent there is a legal dispute, it is often a "one-shot" issue, resolution of which is typically confined to the particular matter at hand, less likely to be repeated, and, therefore, less in need of the uniformity of single legal regime. *McDermott Inc. v. Lewis*, 531 A.2d 206, 216 (Del. 1987) (quoting P. John Kozyris, *Corporate Wars and Choice of Law*, 1985 Duke L.J. 1 (1985)). Second, such activities typically involve actors outside of the corporate sphere—the counterparty to a contract, for instance, or the victim of a tort. *See* Willis L.M. Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1124 (1958) ("Reese & Kaufman"). In such cases, "[t]here is no reason why the rights of such [additional parties] should not vary from case to case, depending on the state in which they dealt with the corporation." *Id.* at 1125.[3]

Acts peculiar to a corporation, however, such as voting and mergers, consolidations, and reorganizations, primarily impact the "relationships *inter sese* of the corporation and its directors, officers, and stockholders." *Id.* Fiduciary duties are a central feature of those relationships. In other words, these acts relate to the

[3] *See also* Restatement § 302 cmt. e ("There is no reason . . . why an issue involving one corporate contract should not be governed by the local law of state X while an issue involving another corporate contract is governed by the local law of state Y.").

organization and management of the entity itself. They are bound to be recurrent, not "one-shot." *McDermott*, 531 A.2d at 215–16. For that reason, "it is desirable that these relationships [among corporate actors], and hence corporate activity which affects them, should be governed by a single law." Reese & Kaufman, *supra*, at 1125. The internal affairs doctrine thus "serves the vital need for a single, constant and equal law to avoid the fragmentation of continuing, interdependent internal relationships." *McDermott*, 531 A.2d at 216.

The danger of fragmentation is particularly pronounced in the corporate context, given that shares are transferable—there is the potential for a wide dispersion and free movement of shareholders across multiple jurisdictions. Thus, in contrast to the uniformity promoted by the internal affairs doctrine, it would be "chaotic" if a corporation's internal affairs were governed by different and shifting sets of laws. Reese & Kaufman, *supra*, at 1125, 1137; *see also* Restatement § 302 cmt. e. Accordingly, the First Department has recognized that the validity of a transaction "cannot be decided on a state-by-state basis," as "every state might seek to judge the same Board of Directors' decision under different public policy standards," which would "completely disregard[]" the benefits of uniformity. *Hart*, 129 A.D.2d at 183–84.

At bottom, the internal affairs doctrine assures that a uniform set of laws applies to a corporation's internal affairs. That uniformity is established and

valuable, and this Court should preserve it here.

B. The Internal Affairs Doctrine Promotes Predictability and Fairness.

A board's ability to comprehensively and continuously plan for the future is essential to sound corporate management. That ability is hampered to the extent the board is unable to predict what laws may or may not apply to its future plans and transactions. A predictable expectation of the law governing legal rights and responsibilities—as opposed to case-dependent interest balancing—is critical for shareholders, directors, and officers in making and assessing the legal rights, responsibilities, and liabilities around corporate decisions and decision-making. The internal affairs doctrine thus allows corporate planners "to adjust the many variables of the corporate life, confident that they can predict the legal effect of these choices." *Nagy v. Riblet Prods. Corp.*, 79 F.3d 572, 576 (7th Cir. 1996).

Applying the law of the state of incorporation to internal affairs supports settled expectations. Shareholders, directors, and officers "usually expect that their rights and duties with respect to the corporation would be determined by the local law of the state of incorporation." Restatement § 302 cmt. e. The chosen state of incorporation "cannot" thus "be dismissed as merely 'fortuitous.'" *Hart*, 129 A.D.2d at 184–85. When shareholders incorporate a corporation, they "determine the body of law that will govern the internal affairs of the corporation and the conduct of their directors," and "[t]he corporation and its shareholders rightfully

expect that the laws under which they have chosen to do business will be applied." *Id.*; *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) ("Application of [the law of the state of incorporation] achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation."), *superseded on other grounds by* 28 U.S.C. § 1610.

In addition to promoting predictability, the internal affairs doctrine also comports with basic principles of fairness and due process. Indeed, "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233, 246 (2013). Thus, "[d]ue process requires that directors, officers and shareholders be given adequate notice of the jurisdiction whose laws will ultimately govern the corporation's internal affairs." *McDermott*, 531 A.2d at 218. In a world of "multistate and multinational organizations," the law recognizes that "directors and officers have a significant right . . . to know what laws will be applied to their actions," while "[s]tockholders[ ] have a right to know by what standards of accountability they may hold those managing the corporation's business and affairs." *Id.* at 216–17.

Selecting which law to apply based on a multifactor balancing test will defeat these purposes. Such a rule is "apt to produce inequalities, intolerable confusion,

and uncertainty." *State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 114 Cal. App. 4th 434, 443–44 (2003) (citing *McDermott*, 531 A.2d at 216–17). And as courts and commentators have long recognized, predicting the outcome of a fact-intensive balancing test—based on lists of multiple factors to be considered in the future by a court in determining after-the-fact what state has the most significant relationship—is difficult at best. As one court explained, "a factual determination to decide which of two conflicting state laws governs the internal affairs of a corporation at any point in time" is not only bound to produce inconsistent results, but would "completely contravene[] the importance of stability within inter-corporate relationships." *VantagePoint,* 871 A.2d at 1115; *see also Newell Co. v. Petersen*, 325 Ill. App. 3d 661, 689 (2001) ("We do not see how the officers, directors, and shareholders of a corporation will be comforted knowing that their choice of law clause may or may not be honored depending on how a court views various factual circumstances peculiar to the case before it."). The unfairness of such a rule is equally plain: if the law governing a corporation's internal affairs is uncertain, directors will have no "opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *James Square Assocs.*, 21 N.Y.3d at 246 (citing *Landgraf v. USI Film Prods.*, 511 US 244, 265 (1994)).[4]

[4] Even those who accept a balancing test in the torts context, as explained in *Babcock v. Jackson*, 12 N.Y.2d 473 (1963), have observed that the test is not a "talisman of legal certainty." Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest*

The internal affairs doctrine has long guarded against unpredictability and unfairness, and this Court should affirm that approach.

II. NEW YORK AND ALL OTHER STATES HAVE UNIFORMLY APPLIED THE INTERNAL AFFAIRS DOCTRINE.

A. New York Has Long and Consistently Recognized the Internal Affairs Doctrine.

For more than 150 years, New York courts have recognized that a corporation's "franchises, powers, capacities, duties and liabilities, are created, fixed, limited and qualified, both in action and time, by the law of the State granting the charter." *Merrick v. Van Santvoord*, 34 N.Y. 208, 222 (1866) (quoting *Blackstone Mfg. Co. v. Inhabitants of Blackstone*, 79 Mass. 488, 489 (1859) (Shaw, C.J.)).[5] As this Court explained long ago, the "decisions of the other States, the

Analysis, 32 Am. J. Comp. L. 1, 14–17 (1984) (collecting cases); *see also* Reese & Kaufman, *supra*, at 1127 (describing the difficulty of determining a company's principal place of business).

[5] Although the New York Business Corporations Law permits certain actions to proceed against foreign corporations, including their officers or directors, s*ee* N.Y. Bus. Corp. Law §§ 1317–1320, New York courts have long held that these provisions do not "override the internal affairs doctrine," but provide "a mere statutory predicate to jurisdiction, which simply confers jurisdiction upon New York courts over derivative suits on behalf of out-of-state corporations but does not *require* application of New York law in such suits." *City of Aventura Police Officers' Ret. Fund v. Arisen*, 70 Misc. 3d 234, 244 (N.Y. Sup. Ct., N.Y. Cty. 2020) (quotation marks omitted); *see also, e.g.*, *Potter v. Arrington*, 11 Misc. 3d 962, 966 (N.Y. Sup. Ct., Monroe Cty. 2006) ("[E]ven though under Business Corporation Law § 1319 a foreign corporation operating within New York is subject to provisions of the State's substantive law, this statute is not a conflict of laws rule and does not compel the application of New York law; rather it must be viewed as the statutory

course of New York legislation, and the general usages of the country" all support this view, and it would be "disastrous to the citizens of our own and of other States, if judicial innovations were permitted in applying the rules of general comity." *Id.* at 221. Over the following century, this Court consistently reaffirmed its commitment to this principle. *See, e.g.*, *Cohn v. Mishkoff-Costlow Co.*, 256 N.Y. 102, 105 (1931) (per curiam) ("the internal affairs of a corporation . . . ought to be managed under the laws . . . of the courts of the state or country where it is organized"); *Matter of Am. Fibre Chair Seat Corp.*, 265 N.Y. 416, 420 (1934) (shareholder rights are "governed by the law of its creation"); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 503–04 (1969) ("the duties and obligations of directors and officers . . . ever remains that of the State which created the corporation").[6]

More recent decisions confirm New York's continued adherence to the internal affairs doctrine. In *Greenspun v. Lindley*, 36 N.Y.2d 473 (1975), this Court considered whether a Massachusetts law requiring that investors make a demand upon the board prior to bringing a derivative suit applied to an investment trust that was "organized and existing under the laws of Massachusetts," where the trust's

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predicate allowing New York to follow its conflict rules in determining the applicable law.").

[6] Historically, New York courts have also declined to exercise jurisdiction over actions involving the internal affairs of foreign corporations. *See, e.g.*, *Nothiger v. Corroon Reynolds Corp.*, 266 A.D. 299, 300 (1st Dep't 1943).

declaration "expressly provide[d] that the law of Massachusetts shall be the applicable law as to the rights of the parties." *Id.* at 477. This Court determined that "prima facie, Massachusetts law is applicable," then went on to "note the pragmatic as well as the theoretical advantages which would appear to flow from a conclusion that the rights of all shareholders . . . should be determined on a trust-wide basis rather than . . . the assessment by several courts as to which State it is where the investment trust may be said to be present." *Id.* To be sure, *Greenspun* did not announce a *per se* rule—it declined "any *automatic* application of the so-called 'internal affairs' choice-of-law rule"—but it also did not create a new interest-balancing rule that would permit the application of a law other than that of a business's place of incorporation. *Id.* at 478 (emphasis added). As *Greenspun* explained, a "strict analogy to the relationship between shareholders and directors of a business corporation" would require application of "the law of the State in which the business entity was formed." *Id.*

Five years later, in *Zion v. Kurtz*, 50 N.Y.2d 92 (1980), this Court cited *Greenspun* in explaining that applying the law of a business's state of incorporation is consistent with "the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors." *Id.* at 100 (citing Restatement § 302). *Zion* reached this holding without any interest-balancing—it was enough that the corporation was incorporated in Delaware, even

though the parties were principally based in New York. *Id.*

Since *Greenspun* and *Zion*, courts applying New York law—state and federal—have continually reaffirmed the internal affairs doctrine. In *Hart*, 129 A.D.2d 179, for example, the First Department held that, "[i]n incorporating in a particular state, shareholders, for their own particular reasons, determine the body of law that will govern the internal affairs of the corporation and the conduct of their directors." *Id.* at 184. The First Department emphasized that the validity of the disputed transaction at issue—involving an acquisition by General Motors, which was incorporated in Delaware—"cannot be decided on a state by state basis," for "[u]niform treatment of directors, officers and shareholders . . . is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." *Id.* at 183–84 (quoting Restatement § 302)); *see also, e.g.*, *Haussmann v. Baumann*, 217 A.D.3d 569, 570 (1st Dep't 2023) ("The internal affairs doctrine is a conflict of laws principle providing that claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation[.]" (quotation marks omitted)); *Glaubach v. Slifkin*, 171 A.D.3d 1019, 1022 (2d Dep't 2019) ("New York choice-of-law rules provide that substantive issues such as issues of corporate governance . . . are governed by the law of the state in which the corporation is chartered—here, Delaware." (citation

omitted)).

The Second Circuit, for its part, has consistently held "[u]nder New York law, courts look to the law of the state of incorporation in adjudicating a corporation's 'internal affairs.'" *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 772 F.3d 740, 743 n.2 (2d Cir. 2014) (some internal quotation marks omitted), *certified question answered*, 118 A.3d 175 (Del. 2015). As the Second Circuit recently explained:

> The internal affairs doctrine—a species of interest analysis—provides that the place of incorporation generally has the greatest interest in having its law apply to questions regarding the internal affairs of a corporation, such as the relationship between shareholders and directors. Although New York courts reject a per se application of the internal affairs doctrine, they generally apply the law of the place of incorporation unless another state has an overriding interest in applying its own law and a defendant has little contact, apart from the fact of its incorporation, with the state of incorporation.

Hau Yin To v. HSBC Holdings, PLC, 700 F. App'x 66, 68–69 (2d Cir. 2017) (summary order) (quotation marks omitted) (citing, *inter alia*, *Zion*, 50 N.Y.2d at 100, and *Greenspun*, 36 N.Y.2d at 477). District court decisions within the Second Circuit are in accord. *See, e.g.*, *Steinberg ex rel. Bank of Am. Corp. v. Mozilo*, 135 F. Supp. 3d 178, 182 (S.D.N.Y. 2015) ("New York law looks to the law of the state of incorporation in adjudicating a corporation's 'internal affairs,'" . . . (some internal quotation marks omitted)); *Seidl v. Am. Century Cos., Inc.*, 713 F. Supp. 2d 249, 255 (S.D.N.Y. 2010) ("Under New York law, courts look to the law of the state of incorporation in adjudicating a corporation's internal affairs, including questions as

to the relationship between the corporation's shareholders and its directors, such as a shareholder derivative action." (internal quotations omitted)), *aff'd*, 427 F. App'x 35 (2d Cir. 2011).

B. Every Other State Applies the Internal Affairs Doctrine.

Like New York, states across the country consider the internal affairs doctrine to be a bedrock principle of law. As early as 1885, a New Jersey state-court judge described the doctrine as "almost too obvious for remark." *Gregory v. N.Y., Lake Erie & W. R.R. Co.*, 40 N.J. Eq. 38, 44 (Ch. 1885). By the end of the nineteenth century, various states agreed that the internal affairs doctrine was the settled approach to corporate conflict of laws. *See, e.g.*, *Guilford v. W. Union Tel. Co.*, 59 Minn. 332, 339–40 (1894) ("The doctrine is well settled that the courts will not . . . interfere with the management of [foreign corporations'] internal affairs. Such matters must be settled by the courts of the state creating the corporation."); *Blackstone Mfg. Co.*, 79 Mass. 488.

The twentieth century cemented this doctrine. State courts regarded "as axiomatic" the long-settled application of the internal affairs doctrine. *McDermott*, 531 A.2d at 216 n.10. Or, as one scholar put it, "[t]he umbilical tie of the foreign corporation to the state of its charter is usually still religiously regarded as conclusive in determining the law to be applied in intracorporate disputes." Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 Vand. L. Rev. 433, 464

(1968). Thus, state courts regularly declined to accept jurisdiction of internal affairs disputes where the place of incorporation was elsewhere. *E.g.*, *Cohn v. Mishkoff-Costlow Co.*, 256 N.Y. 102 (1931) (per curiam).

Likewise, beginning in 1933 (and since), the U.S. Supreme Court considered the internal affairs doctrine to be the determinative approach. *Rogers v. Guar. Tr. Co. of New York*, 288 U.S. 123, 130, 148 (1933) (noting that, under "long settled" doctrine, corporate internal affairs are "to be determined upon the ascertainment and proper application of" the "laws of the State in which it was organized"); *Atherton v. FDIC*, 519 U.S. 213, 224 (1997) ("States normally look to the State of a business' incorporation."); *First Nat'l City Bank*, 462 U.S. at 621 ("the law of the state of incorporation normally determines issues relating to [a corporation's] internal affairs"). As the Supreme Court observed in *CTS*, "[the] beneficial free market system depends at its core upon the *fact* that a corporation—except in the rarest situations—is organized under, *and governed by*, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation." 481 U.S. at 90 (emphasis added).

Recent case law continues to uphold this long-held approach. For instance, state courts view the internal affairs doctrine as the "majority" approach of those "jurisdictions that have addressed this issue"—indeed, *amici* are aware of no state

rejecting this approach.[7] *Harrison v. NetCentric Corp.*, 433 Mass. 465, 471 (2001). Under this approach, state courts apply the "policy that the State of incorporation dictates the choice of law regarding the internal affairs of a corporation," without needing to resort to the "most 'significant relationship'" test. *Id.* Federal courts likewise continue consistently to resolve choice-of-law questions by reference to the internal affairs doctrine. *E.g.*, *CDX Liquidating Tr. v. Venrock Assocs.*, 640 F.3d 209, 212 (7th Cir. 2011) (Posner, J.) (under "what is known as the 'internal affairs' doctrine," "Illinois choice of law principles . . . makes the law applicable to a suit against a director for breach of fiduciary duty that of the state of incorporation."); *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009) ("When a claim addresses matters of corporate governance or other internal affairs of a company, D.C. courts apply the law of the state of incorporation," or, for "corporations incorporated outside of the United States," the law of that nation.); *Mariasch v. Gillette Co.*, 521 F.3d 68, 71–72 (1st Cir. 2008) (holding that "[c]onsistent with the internal affairs doctrine, we must apply Delaware law" when assessing the exercise of a stock option).

[7] California has enacted a statute, Cal. Corp. Code § 2115, governing certain internal affairs of corporations with pre-specified contacts with the state, but this prospective approach does not resemble the balancing test proposed in this case, as it provides corporate managers with notice of which state's law will apply under certain factual circumstances, and California continues to apply the internal affairs doctrine. *See State Farm*, 114 Cal. App. 4th at 445 ("The corporate internal affairs rule is deeply ingrained in the choice-of-law culture.").

Adoption of the internal affairs doctrine is a purposeful choice, made in recognition of the interests described above: "promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." *Juul Labs, Inc. v. Grove*, 238 A.3d 904, 915–16 (Del. Ch. 2020). And so, "[b]y providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation." *Johnson v. Johnson*, 720 272 Neb. 263, 270 (2006); *see also Nagy v. Riblet Prods. Corp.*, 79 F.3d 572, 576 (7th Cir. 1996), *certified question answered*, 683 A.2d 37 (Del. 1996) ("A single rule for each corporation's internal affairs reduces uncertainty and the prospect of inconsistent obligations; it also enables the corporate venturers to adjust the many variables of corporate life (including the contractual promises made to CEOs), confident that they can predict the legal effect of these choices."). New York will be a clear outlier were the Court to decide to disturb this uniformity.

III. FAILING TO APPLY THE INTERNAL AFFAIRS DOCTRINE WILL HAVE PRACTICAL, NEGATIVE CONSEQUENCES IN NEW YORK.

Adopting a balancing test will have practical, negative consequences for commerce and New York's courts. New York enjoys a unique status as a global commercial and financial center, which underscores the harms that will flow from disregarding the long-settled internal affairs doctrine. First, failing to apply the internal affairs doctrine will draw into question the settled expectations of investors

and company managers alike, disadvantaging corporations with strong ties to New York and disincentivizing experienced executives—who will no longer be certain of their legal obligations or liability—from serving on the boards of companies with close connections to New York. Second, were New York to become the sole outlier state to embrace a balancing test, the courts of this State will be flooded with conflict of laws cases, straining an already-overburdened judicial system for no defensible reason. And third, particularly in light of the substantial ties that global corporations have with New York, free commerce and settled expectations will be thwarted—raising serious constitutional concerns.

As explained *supra* in Sections I and II, the internal affairs doctrine has long been accepted for good reason: the doctrine promotes stability, predictability, and uniformity in corporate governance and protects the settled expectations of shareholders, officers, and directors. Particularly because of New York's financial and commercial prominence, these foundations of corporate governance will be weakened if New York suddenly departs from this settled doctrine—"[t]he alternatives [to which] present almost intolerable consequences to the corporate enterprise and its managers." *McDermott*, 531 A.2d at 216. At bottom, conducting the business of a corporation while potentially being subject to the conflicting laws of multiple jurisdictions is virtually unmanageable, and that risk will need to be factored by boards whose companies are located in or otherwise have significant ties

to New York. The uncertainty that will result from adopting a balancing test is also likely to be a factor for a corporation's founders and shareholders in deciding whether to incorporate (or remain incorporated) in New York as opposed to a state with the greater certainty provided by the internal affairs doctrine. At an extreme, it may be a factor for corporations in considering whether to locate (or re-locate) their headquarters in or outside New York.

Applying a choice-of-law balancing test to internal affairs is also likely to disincentivize experienced executives from serving on the boards of companies with connections to New York. One can understand why, if it becomes unclear which state's law applies to a director's responsibilities and liability, qualified people will be discouraged from becoming board members. Similarly, it will be difficult to attract directors to serve on corporate boards if the legal framework governing indemnification becomes uncertain. In sum, if doing business in New York creates ambiguity around the law governing board responsibility and liability, corporations with close ties with New York are more likely to find it difficult to attract high quality, conscientious leadership.

Adopting a balancing test will also needlessly flood New York courts with burdensome conflict-of-laws cases. This is so because a significant number of corporations are incorporated in Delaware but, under a balancing-of-interests approach, some potentially may be considered to have relevant contacts with New

York such that shareholders seeking to forum shop could bring suit in New York and argue that New York law should apply. In fact, adopting such a balancing test is likely to attract to New York courts all run-of-the-mill merger lawsuits, which typically involve alleged breaches of fiduciary duty, where a corporation is headquartered in or otherwise has significant ties to New York. Fiduciary duty claims are emblematic of the types of claims brought to challenge a merger and plainly relate to a corporation's internal affairs—the "relations *inter se* of the corporation, its shareholders, directors, officers or agents." Restatement § 302, cmt. a; *see Hausman v. Buckley*, 299 F.2d 696, 703 (2d Cir. 1962) ("the 'internal affairs' rule has been applied repeatedly in order to determine the fiduciary duty of a foreign corporation's directors").

To put a finer point on it, as of 2022, over 60% of Fortune 500 companies were incorporated in Delaware and nearly 80% of all U.S. initial public offerings were for companies registered in Delaware.[8] Applying the internal affairs doctrine, corporate governance suits against those companies are governed by Delaware corporate law. But under a balancing test, the choice of law becomes murkier and unpredictable. For example, as of February 2024, there were more than 14,000 public and private corporations incorporated in Delaware but headquartered in New

[8] Delaware Division of Corporations: 2022 Annual Report, *available at* https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf.

York, and nearly 3,000 corporations incorporated in Delaware trading on the New York Stock Exchange or Nasdaq.[9] Nearly all of the publicly-issued stock in the United States is registered in the name of Cede & Co. (the nominee of The Depository Trust Company)—which, too, is located in New York. Institutional investors own about 80% of the large-cap S&P 500 index, and several of the largest—including BlackRock, BNY Mellon, Goldman Sachs, and J.P. Morgan, to name a few—are headquartered in New York.[10] Under a balancing test, would-be litigants could seek to leverage these claimed "contacts" (and more) for tens of thousands of organizations in an effort to evade the law of the state of incorporation.

As this Court is aware, New York courts are already overburdened.[11] Adding a stream of cases that turn on a highly fact-dependent balancing test will only

[9] These figures are drawn from the S&P Capital IQ database, which is a subscriber based database. The search in the S&P Capital IQ database was done using the following search parameters: (1) Headquarter figure is based on a February 12, 2024, search, screened for Delaware as the state of incorporation, public and private companies that are currently operating, primary geographic location of New York; and (2) NYSE and Nasdaq figures are based on a February 12, 2024, search, screened for Delaware as the state of incorporation and listed on the NYSE or Nasdaq. S&P Capital IQ, https://www.capitaliq.com (last visited Feb. 12, 2024).

[10] Pensions & Investments, *80% of equity market cap held by institutions* (April 25, 2017), *available at* http://tinyurl.com/3zmsuh4e.

[11] Indeed, as of December 2023, there were over 1.3 million cases pending in New York courts and Governor Hochul signed legislation to increase the number of judges statewide to address this backlog. *See* Nika Schoonover, *New York governor signs bill to increase numbers of judges statewide*, Courthouse News Service, Feb. 28, 2024, http://tinyurl.com/uw67amyb.

exacerbate this burden and create a bottleneck for corporate governance actions, delaying justice in countless matters. Such needless congestion will not serve "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world," which "naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here." *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581 (1980).

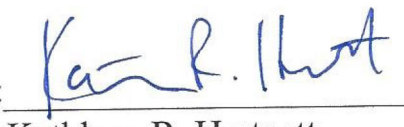
Finally, abandoning the internal affairs doctrine will significantly disrupt free commerce and settled expectations—thereby raising serious constitutional concerns. *See CTS*, 481 U.S. at 88, 90; *McDermott*, 531 A.2d at 217. As the Delaware Supreme Court stated in *McDermott*, the "application of the internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions." 531 A.2d at 216. In particular, the U.S. Supreme Court explained that a state "has no interest in regulating the internal affairs of foreign corporations" under the Commerce Clause and thus has invalidated statutes governing the internal affairs of foreign corporations, recognizing that such statutes "subject[] [corporate] activities to inconsistent regulations." *CTS*, 481 U.S. at 88; *see also Edgar*, 457 U.S. at 645–56. By creating the risk of "inconsistent regulations," if New York adopts a balancing test, it will raise the same constitutional concerns. *CTS*, 481 U.S. at 88–89.

Adopting a balancing test will also raise Fourteenth Amendment Due Process concerns. As described above, the uncertainty of a balancing test will disrupt settled expectations, depriving directors and officers of "adequate notice of the jurisdiction whose laws will ultimately govern the corporation's internal affairs." *McDermott*, 531 A.2d at 218. Doing so contravenes principles of fairness and due process grounded in the Fourteenth Amendment, which provides directors and officers with "a significant right . . . to know what law will be applied to their actions." *See McDermott*, 531 A.2d at 216; *see also State Farm*, 114 Cal. App. 4th at 444; *Johnson v. Johnson*, 272 Neb. at 270–71. Thus, eschewing a balancing test in favor of the well-settled internal affairs doctrine is not only grounded in sound policy, but in significant "constitutional underpinnings." *VantagePoint*, 871 A.2d at 1115.

CONCLUSION

For the foregoing reasons, this Court should affirm the First Department's order.

Dated: March 1, 2024

By: 

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NEW YORK STATE COURT OF APPEALS
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