IN THE

Supreme Court of the State of Delaware

IN RE CLOUDFLARE, INC. STOCKHOLDERS LITIGATION

No. 468, 2026

COURT BELOW:
COURT OF CHANCERY OF THE STATE OF DELAWARE

C.A. No. 2026-0772-JTL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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November 25, 2026

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

This case presents a question of paramount importance to the Chamber and its many members incorporated in Delaware: can a special committee of disinterested directors that has acted with due care nevertheless be deemed to have acted in bad faith on the basis that the committee approved a transaction that included terms sought by a corporation's controlling stockholders?

The parties will brief this question and its application to the facts of this case. The Chamber takes no position on the facts found below. Rather, the Chamber writes to highlight the practical consequences of the bad-faith standard the Court of Chancery articulated. Bad faith is among the gravest charges that can be leveled against an independent director, and Delaware law has always made it the hardest to maintain. It requires scienter. A broader conception of bad faith would deter qualified individuals from serving on Delaware boards and constrain independent directors' ability to consider value-creating conflicted-controller transactions.

STATEMENT UNDER SUPREME COURT RULE 28(C)(4)

Under Supreme Court Rule 28(c)(4), the Chamber states that: (i) no party's counsel authored this brief in whole or in substantial part; (ii) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (iii) no person—other than the Chamber, its members, or its counsel—contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Delaware General Corporation Law is relied upon by many of this nation's businesses, including many of America's largest companies. In 2025, Delaware again showed its profound commitment to those businesses by codifying many important principles of corporate law, providing assurance that Delaware corporations could plan their affairs in predictable reliance on Delaware law. This case raises a critical issue for the ability of businesses to take advantage of the DGCL's important new safe harbors: does the new statute require that any independent director accused of bad faith be found to have acted with scienter, that is, with a conscious knowledge that his actions were contrary to the best interests of the corporation? The Chamber urges this Court to answer that important question yes, in accordance with the statute's plain language and evident purpose.

The court below incorrectly framed that question as turning on whether *Disney* should remain good law and further asked whether courts should assess good faith under Section 144 collectively or director by director. Those questions matter to everyone considering service on a Delaware controlled-company board. Both can be resolved by applying *Disney*'s scienter requirement and Section 144's text.

Delaware law has long reserved bad faith for the most extreme forms of misconduct—it requires either an "actual intent to do harm" to the corporation or its stockholders or an "intentional dereliction of duty, a conscious disregard for one's responsibilities." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64, 66 (Del. 2006). Each of *Disney*'s formulations—including its reference to a fiduciary who "intentionally acts with a purpose other than that of advancing the best interests of

the corporation," *id.* at 67—shares a critical element: scienter. The director must intentionally act against the corporation's best interests.

That narrow view of bad faith, tethered to scienter, has long encouraged service on Delaware boards—especially by independent directors of controlled companies. For independent directors acting with care, good faith is the difference between judicial deference and potential personal liability. Good faith informs whether the business judgment rule applies and whether exculpation and indemnification are available; it may also affect insurance coverage. And following the adoption of Senate Bill 21 ("S.B. 21") in 2025, it is an express condition for cleansing conflicted-fiduciary transactions through approval by a committee of disinterested directors under the new Section 144 safe harbors. A judicial finding of bad faith can gravely damage a director's reputation.

Yet in the opinions below, the court introduced a conception of bad faith that, by its own account, would require neither malice, nor conscious disregard of fiduciary duties, nor individualized inquiry into each director's subjective beliefs. At issue are two questions about Delaware's conception of good faith:

First, does Delaware law presume that the interests of a corporation and its controlling stockholders are mutually exclusive? The answer is no. Delaware law has long recognized that independent directors may faithfully determine that a transaction favored by a controlling stockholder serves the best interests of the corporation and its stockholders. A director who holds that belief does not act "with a purpose other than" the corporation's interest, whatever else may be said about the process. This Court should reaffirm that principle.

Second, can the process-oriented concept of a "controlled mindset," drawn from an entire fairness case in which the independent directors were dismissed precisely because there was no basis to find scienter (*Southern Peru*), substitute for the individualized scienter Section 144 requires to establish bad faith? Again, the answer is no. Delaware law has long distinguished process concerns from scienter, and Section 144 requires that good faith be assessed based on the states of mind of the disinterested directors whose votes supplied the statute's cleansing effect. This Court should reaffirm that distinction.

The answers matter well beyond this case. Delaware's corporate law depends on independent directors being willing and able to exercise business judgment without fear that approving a controller-sponsored transaction, standing alone, will later be recast as evidence of bad faith. The distinction between intentional fiduciary misconduct and good-faith approval of related-party transactions is critical both to attracting qualified directors and to preserving the ability of Delaware corporations to pursue value-enhancing transactions involving controlling stockholders. Without that distinction, S.B. 21's protections are hollow.

ARGUMENT

I. This case raises important concerns for independent directors

A. Delaware law on independent directors and conflicted controllers

"For more than a generation, our law has recognized that the negotiating efforts of independent directors can help to secure transactions with controlling stockholders that are favorable to the minority." *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1184 (Del. 2015).[1] Independent directors play an important role in controlled corporations, where they balance the risk of unchecked self-dealing against the potential for value-creating related-party transactions—particularly when, as here, the controllers founded and lead the company and may offer an "idiosyncratic vision for producing above market returns."[2]

"A director could believe in good faith that it is generally optimal for companies to be controlled by their founders and that this governance structure is value-maximizing for the corporation and its stockholders over the long-term," and thus approve a conflicted transaction designed to perpetuate founder control. *United Food & Com. Workers Union* v. *Zuckerberg*, 250 A.3d 862, 895 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021). Conflicted-controller transactions also pose a heightened risk of exploitation. Independent directors are the safeguard that lets

[1] *See also Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983).

[2] *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 566 (2016).

corporations capture the benefits of such transactions while minimizing the risk of abuse.

That is a foundational premise of S.B. 21. By enacting S.B. 21, the General Assembly "displaced [the prior] ruling in *Match*" that a committee of disinterested directors was not alone sufficient to cleanse conflicted-controller transactions. *Rutledge* v. *Clearway Energy Grp. LLC*, 360 A.3d 1271, 1281-82 (Del. 2026). In its place, the General Assembly codified the principle that "disinterested directors" acting "in good faith and without gross negligence" can themselves assess whether a "controlling stockholder transaction" (other than going-private transactions) can be in the best interests of the corporation. 8 *Del. C.* § 144(b).

S.B. 21 reinforced the primacy of independent directors in addressing controller conflicts. And it builds on bedrock Delaware doctrine that "independent directors are presumed to be motivated to do their duty with fidelity" when transacting with controlling stockholders. *Cornerstone*, 115 A.3d at 1182-83 (internal quotation marks omitted).

Delaware law encourages independent directors to serve by striking a careful balance: protecting directors from personal liability for rational business decisions, while protecting corporations from abuses of director discretion. Good faith is the linchpin of that balance. It runs through the business judgment rule; the DGCL's tripartite personal liability scheme of director exculpation, indemnification, and insurance; and the Section 144 safe harbors.[3] Grounding those protections in good

[3] *Brehm* v. *Eisner*, 746 A.2d 244, 264 (Del. 2000); 8 *Del. C.* § 102(b)(7) (exculpation); *id.* § 145(a)-(b) (indemnification); Lawrence J. Trautman & Kara

faith enables "directors and officers to engage in broadly based decision making in order to enhance shareholder value" free from "the chilling effect of potential personal liability." *See Scharf* v. *Edgcomb Corp.*, 1997 WL 762656, at *4 (Del. Ch. Dec. 4, 1997). But those protections depend on preserving a carefully cabined conception of bad faith, lest it devolve into an "invariable rule that any independent director who says yes to an interested transaction subject to entire fairness review must remain as a defendant." *See Cornerstone*, 115 A.3d at 1184.

For that reason, Delaware courts have long confined bad faith to the most "extreme" form of fiduciary misconduct—that involving scienter. *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 243-44 (Del. 2009). To establish bad faith, a plaintiff must show either an "actual intent to do harm" to the corporation or its stockholders, or an "intentional dereliction of duty, a conscious disregard for one's responsibilities." *Disney*, 906 A.2d at 64, 66. As *Disney* explained, "examples" of an "intent to do harm" or "intentional dereliction of duty, a conscious disregard for one's responsibilities" include situations "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act." *Id*. at 66-67 (citation omitted). The common thread is "intentionally": in each, the fiduciary *intentionally* does something she knows is contrary to her duty, whether pursuing a

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Altenbaumer-Price, *D & O Insurance: A Primer*, 1 AM. U. BUS. L. REV. 337, 352-53 (2012) (D&O policy exclusions).

purpose she knows is against the corporation's, breaking the law she knows applies, or ignoring a duty she knows exists.

A mistaken judgment about what best serves the corporation is not bad faith. Delaware law has long required that a plaintiff alleging that an independent director with no conflicting self-interest breached his duty of loyalty by approving a transaction must show scienter. In *McMillan* v. *Intercargo Corp.*, for example, the Court of Chancery denied a preliminary injunction and dismissed claims in substantial part because the plaintiff could not show that the directors had "improper motivations," rather than that their "actions were unreasonable, imprudent, or inappropriate." 768 A.2d 492, 499, 502-07 (Del. Ch. 2000). This Court's *Cornerstone* decision reaffirmed that line, holding that "each director has a right to be considered individually when the directors face claims for damages" and is entitled to dismissal unless she purposely acted against the company's best interests. 115 A.3d at 1182-83, 1187.

And where there is no showing of "conflicted interests or lack of independence on the part of the [directors], the scienter requirement compels that a finding of bad faith should be reserved for situations where the nature of [directors'] action[s] can in no way be understood as in the corporate interest." *Equity-League Pension Tr. Fund ex rel. Wayfair Inc.* v. *Great Hill P'rs, L.P.*, 2021 WL 5492967, at *9 (Del. Ch. Nov. 23, 2021) (internal quotation marks omitted). That is, decisions by disinterested directors who lack scienter are protected by the business judgment rule, under which directors' "decisions will not be disturbed if they can be attributed

to any rational business purpose." *Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 720 (Del. 1971).

A broader conception of bad faith "would nullify [the] legislative protections" that have long encouraged independent directors to serve on Delaware boards. *Disney*, 906 A.2d at 66. That concern extends beyond personal liability, exculpation, indemnification, and insurance.[4] Because bad faith requires scienter, the bad-faith label carries reputational consequences that outlast the transaction or litigation. The standard must therefore preserve the line between flawed judgment and culpable intent.

B. The two opinions below

In its first opinion, the court below preliminarily enjoined a recapitalization that would preserve founder control. It held that the plaintiffs failed to establish a reasonable probability of rebutting the special committee's disinterestedness and that its process bore "[a]ll the outward signs of diligent and careful effort." Appellants' OB Tab A ("Op.") 114-16, 126-28. The court nevertheless concluded that plaintiffs had shown a reasonable probability of proving bad faith. Its first opinion left open whether the ultimate inquiry would turn on trial evidence about the directors' individual states of mind. *Id.* at 10. That opinion appeared to contemplate an initial trial focused on "what the committee members knew or believed, what they did, and what they sought to accomplish." *Id*. The court appeared open to the possibility that the committee members "may have concluded in good faith that

[4] *See* 8 *Del. C.* §§ 102(b)(7), 145(a)-(b).

benefitting the [controllers] would serve the best interests of the corporation and its stockholders." *Id*. at 7.

The court's certification opinion sharpened the legal theory behind its preliminary injunction ruling. That decision made clear that the record did not support a reasonable probability of showing that the committee members acted with malice or a conscious disregard for known duties. Appellants' OB Tab B ("Certification Op.") 5-7, 41. "Nothing," the court explained, "suggests that the Committee sought to harm the Company and its stockholders." *Id.* at 5. Thus, by the time of this appeal, the court below had clarified that:

- every member of the committee was disinterested,
- the committee's process had "[a]ll the outward signs of diligent and careful effort," including "competent advisors," "eighteen meetings over six months," and "hundreds of pages of detailed minutes and presentation materials,"
- there was no reasonable probability of showing that the committee acted with "malice," and
- there was no reasonable probability of showing that the committee consciously disregarded known duties.

Op. 114-16, 126-28; Certification Op. 5-7, 41. At the same time, the court explained that it saw no need for a "director-by-director analysis of good faith" when it issued the preliminary injunction. Certification Op. 8, 44-50. In its view, a good-faith/bad-faith determination under Section 144 could "be made as to the Special Committee generally." Certification Op. 44.

The opinions below bring into focus this important question: if neither malice, nor conscious disregard, nor individualized states of mind are doing the work to establish scienter in this context, what is?

The opinions below suggest that the answer lies in the court's expansive treatment of *Disney*'s reference to fiduciaries who "intentionally act[] with a purpose other than that of advancing the best interests of the corporation." *Disney*, 906 A.2d at 67. *Disney* posited that concept as an "example" of an "intent to do harm" or an "intentional dereliction of duty, a conscious disregard for one's responsibilities." *Id.* at 66-67. The court below, however, treated the "other than" clause as distinct from the inquiry into whether the conduct reflected an intent to harm the corporation or an "intentional dereliction of duty, a conscious disregard for one's duties." Certification Op. 5. The court stated that "consciously pursu[ing] a purpose other than the best interests of the corporation and its stockholders" is an "additional" type of bad faith separate from intent to harm and "consciously disregard[ing] known duties." *Id*.

The problem is not *Disney*'s "other than" clause, but what the court below read out of it. The clause asks whether the fiduciary *intentionally* pursued a purpose *other than* the corporation's. It therefore requires, no less than *Disney*'s other formulations, that the director believes her decision is against the corporation's best interests. A director's knowledge that the founders wanted the transaction does not show that she deliberately put their wishes ahead of what she believed best for the corporation.

The court below found evidence of bad faith only by untethering the "other than" clause from the scienter requirement. This Court's *Lyondell* opinion teaches that in the transactional context, bad faith requires that the "directors utterly failed to attempt to" discharge their duties and cannot be established by showing merely that they failed to do "everything . . . they (arguably) should have done." 970 A.2d at 243-44. But the court below, without citation, characterized *Lyondell*'s holding on bad faith as addressing "conscious lawbreaking," a concept it stated has meaningful application only in cases involving affirmative violations of law, "such as under the *Caremark* and *Massey* frameworks." Certification Op. at 6-7. That was mistaken. *Lyondell* was not a "conscious lawbreaking" case; it was a *Revlon* case addressing bad faith in a transaction approved by "disinterested, independent directors." *Lyondell*, 970 A.2d at 244. Having acknowledged that *Lyondell*'s teaching precluded—if applicable—a finding of scienter here, the court nevertheless concluded that the same facts could support scienter under *Disney*'s formulation of bad faith as acting "intentionally . . . with a purpose other than that of advancing the best interests of the corporation." Certification Op. at 38-40; *Disney*, 906 A.2d at 67.

That expansive conception of bad faith was misguided. If those facts precluded scienter under *Lyondell*, how could they establish scienter under *Disney*'s "other than" formulation? It would make little sense for Delaware's conception of bad faith to compel opposite answers to the scienter question depending on which formulation a court elects to invoke.

II. Untethering *Disney*'s "other than" clause from scienter would ignore the DGCL's recognition that conflict transactions can benefit the company and all stockholders

Independent directors assessing potentially valuable conflicted transactions need to know the reach of *Disney*'s "other than" formulation. If acting "intentionally . . . with a purpose other than that of advancing the best interests of the corporation" could be untethered from intent to harm or "a conscious disregard for one's responsibilities," *Disney*, 906 A.2d at 66-67 (internal quotation marks omitted), that would ignore Section 144's recognition that the interests of a founder and the interests of the corporation and its stockholders are not mutually exclusive.

In both opinions below, the court framed the special committee's duty as an "either/or" choice between advancing Cloudflare's interests and satisfying the founder-controllers' desire for continued control. The court accepted plaintiffs' theory that the special committee:

- acted "to placate the Founders and give them what they wanted, *rather than* striving to obtain a transaction that served the best interests of the Company and its stockholders as a whole,"
- "deferred to the Founders' needs and placated their desires *rather than* negotiating at arm's length and in the best interests of the Company and all of its stockholders,"
- "sought to placate their desires *rather than* pursuing what was in the best interests of the Company," and
- "acted to serve the Founders' interests *rather than* the best interests of the Company."

Op. 6, 119-20, 126 (emphasis added); Certification Op. 4 (emphasis added). In neither opinion did the court find a probability that committee members intentionally

approved a transaction they believed was not in the best interests of the corporation and its stockholders, as *Disney* requires. In both opinions, the court recognized that the committee members "may have concluded in good faith that benefiting the [controllers] would serve the best interests of the corporation and its stockholders." Op. 7; Certification Op. 17. Yet the court said it did not intend to make a "director-by-director" assessment of whether the members held that belief. Certification Op. 44-50.

Without a "director-by-director" inquiry into the committee members' subjective purposes, there would be no way for the directors to show they believed, as the court put it, that "benefiting the [controllers] would serve the best interests of the corporation and its stockholders." Op. 7. Instead, the inquiry would proceed from the premise that a transaction that benefits the founders *necessarily* meant acting against Cloudflare's interests. Under that framework, every invocation of the Section 144 safe harbors would invite a claim that the disinterested directors acted in bad faith by approving a transaction that benefited a conflicted party. That is precisely the sort of "invariable rule" that this Court rejected in *Cornerstone*. 115 A.3d at 1184.

Delaware law recognizes no such categorical distinction between the controllers' interests and the corporation's interests. As a matter of both logic and the text of Section 144, a transaction with a controlling stockholder can advance the corporation's interests. The question is why the directors approved those terms. A director may support continued founder control because she believes it serves the

corporation and its public stockholders.[5] Delaware's embrace of independent directors on controlled-company boards as a safeguard for conflicted transactions assumes that disinterested directors can determine in good faith whether a transaction with a controlling stockholder benefits the corporation and its stockholders. Indeed, that is the premise of S.B. 21 and new Section 144(b). To hold that agreeing to a controller's objectives in exchange for consideration is itself sufficient to support an inference of bad faith would rob S.B. 21 of its content. That tautology not only undermines the clear policy view of the DGCL to the contrary; it would create "incentives for independent directors to avoid serving as special committee members, or to reject transactions solely because their role in negotiating on behalf of the stockholders would cause them to remain as defendants until the end of any litigation challenging the transaction." *Cornerstone*, 115 A.3d at 1184.

That principle applies with particular force to founder-controlled corporations like Cloudflare. As the Court of Chancery recognized in *Zuckerberg*, a disinterested director may rationally conclude that maintaining founder control serves the corporation's long-term interests. 250 A.3d at 895. Academic literature likewise recognizes that founder-controllers can create value through an "idiosyncratic vision" that public markets may undervalue or inadequately protect.[6] Academic commentary has observed that "the dual-class share structure could be employed

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[5] *See* Leo E. Strine, Jr., et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 692-93 (2010).

[6] *See* Goshen & Hamdani, *supra* note 2 at 560.

under many circumstances to boost shareholder value," citing "numerous studies finding positive abnormal returns after dual-class recapitalization, both over the short and long terms."[7] A disinterested director could therefore faithfully conclude that accommodating controllers by approving their desired dual-class structure serves the corporation's best interests—particularly where they secure in exchange, as was done here, commitments that ensure that the founders remain the company's principal executives and strategic visionaries.

That principle extends beyond dual-class recapitalizations or founder-controlled companies. Independent directors often confront conflicted transactions that could benefit a controller or other conflicted fiduciary, while also benefiting the corporation and its stockholders. The DGCL's safe harbors recognize that transactions between companies and directors, officers, and controlling stockholders can be a win for companies and their public stockholders. To facilitate that reality, the safe harbors depend on independent directors being able to exercise judgment about the value of such transactions without risking a charge of bad faith whenever they conclude that the conflicted party's preferred outcome also serves the corporation's best interests. 8 *Del. C.* § 144(a)-(b).

To deny that principle is to deny the fundamental predicate of the business judgment rule. This Court should reaffirm that directors may conclude in good faith that a transaction sought by a controlling stockholder also serves the corporation's

[7] Joanna Xu, *Dual-Class Share Structure—A Viable Approach to Shareholder Value Creation*, 16 N.Y.U. J.L. & BUS. 801, 817, 835 (2020).

best interests. A rule to the contrary would expand *Disney*'s "other than" formulation of bad faith to encompass every transaction approved on terms favorable to or requested by the conflicted party. That has never been the law. That is irreconcilable with new Section 144. And contrary to the suggestion below, this Court need not overrule *Disney* to reject that unbounded premise.

III. Reading *Disney*'s "other than" clause without scienter would let collective process concerns displace Section 144's individualized good-faith inquiry

The court below concluded that the plaintiffs had presented enough evidence for a trial on the special committee's good faith by relying on the view that the committee operated with a collective "controlled mindset." Op. 117-26. The certification opinion made explicit the court's collective approach to the good-faith inquiry. The court explained that it did not view a "director-by-director analysis of good faith" as required when it issued the preliminary injunction, but instead that it believed a good-faith determination under Section 144 could "be made as to the Special Committee generally." Certification Op. 8, 44-50.

That clarification exposes a fundamental question about how the court's "controlled mindset" analysis fits Delaware's scienter-based conception of bad faith.

The "controlled mindset" concept originated in Delaware's entire fairness jurisprudence. Introduced in the Chancery opinion *Southern Peru*, it describes a mindset that can "afflict[] even good faith fiduciaries trying to address a controller," causing them to believe that "the only options to be considered are those proposed by the controlling stockholder." *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 763, 800 (Del. Ch. 2011), *aff'd sub nom. Americas Mining Corp.* v. *Theriault*, 51 A.3d 1213 (Del. 2012). Courts have since applied the concept repeatedly to the "fair dealing" prong of entire fairness. *E.g.*, *Tornetta* v. *Musk*, 310 A.3d 430, 531 (Del. Ch. 2024), *rev'd on other grounds sub nom.*, *In re Tesla, Inc. Deriv. Litig.*, 351 A.3d 1005 (Del. 2025) (TABLE).

As the court recognized in *Southern Peru*, a "controlled mindset" bears on the fairness of the transaction, because it suggests that a special committee may have "engage[d] in the self-defeating practice of negotiating with itself—perhaps without even realizing it." *S. Peru*, 52 A.3d at 800. The concept describes a process flaw in how a director negotiates with a controller—"a latent inability to perceive a conflict that is, at its core, a process failure." *In re Trade Desk, Inc. Deriv. Litig.*, 2025 WL 503015, at *24 (Del. Ch. Feb. 14, 2025), *aff'd*, 350 A.3d 1223 (Del. 2025) (TABLE).

Because a "controlled mindset" describes a process flaw, it cannot by itself establish the scienter bad faith requires. As this Court emphasized in *Lyondell*, "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." 970 A.2d at 243. *Southern Peru* illustrates the point well. Although the court there found that "the Special Committee fell victim to a controlled mindset and allowed [the controller] to dictate the terms and structure of the Merger," *S. Peru*, 52 A.3d at 798, it dismissed those same committee members from the case because the record lacked "evidence supporting a rational inference of a non-exculpated breach of fiduciary duty claim against" them, *see Trade Desk*, 2025 WL 503015, at *24 n.169 (describing *Southern Peru*). Thus, "[a]s articulated in *Southern Peru*, operating under a controlled mindset is, alone, at most a breach of the duty of care." *Id*. That is categorically different from bad faith, which requires "facts suggesting that the directors consciously approved an unfair transaction." *See S. Peru*, 52 A.3d at 761, 787 n.72.

To be sure, a "controlled mindset" can coexist with disloyalty or bad faith. If "combined with other well-pleaded allegations," a controlled mindset may

"contribute to a broader constellation of facts that support a finding or reasonable inference of disloyal conduct." *Trade Desk*, 2025 WL 503015, at *24. But that only underscores that "a stockholder plaintiff cannot merely slap a 'controlled mindset' label onto a process or result with which it disagrees" to show bad faith. *Id*.; *see also Eckert* v. *Hightower*, 2025 WL 930788, at *6 (Del. Ch. Mar. 24, 2025) (rejecting bad faith claim predicated on "controlled mindset" allegations that amounted to "disagree[ment] with the challenged compensation" and the belief that "the directors should have done more"). More is required.

That more is scienter.

The distinction between process and scienter is essential to S.B. 21's safe harbors; that is why the statute used the words for a loyal state of mind, "good faith." 8 *Del. C.* § 144(b); *see also* Strine, et al., *supra* note 4, at 648-55. As the court below itself acknowledged, S.B. 21 provides "powerful protection for conflicted transactions" that are "intended to obviate the need for entire fairness review." Op. 4, 9. Section 144(b)(1) requires the disinterested majority to act "in good faith and without gross negligence." A negotiating failure amounting to gross negligence can defeat the safe harbor even if the directors acted loyally. To establish bad faith from the same conduct, however, the evidence must support an inference that the director consciously approved a transaction knowing it was not in the best interests of the corporation. It is legal error to invoke a turn of phrase from a Chancery decision that dismissed independent directors because they had not acted in bad faith as a substitute for the finding of bad faith now required by statute. Importing a concept

from entire fairness into Section 144's good-faith requirement risks reintroducing the very framework the General Assembly sought to avoid by enacting S.B. 21.

This distinction also serves a practical function. Unlocking value in related-party transactions depends on negotiations where the parties can communicate openly regarding the conflicted party's objectives, the corporation's interests, and the benefits and costs of the proposed transaction and its alternatives. Treating process criticisms as sufficient to infer bad faith would stifle the open discussion that Section 144's framework facilitates. That would invite a kabuki-like process.

The Court should therefore clarify that when assessing the good-faith requirement under Section 144(b), evidence of a committee-wide "controlled mindset" cannot replace the statutorily required individualized inquiry into the scienter of the committee members who approved the transaction. The statute requires that the board determine that each committee member is disinterested, and calls for approval or recommendation "by a majority of the disinterested directors then serving on the committee." 8 *Del. C.* § 144(b)(1). One member's improper purpose does not defeat that majority if enough other disinterested members cast qualifying votes. *Id*. Preserving that distinction gives effect to the statute's text and maintains Delaware's careful balance: encouraging independent directors to exercise judgment on potentially value-enhancing conflicted-controller transactions while holding them accountable for intentional misconduct.

CONCLUSION

The Court should reaffirm that bad faith requires scienter and that courts must assess scienter director by director.

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

	)	
	)	Case No. 468, 2026
IN RE CLOUDFLARE, INC.	)	
STOCKHOLDERS LITIGATION	)	Court Below: Court of Chancery
	)	of the State of Delaware
	)	
	)	C.A. No. 2026-0772-JTL

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 28(d) because it contains 4,818 words, which were counted by Microsoft Word 2016.

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EFiled: Nov 25 2026 04:09PM EST
Filing ID 81453855
Case Number 468,2026

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Pursuant to Rule 28 of the Rules of the Supreme Court of the State of Delaware, the Chamber of Commerce of the United States of America ("*Amicus*" or the "Chamber") hereby moves for leave to file the brief of *amicus curiae*, attached hereto as Exhibit A, in support of neither party. In support of this motion, *Amicus* states the following.

ARGUMENT

Amicus has no financial interest or direct personal interest in the case. Pursuant to Supreme Court Rule 28(b)(2), *Amicus* states that: (i) no party's counsel authored this brief in whole or in substantial part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than *Amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber does not seek to rehash arguments of the parties, which focus on whether the directors approved the recapitalization of Cloudflare in good faith. Rather, the Chamber seeks to use its unique expertise to highlight the practical consequences of the conception of bad faith articulated by the court below.

The proposed *amicus curiae* brief is desirable and relevant because this appeal raises important questions of law regarding what constitutes "bad faith" in the context of independent and disinterested directors approving a conflicted-controller transaction under Delaware law and 8 *Del. C.* § 144 and whether the concept of a "controlled mindset" can substitute for an individualized scienter inquiry. The proposed *amicus curiae* brief discusses Delaware law's conceptions of good faith and bad faith, which has long confined a judicial finding of bad faith to the most extreme forms of fiduciary misconduct—that involving scienter—on a director-by-

director basis, and the practical consequences and concerns that flow from departing from that standard.

These concerns fall within the ambit of the unique interests, perspectives, and expertise of *Amicus*, and carry significance and public importance well beyond this case. Delaware's corporate law framework depends on independent directors being willing and able to exercise business judgment without fear that approval of a conflicted or controller-sponsored transaction, standing alone, will later be recast as evidence of bad faith. Maintaining the distinction between intentional fiduciary misconduct and good-faith approval of related-party transactions is critical both to attracting qualified directors and to preserving the ability of Delaware corporations to pursue value-enhancing transactions involving controlling stockholders. That distinction is essential lest the salutary protections provided by the 2025 enactment of Senate Bill 21 be rendered hollow. Accordingly, *Amicus* offers its perspective and experience to address the broader implications of this case for Delaware corporations and their directors, stockholders, and other stakeholders as well as to the business community at large and to aid in the Court's evaluation of the issues on appeal.

Counsel for Appellants have informed counsel for *Amicus* that they do not oppose this Motion. Counsel for Appellees have informed counsel for *Amicus* that they take no position on the Motion.

CONCLUSION

Amicus respectfully requests an order granting leave to file the *amicus curiae* brief attached as Exhibit A.

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[PROPOSED] ORDER GRANTING UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

The Court, having read and considered the Unopposed Motion for Leave to File an *Amicus Curiae* Brief (the "Motion") filed by the Chamber of Commerce of the United States of America, and all other pertinent filings submitted, and finding good cause therefore, hereby **ORDERS** that the Motion is **GRANTED**. The *Amicus Curiae* Brief, submitted concurrently with the Motion, is hereby deemed filed.

IT IS SO ORDERED this ____ day of _____, 2026.

_____
Justice, Delaware Supreme Court

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DISCLOSURE OF CORPORATE
AFFILIATIONS & FINANCIAL INTERESTS

Pursuant to Supreme Court Rule 28(b), the Chamber of Commerce of the United States of America ("*Amicus*") makes the following disclosure:

1. List any entity not named in the caption which is an active participant in the underlying transaction, involved in this proceeding, e.g., financial advisors, lending institutions, equity investors.

Amicus is unaware of any entity not named in the caption that was an active participant in the underlying transaction involved in this proceeding beyond those already identified by the parties to the appeal.

2. Is the party identified above a subsidiary or affiliate of a publicly owned corporation?

() Yes (X) No

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

3. Is there a publicly owned corporation, not a party to the appeal, that has a substantial financial interest in the outcome?

( ) Yes (X) No

If the answer is YES, list below the identity of such corporation and the nature of the financial interest.

N/A

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