No. 13-869

In the
Supreme Court of the United States

LEO E. STRINE, JR., CHANCELLOR, DELAWARE COURT OF CHANCERY, ET AL.,
Petitioners,

v.

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF NASDAQ OMX GROUP, INC. AND NYSE EURONEXT AS AMICI CURIAE IN SUPPORT OF GRANTING THE PETITION

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INTEREST OF AMICI CURIAE

Amici curiae NASDAQ OMX Group, Inc. ("NASDAQ") and NYSE Euronext ("NYSE") operate the principal stock exchanges in the United States. These exchanges list the securities of major United States and foreign companies seeking to access United States public capital markets.[1] *Amici* are committed to facilitating capital formation for businesses operating in this country. This responsibility, which lies at the heart of *amici*'s business mission, gives *amici* a perspective that is distinct from that of any party and motivates the views expressed in this brief.

As self-regulatory organizations, *amici* also understand the value of arbitration as a form of alternative dispute resolution ("ADR"). *Amici* have long-standing experience with arbitrations as a means of resolving securities disputes, beginning in 1939 through the National Association of Securities Dealers ("NASD"), and since 2007 through its successor, the Financial Industry Regulatory Authority ("FINRA").[2] Indeed, FINRA operates the

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[1] Counsel of record for all parties received notice of *amici*'s intention to file this brief at least ten days prior to its due date and have consented to its filing. No counsel of record for any party authored this brief in whole or in part. No person other than *amici curiae* and their counsel has made a monetary contribution to its preparation or submission.

[2] In 2007, *amici*'s enforcement operations merged to form FINRA. *See* SEC Release No. 34-56145, 72 Fed. Reg. 42169 (Aug. 1, 2007) (approving consolidation of NASD and NYSE Regulation, Inc. into FINRA). *Amici*'s rules endorse FINRA arbitration as the preferred forum for NASDAQ and NYSE members to arbitrate. *See* NASDAQ Code of Arbitration Procedure § 10001; NYSE Arbitration Rule 600A.

largest securities dispute resolution forum in the world.[3] These arbitrations are confidential,[4] and are praised for their efficiency and integrity.[5]

Amici believe that Delaware's confidential, expedited arbitration procedure is an important and beneficial ADR process that ensures that major United States and foreign companies choose to conduct business and list securities in the United States. In deciding where to locate operations and where and how to raise needed capital, companies consider the quality and cost of various jurisdictions' legal infrastructure. One significant consideration is the relative efficiency, competency, and fairness of available dispute resolution mechanisms, particularly for commercial disputes.[6]

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[3] *See* FINRA's Dispute Resolution Process 1 (2012), *available at* http://tinyurl.com/9ejxwu.

[4] FINRA Dispute Resolution Arbitrator's Guide, p. 70 (2013) *available at* http://tinyurl.com/94upafs ("FINRA Arbitrator's Guide") ("All matters relating to the arbitration (including the pleadings, motions, evidence and panel deliberations) are confidential[.]").

[5] *See, e.g.*, Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harvard J.L. & Pub. Pol'y 608 (2010); *see also* Michael A. Perino, Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations 2 (2002); *see also* Press Release, SEC, Report to the SEC Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations (Nov. 12, 2002), *available at* http://tinyurl.com/lk7lcrx.

[6] *See* Lewis S. Black, *Why Corporations Choose Delaware*, Delaware Department of State Division of Corporations 5-8 (2007).

Just as FINRA's ADR process is geared towards providing fast, efficient, and flexible means for resolving securities-related disputes, Delaware's statutory arbitration procedure provides businesses with another key ADR mechanism, enabling them to have certain commercial matters confidentially resolved by judges nationally recognized for their experience in deciding corporate and commercial matters. Confidentiality is crucial – it protects sensitive and closely held information, prevents reputational damage that could flow from highly adversarial and public disputes, and preserves existing and future relations with other parties. *Amici* believe that if companies are prohibited from utilizing this mechanism confidentially, they will choose other dispute resolution fora, which may be outside the United States or otherwise less efficient at resolving disputes.

SUMMARY OF ARGUMENT

The Court must grant the petition in order to settle an important question of federal law raised by the Third Circuit's erroneous relaxation of the "experience and logic" test for public access to Delaware's statutory arbitration procedure.[7]

In finding a right of access to Delaware's arbitration procedure, the majority of a divided three-judge panel of the Third Circuit – which issued three separate opinions – incorrectly relaxed each prong of the "experience and logic" test. Judge Sloviter's plurality opinion effectively gave courts *carte blanche* to require public access to these and similar arbitrations, thereby inhibiting (if not nullifying) them and chilling authority legislatively granted to government actors. Judge Sloviter further erred by severing First Amendment right-of-access doctrine from its purpose of providing a check on the fairness with which the state wields its coercive power.

In short, neither prong of the "experience and logic" test support a right of access. Public access to Delaware's statutory arbitration procedure contravenes its consensual nature and long-standing confidentiality, inhibits its proper functioning, and infringes upon rights reserved to the States.

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[7] *See* Sup. Ct. R. 10(c). *Amici* recognize that courts of appeals are divided over how to apply the Court's experience and logic test. *See* Pet. 18. *Amici* assume for purposes of this brief only that the experience and logic test applies to *civil* trials, and that it applies to Delaware's statutory arbitration procedure.

ARGUMENT

I. Delaware's Statutory Arbitration Procedure Does Not Satisfy The Experience Prong Of The "Experience and Logic" Test

Under the experience prong of the "experience and logic" test, courts consider whether the proceeding at issue may properly be said to have a long-standing tradition of accessibility to the public.[8] Because Delaware's statutory procedure constitutes arbitration, not trial, and because arbitration lacks the requisite long tradition of openness, Delaware's procedure does not meet the experience prong of the test and thus is not subject to a First Amendment right of access.

A. Delaware's Procedure Is Arbitration, Not Civil Trial

1. Delaware's Procedure Fits The Definition Of Arbitration

Arbitration is the consensual[9] submission of a dispute to a neutral third-party for resolution, in a proceeding that ensures flexibility and informality

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[8] *See* Pet. App. 8a (Sloviter, J.); *see* also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980); *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 505 (1984) ("*Press I*"); *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986) ("*Press II*") (noting the required long tradition).

[9] *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("Underscoring the consensual nature of private dispute resolution, we have held that parties are 'generally free to structure their arbitration agreements as they see fit.'") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

(e.g., party-determined rules of evidence, procedure, and substantive law),[10] expedition (e.g., limited discovery and limited motion practice), and confidentiality,[11] with non-precedential decisions[12] and a limited right of appeal.[13] *Amici*'s own dispute resolution process through FINRA utilizes arbitration with precisely these characteristics.[14]

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[10] *See id.*; Del. Ch. Ct. R. 96 (c) (authorizing party-determination of rules).

[11] *See Stolt-Nielsen*, 559 U.S. at 685 ("[P]arties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("[Arbitration] allow[s] for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets."); *Guyden* v. *Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) ("[C]onfidentiality is a paradigmatic aspect of arbitration.").

[12] *See* Pet. App. 47a (Dist. Ct. Op.).

[13] *See id.* 15a (Sloviter, J.); *see also* Federal Arbitration Act, 9 U.S.C. § 10 (2006) (limiting appeal under Federal Arbitration Act to cases of fraud on or corruption, misconduct, or abuse of power by arbitrator).

[14] *See, e.g.*, FINRA Arbitrator's Guide, pp. 8 ("Parties agree in advance to abide by the decision of the arbitrators . . . ."), 54 ("The rules of evidence applied in a court of law are not usually used in arbitration because arbitration is less formal than judicial proceedings, and allows for more liberal introduction of evidence than would be permitted in court."), 59 ("Arbitrators are not strictly bound by legal precedent or statutory law."); *id.* at 22 ("Expeditious resolution of disputes is one of the goals of arbitration."), 26 ("[T]he parties and arbitrators retain their flexibility in the discovery process."); *id.* at 8 ("The arbitrators' award is final and binding, subject to court review only under limited circumstances.").

Delaware's statutory arbitration procedure likewise fits squarely within this definition.[15]

2. Delaware's Statutory Arbitration Procedure Is Not Otherwise Analogous To Civil Trial

Judge Sloviter's plurality opinion below found a "strong tradition of openness for proceedings like" Delaware's statutory arbitration procedure by analogizing it to a trial, and did so by noting, in part, that the arbitrations are conducted by sitting judges in a courthouse.[16]

Judge Sloviter misapprehended the fundamental difference between arbitration and trial recognized by Judge Roth in dissent: arbitration is a *consensual* dispute-resolution process. Trials, in contrast, derive their dispute-resolving authority from the coercive power of the state.[17]

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[15] *See* Del. Code Ann. tit. 10, § 349(a); Del. Ch. Ct. R. 96(d)(7), 97(a) (ensuring consent to arbitrate), 96(c) (flexibility and informality), 96(d)(4), 97(f) (expedition), 97(a)(4), 98(b) (confidentiality); Del. Code Ann. tit. 10, § 349(b) (non-precedential decisions, limited right of appeal, and privacy and confidentiality); Del. H.B. 49 syn, 145th Gen. Assemb. (Del. 2009); Del. Code Ann. tit. 10, § 349. Insofar as Respondent claims that Petitioners beg the question by defining privacy and confidentiality as essential elements of arbitration, it is mistaken. First, as discussed in Parts I.A.1 and I.B, arbitration has long involved confidentiality. Second, as discussed in Part II.B.2, *infra*, eliminating confidentiality would effectively end arbitration.

[16] *See* Pet. App. 14a (Sloviter, J.).

[17] Pet. App. 29a n.4 (Roth, J., dissenting); *see, e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process

This key difference between arbitration and trial is precisely what motivates the judicially and legislatively recognized "desirability of arbitration as an alternative to the complications of litigation [ ]."[18] It is also why *amici* utilize arbitration for dispute resolution.[19] Like FINRA arbitration, Delaware's statutory procedure meets all criteria of arbitration, and Delaware's arbitrators derive their authority in this context from the consent of the parties, and not the coercive power of the state.[20] Thus, arbitrations under Delaware's statutory scheme are not "trials."

In ignoring the fundamental difference between arbitration and trial, Judge Sloviter erred by severing right-of-access doctrine from its purpose, which is to provide a check on the fairness with

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and submit their disputes to private dispute resolution."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration") (citation omitted); *compare Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.16 (1974) (A court is a "public tribunal imposed upon the parties by superior authority which the parties are obliged to accept").

[18] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) ("The United States Arbitration Act, now 9 U.S.C. § 1 *et seq.*, reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation' and to place arbitration agreements 'upon the same footing as other contracts.'") (internal citation omitted).

[19] *See, e.g.*, FINRA Arbitrator's Guide, p. 8 ("[A]rbitration is a quick, fair, and relatively inexpensive alternative to litigation.").

[20] *See* Del. Code Ann. tit. 10, § 349(a); Del. Ch. Ct. R. 96(d)(7), 97(a).

which the state wields its coercive power.[21] If the state's exercise of coercive power is reported on by the press and hence scrutinized by the public, uncorrected abuse of that power is far less likely. *Id.* Because the disputants' appearance in the Delaware arbitral forum is consensual and not coerced, there is no need for any right of access.[22]

Judge Sloviter's remaining bases for analogizing Delaware's statutory arbitration procedure to trial and finding a right of access – that it results in "binding order[s]" and "allow[s] only a limited right of appeal"[23] – are countervailed by the procedure itself. Pursuant to the Delaware statute, the proceedings become public when one of the disputants appeals the arbitrator's award.[24] If the award is accepted, and not appealed, then it would

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[21] *See Richmond Newspapers*, 448 U.S. at 571-72 (1980) (emphasizing the importance of the "appearance of justice" in "society's criminal process[es]") (citation omitted), *cited in* Pet. 29.

[22] In granting the petition and deciding this case, the Court does not need to decide whether to extend its right-of-access jurisprudence from criminal cases to civil cases. *See* Pet. 17-23 (noting that Supreme Court has recognized a right of access only in criminal cases, and citing cases). The premise of that jurisprudence – that the state's exercise of coercive power against a defendant requires the check of public exposure – is simply inapplicable here. Delaware's arbitration statute neither limits Delaware courts' civil trial jurisdiction nor obligates disputants to arbitrate rather than litigate. Thus, because the disputants consensually submit to an arbitral forum, there is no exercise by a state of coercive power and hence no need for the check thereon that would be provided by public exposure.

[23] Pet. App. 15a (Sloviter, J.); *see also* 9 U.S.C. § 10.

[24] *See* Del. Code Ann. tit. 10, § 349(b).

be hard to conclude that there is any coercion, or any imposition against the will of either party. (That the order resulting from Delaware's procedure is "binding" – without the need for the prevailing party to apply for an order of enforcement – is a matter of convenience and is purely ministerial.) By contrast, if the award *is* appealed, the appealing party is effectively stating that it does not consent to the imposition of the award, and that the imposition of the award would therefore be coercive.[25] Under those circumstances, the statute makes the proceedings public. The statute draws the line carefully in consonance with the principle that state coercion is a necessary prerequisite for public access.[26]

Finally, Respondent's claim that Delaware's statutory arbitration procedure is a civil trial is similarly unavailing. For example, Respondent's argument that disputants do not "choose" their arbitrator is illusory.[27] In FINRA arbitrations

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[25] In any event, a "limited right of appeal" has always been a hallmark of arbitration, *not* civil trial. *See supra* Part I.A.1.

[26] To be sure, the state's exercise of coercive power, while a *necessary* prerequisite for a right of access, is not necessarily *sufficient*. The "experience and logic" test must still be satisfied. In addition, the Court may decide to limit the right of access to criminal proceedings exclusively, because the coercion in criminal proceedings – involving loss of life and liberty – is qualitatively different from the coercion in civil proceedings.

[27] *See* Resp. 4 ("Like litigation, the parties have no choice as to who will hear and decide the case. . . . By contrast, in private arbitration, the parties are free to contract as to how the arbitrator is selected.") (citing Del. Ch. Ct. R. 97(b) ("Upon

involving, e.g., claims for more than $100,000 between brokerage firms, disputants rank fourteen of thirty names that FINRA randomly generates from its arbitration rosters. FINRA combines the parties' ranked lists and appoints the three highest ranked available arbitrators.[28] Under Delaware's procedure, disputants know in advance the names of the entire roster of possible arbitrators – *i.e.*, the five judges of the Court of Chancery – and by consenting to Delaware's statutory arbitration procedure, consent to any one of those arbitrators.

3. By Invalidating Delaware's Statutory Arbitration Procedure, Judge Sloviter Violated Principles Of Federalism

In likening Delaware's statutory arbitration procedure to trial based on the fact that a sitting judge in a courtroom is also the arbitrator, Judge Sloviter also failed to appreciate States' powers grounded in the structure of our federal system and in the Tenth Amendment.[29] The allocation of States' powers among their respective organs belongs to the States.[30] The States also have the lesser power to determine whether certain actions of State actors

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receipt of a petition, the Chancellor will appoint an Arbitrator.")).

[28] FINRA, "Arbitrator Selection," FINRA Dispute Resolution (2014), *available at* http://tinyurl.com/l2jefkh.

[29] *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[30] *See Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

are carried out in a confidential setting.[31] Moreover, the Constitution's protection of these State powers is most suited to judicial enforcement where, as here, the challenged federal interference with those powers arises not from the federal legislature under the Commerce Clause but rather from the federal judiciary under the First Amendment. Indeed, the political process, which might be relied on to remedy such a legislative overreach,[32] is singularly ineffective at remedying a judicial overreach, as constitutional decisions – such as the Third Circuit's here – are not subject to legislative revision. Judge Sloviter, who saw this case as simply a conflict between the United States Constitution and a State act, failed to recognize the constitutional principles of federalism countervailing Respondent's invocation of the First Amendment.

Further, giving arbitral authority to judges does not render the consequent arbitrations "civil trials." Rather, they remain arbitrations – in which the neutral third-party happens to be a judge.[33] By analogizing Delaware's statutory arbitration procedure to civil trials on this basis, Judge Sloviter gave courts free rein to require public access to State-created arbitration procedures, effectively

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[31] *See, e.g.*, *In re Gault*, 387 U.S. 1, 25 (1967) ("In any event, there is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles.").

[32] *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) (noting that political process is States' primary safeguard against federal legislation that interferes with States' sovereign powers).

[33] *See supra* Part I.A.2.

nullifying them (by driving companies away, as discussed in Part II.B.2, *infra*) and inhibiting authority properly granted by State legislatures to government actors.

B. Arbitration Does Not Have A Long Tradition Of Openness

Judge Sloviter's plurality opinion could find little evidence from the last one hundred years that arbitration has traditionally been open.[34] As Judge Roth stressed in dissent, this is because no such tradition exists.[35] Indeed, *amici*'s own long-standing experience with arbitrations reflects an equally long-standing appreciation for confidentiality.[36]

Accordingly, arbitration – including Delaware's arbitration procedure – lacks the long tradition of openness necessary to create a right of access under the experience prong of the "experience and logic" test.

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[34] Pet. 25-28; *see also* Pet. App. 11a-15a (Sloviter, J.).

[35] *See* Pet. App. 31a (Roth, J., dissenting) (noting that all major bodies specify that arbitration proceedings are confidential) (citing Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1271-72 (2006); AAA & ABA *Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI(B) (2004); AAA Commercial Arbitration Rules R-23 (2009); UNCITRAL, Arbitration Rules art. 21(3) (2010)).

[36] *See, e.g.*, FINRA Arbitrator's Guide, p. 70.

II. Delaware's Statutory Arbitration Procedure Does Not Satisfy The Logic Prong Of The "Experience and Logic" Test

Under the logic prong of the "experience and logic" test, courts consider whether "access plays a significant positive role in the functioning of the particular process in question,"[37] and "the extent to which openness impairs the public good."[38]

A. Access Provides No Significant Positive Role In The Functioning Of Delaware's Statutory Arbitration Procedure

Judge Sloviter's plurality opinion below again reaches an erroneous conclusion because of its failure to fully appreciate the consensual nature of arbitration versus the coercion of trial.

Judge Sloviter stated that "[a]llowing public access to state-sponsored arbitrations would give stockholders and the public a better understanding of how Delaware resolves major business disputes."[39] But precisely because arbitration is consensual –

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[37] *Press II*, 478 U.S. at 8.

[38] *N. Jersey Media Grp. Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002).

[39] Pet. App. 16a (Sloviter, J.) (noting further that it "would also allay the public's concerns about a process only accessible to litigants in business disputes who are able to afford the expense of arbitration[,] . . . expose litigants, lawyers, and the Chancery Court judge alike to scrutiny from peers and the press[,] . . . [and] discourage perjury and ensure that companies could not misrepresent their activities to competitors and the public.").

unlike a trial, which is coerced – businesses do not need to choose the Court of Chancery for alternative dispute resolution.[40] Therefore, if the Court were to hold that the First Amendment prohibits the State of Delaware from creating its own confidential ADR program with Court of Chancery judges, the public will not develop a better understanding of how Delaware resolves major business disputes. Rather, as discussed in Part II.B.2, *infra*, businesses, which have a choice of what ADR mechanism to select, will simply choose to use ADR mechanisms that allow for the key benefit of confidentiality, while sacrificing the expert knowledge of the Court of Chancery judges. Ironically, it is only where those businesses are coerced to use the courts of Delaware, *i.e.*, where they have not agreed to alternative dispute resolution, that the benefits Judge Sloviter ascribed to openness will be realized.

Accordingly, Delaware's statutory arbitration procedure does not satisfy the logic prong because access cannot play a "significant" positive role in the functioning of the proceeding.

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[40] *See AT&T Techs.*, 475 U.S. at 648-49 (arbitrators "derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"); *Stolt-Nielsen*, 559 U.S. at 664 ("[A]rbitration 'is a matter of consent, not coercion.'") (citation omitted).

B. Access To Delaware's Statutory Arbitration Procedure Would Impair The Public Good

1. Access Infringes Upon Powers Possessed By The States Under Principles Of Federalism

As discussed in Part I.A.3, *supra*, each State's authority to allocate power among State actors and decide which actions of State actors require confidentiality is grounded in principles of federalism.[41]

The First Amendment does not constrain the ability of sovereign States to create mechanisms that satisfy their evolving needs. Indeed, federal law does not prohibit States from allocating arbitral authority to any State actors and to any extent that the States wish.[42] In addition to Delaware, numerous States have done exactly that.[43]

As these States demonstrate, principles of federalism facilitate experimentation by those in the best position to appreciate needs, address them, and ensure that the resident public and businesses enjoy significant consequential benefits.

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[41] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[42] *See Highland Farms*, 300 U.S. at 612; *Dreyer*, 187 U.S. at 84.

[43] *See* Pet. 33 (listing States).

Businesses consider a wide variety of factors in determining where to incorporate, list securities, and conduct their affairs. Because of *amici*'s own experience in meeting the needs of those businesses by providing ADR mechanisms for resolving securities-related disputes, *amici* similarly recognize the benefits of allowing States to develop their own ADR mechanisms to ensure that companies remain in the United States.

2. Access Drives Companies Away From Delaware's Statutory Arbitration Procedure

By eliminating the confidentiality of Delaware's arbitration procedure, a right of access will dissuade corporations from utilizing the procedure, thus preventing it from functioning at all.[44]

Confidentiality is crucial – it protects sensitive and closely held information, prevents reputational damage that could flow from highly adversarial and public disputes, and preserves existing and future relations with other parties. Exposure of companies' internal decision-making may create embarrassment before, and loss of confidence from, the investment community. Indeed, the recently-enacted JOBS Act, which aims to "improv[e] access to the public capital markets for

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[44] *See* Pet. App. 30a (Roth, J., dissenting) ("Confidentiality is one of the primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes, involving corporate earnings and business secrets.") (citing 1 Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* 7:12 (2013)); *see also Guyden*, 544 F.3d at 385; *Concepcion*, 131 S. Ct. at 1749.

emerging growth companies,"[45] directly acknowledges all of these benefits. For example, the Act permits emerging growth companies to confidentially submit draft registration statements to the SEC for comment, thereby allowing these companies to prevent concurrent public exposure of evolving drafts, and incentivizing their initial public offerings.[46] Similarly, confidentiality is a significant and necessary attractant for companies in the context of alternative dispute resolution.

Access will defeat this significant purpose of arbitration. As a result, both United States and foreign companies that, for entirely salutary and legitimate reasons, desire confidentiality, would likely choose to arbitrate their disputes elsewhere.

The expectation that arbitration proceedings are confidential is the historic norm not only in the United States,[47] but also in the rest of the world. Some countries, such as England and France, hold that even in the absence of any specific agreement regarding confidentiality, confidentiality is nonetheless implied from the very nature of arbitration.[48] Still other jurisdictions, including

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[45] H.R. 3606, 112th Cong. (2012).

[46] *Id*. at 7.

[47] *See supra* Part I.B.

[48] *See, e.g.*, *Ali Shipping Corp. v. Shipyard Trogir*, [1998] 2 All E.R., 1 Lloyd's Rep. 643 (Eng. Ct. App.); *Aita v. Ojjeh*, 1986 Revue De L'Arbitrage 583 (Cour d'Appel de Paris, Feb. 18, 1986).

New Zealand, have gone even further to protect the confidentiality of arbitration proceedings.[49]

In light of the growing international use of arbitral mechanisms that are confidential and utilize sitting judges,[50] and in light of companies' desire for confidentiality in arbitrations, a right of access will drive businesses away from Delaware's statutory arbitration procedure and potentially outside the United States. Businesses that are unwilling to have their disputes resolved in the United States may also be unwilling to raise capital in this country. In contrast, businesses that are given the flexibility to consider Delaware's unique arbitration program, which offers the benefits of having disputes decided confidentially by judges who are nationally recognized for their experience and sophistication in resolving contract, commercial, and corporate disputes, may be more likely to conduct business in the United States.[51] By inhibiting businesses' use of Delaware's statutory arbitration procedure while alternatives remain available elsewhere, including abroad, access may also

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[49] *See, e.g.*, Arbitration Act 1996 (New Zealand) § 14 at 14A-14I, *available at* http://tinyurl.com/kx7nvp2.

[50] *See* Pet. 33 nn.16-17; *see, e.g.*, Arbitration Act, 1996, c. 23 § 1993 (U.K.); French Decree 93-21 of 7 January 1993, modified by decree 94-314 of 20 April 1994, Art. 37; Deutsches Richtergesetz [DRiG] [German Law on Judges], April 19, 1972, last amended July 11, 2002, § 40 (Ger.).

[51] *See* Black, *supra*, at 5-8; *see also* Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping By Insolvent Corporations*, 94 Nw. U. L. Rev. 1357, 1385 (2000) ("The Delaware Chancery Court is nationally recognized for its expertise in corporate law.").

influence businesses not to incorporate in Delaware or the United States.

3. Access Encroaches Upon Numerous Other Confidential Communications

By neglecting the crucial distinction between consent and coercion discussed in Part I.A.2, *supra*, Judge Sloviter fundamentally misconceived the effect of government action on privacy and confidentiality. Judge Sloviter suggests that if a state actor is involved in a matter, then any confidentiality otherwise attaching to the matter is presumptively subject to First Amendment scrutiny and a right of access. This view is directly contrary to history and practice. Government action frequently takes place in a confidential setting. Confidentiality has traditionally been regarded as essential to government's decisional process, without any right of access. If enshrined in law, Judge Sloviter's view would have vast, adverse consequences on these communications.[52]

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[52] Contrary to Judge Sloviter's view, courts have held that the involvement of a sitting judge in a matter does not necessarily render the matter subject to a right of access. For example, although Judge Sloviter's view might subject a settlement discussion in a robing room to a right of access, the Seventh Circuit has held otherwise. *See B.H. v. McDonald*, 49 F.3d 294, 298 & n.4 (7th Cir. 1995) (finding no First Amendment right of access to private communication between judge and parties, "whether in bench conferences or in chambers") (citing cases). Similarly, although Judge Sloviter's view might subject a sealed *qui tam* complaint under the False Claims Act to a right of access, the Fourth Circuit has held otherwise. *See ACLU v. Holder*, 673 F.3d 245, 251-54 (4th Cir. 2011). Specifically, such *qui tam* complaints are filed under

CONCLUSION

Amici curiae respectfully urge the Court to grant the petition for a writ of certiorari.

Dated: February 24, 2014 Respectfully submitted,

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seal pursuant to statutory directive and do not become public until an extensive period of government investigation and analysis is completed, all subject to judicial oversight (because extensions of the sealing period must be approved by the assigned judge). Contrary to Judge Sloviter's view that the pendency of a matter before a sitting judge requires a right of access, the Fourth Circuit has upheld the Act's sealing provision against the precise challenge made by Respondent here. *Id.* (rejecting contention that sealing requirement of False Claims Act's *qui tam* provisions must be struck down under First Amendment's right of access).