UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 12-3859

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,

Plaintiff - Appellee,

v.

THE HON. LEO E. STRINE, JR.; THE HON. JOHN W. NOBLE; THE HON. DONALD F. PARSONS, JR.; THE HON. J. TRAVIS LASTER; AND THE HON. SAM GLASSCOCK, III; IN THEIR OFFICIAL CAPACITIES,

Defendants - Appellants.

On appeal from the United States District Court
for the District of Delaware
(Hon. Mary A. McLaughlin, United States District Judge)

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PLAINTIFF-APPELLEE DELAWARE COALITION FOR OPEN GOVERNMENT, INC. URGING AFFIRMANCE

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January 14, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 & 29(c)(1), amicus curiae Public Citizen, Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of Public Citizen, Inc.

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INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a non-profit advocacy organization with approximately 300,000 members and supporters nationwide, appears before Congress, federal agencies, and the courts to advocate for openness in government, access to courts, consumer protections, and health and safety regulations. Since its founding more than forty years ago, Public Citizen has advocated for the public right of access to court proceedings and court records in many cases, including *Company Doe v. Public Citizen*, No. 12-2209 (4th Cir. filed Dec. 13, 2012), *Verni v. Lanzaro*, 960 A.2d 405 (N.J. Super. Ct. App. Div. 2008), and *Cardiac Pacemakers, Inc. v. Aspen II Holding Co., Inc.*, No. 04-cv-4048, 2006 WL 3043180 (D. Minn. Oct. 24, 2006). The public interest in access to court proceedings and court records is strongly implicated by this case.

All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from Public Citizen, no person, including parties or parties' counsel, contributed money intended to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

At issue in this case is whether Delaware statutes and rules of court under which the Delaware Court of Chancery, through its judges, adjudicates cases and issues binding judgments in secret, violate the right of public access to civil

judicial proceedings. The district court correctly held that the system of secret adjudication created by Del. Code Ann. tit. 10, § 349 and Delaware Court of Chancery Rules 96 through 98 (a "§ 349 proceeding"), though denominated as "arbitration," functions "essentially as a non-jury trial before a Chancery Court judge," rather than as a conventional arbitration and that, therefore, the statute and the Chancery Court Rules violate the qualified right of public access to civil proceedings under the First Amendment. The court's finding that a § 349 proceeding is, functionally, a civil judicial proceeding is based on the facts that when parties elect to invoke that process, their dispute is heard by the Chancery Court through its active judges, and public resources, including the courthouse, court personnel, and judicial salaries, are employed to decide the dispute and issue an executable judicial judgment.

On appeal, the Chancery judges administering § 349 proceedings, who were the defendants in the district court, contend that the district court erred in holding that the right of public access that attaches to conventional judicial proceedings is equally applicable to the parallel system of secret court adjudication that Delaware has created. They argue that § 349 proceedings must be compared to conventional commercial arbitration, to which the public historically has been denied access. The Chancery judges are wrong. The Chancery Court's power to issue enforceable judgments in § 349 proceedings, which derives from the state, stands in stark

contrast to the authority of conventional arbitrators, which is derived from the parties' agreement. Thus, whereas arbitrators' awards must be confirmed by a court before they can be enforced, executable judicial judgments under § 349 are an exercise of governmental, rather than private, authority. This exercise of state judicial power underlies First Amendment public access jurisprudence, which promotes understanding of the judicial system and confidence in the results it renders.

Accordingly, the district court was correct in holding that § 349 and the implementing Chancery Court Rules establish, in essence, a private, parallel court system in which the parties' dispute and, perhaps most significantly, the judge's decision are shielded from public knowledge. Further, because the resulting judgments may be executed upon without further judicial action, a § 349 proceeding eliminates public access even to those elements of conventional arbitration that are subject to public access: judicial confirmation and enforcement of arbitration awards. This Court should affirm the district court's holding that § 349 and Court of Chancery Rules 96 through 98 violate the public's First Amendment right of access.

ARGUMENT

I. BY AUTHORIZING A COURT TO ISSUE ENFORCEABLE JUDGMENTS, THE DELAWARE STATUTE AND ITS IMPLEMENTING RULES CREATE A PARALLEL COURT SYSTEM THAT IS MATERIALLY DISTINGUISHABLE FROM CONVENTIONAL ARBITRATION.

Section 349 and the implementing Chancery Court rules purport to allow parties to business disputes the option of obtaining a judicial resolution of their dispute incorporated in a judgment of the Chancery Court while bypassing the right of public access that normally accompanies the judicial proceedings in a civil case. Parties seeking to avail themselves of this option file a petition with the Register in Chancery stating that the dispute meets eligibility criteria set forth in Del. Code Ann. tit. 10, § 347, a statute that authorizes non-binding Chancery Court mediations of certain business disputes, including cases involving claims solely for monetary damages if the amount in controversy exceeds $1 million. *See* §§ 347(a)(1)-(5) and 349(a); Del. Ch. R. 97(a)(1).[1] Chancery Court Rule 97 mandates procedures for the appointment of a judge or master to act as "arbitrator," preliminary conference, preliminary hearing, pre-hearing exchange of information (unless the parties agree, subject to the appointed judge's approval, to forgo exchanging information), and the proceeding itself, which occurs within 90

[1] The arguments set forth in this brief do not challenge the constitutionality of the non-binding Chancery Court mediation scheme set forth in § 347.

days of the filing of the petition. Del. Ch. R. 97(b)-(f). The Chancery Court rules with respect to discovery govern proceedings, unless the parties and judge agree otherwise. *Id.* 96(c).

The Chancellor selects the "arbitrator," who "is a judge or master sitting permanently in the Court." *Id.* 96(d)(2).[2] The selected judge is empowered to make a final award of "any remedy or relief" that is just and equitable and within the scope of the parties' agreement. *Id.* 98(f)(1). "Upon the granting of a final award," the judge must enter judgment that "shall … be enforced as any other judgment or decree." *Id.* 98(f)(3).

As the district court correctly recognized, a § 349 proceeding is properly considered a civil judicial proceeding. Parties enjoy the benefit of the same discovery rules that would apply had the parties filed an ordinary civil action, as well as the benefit of having their disputes heard by active judges who are well-versed with developments in the business litigation that comes before the Chancery Court. In issuing executable judgments, the Chancery Court in the Delaware proceeding exercises the same state-created authority as in other civil litigation. It

[2] The district court considered the constitutionality of § 349 and Chancery Court Rules 96 through 98 only with respect to the appointment of Chancery Court judges as arbitrators, not with respect to the appointment of masters. Joint Appendix (JA) 11 n.3.

is this state authority that sets a § 349 proceeding apart from conventional arbitration and establishes that the proceeding is judicial in nature.

Arbitration is a "creature born of a contract between parties who are desirous of avoiding litigation in a court of law … [that] provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system." *Bowles Fin. Group, Inc. v. Stifel, Nicolaus, & Co.*, 22 F.3d 1010, 1011 (10th Cir. 1994). Parties electing to arbitrate a dispute enjoy wide latitude to agree to "limit the issues they choose to arbitrate, … [select] rules under which any arbitration will proceed, … [and] choose who will resolve specific disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010) (citations omitted). Further, arbitrations often are confidential. *Mosaid Techs. Inc. v. LSI Corp.*, __ F. Supp. 2d __, 2012 WL 2951389, at *7 (D. Del. July 20, 2012). Because the process is contractual, the parties are free to "trade[] the procedures and opportunity for review of the courtroom" to achieve the objectives that led them to choose private adjudication. *Bowles*, 22 F.3d at 1011.

As with the arbitration process itself, the decisional authority of an arbitrator is both defined by and confined to the contractual agreement of the parties to resolve their disputes outside of litigation. *See 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 their

disputes to arbitration." (citation omitted)); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 182 (3d Cir. 2010) (en banc) (recognizing that arbitrator's authority arises from contract (citing *Allstate Settlement Corp. v. Rapid Settlements, Ltd.*, 559 F.3d 164, 169 (3d Cir. 2009))). "[B]ecause an arbitrator derives his or her powers from the parties' agreement to forgo the legal process … arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (citing *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

Significantly, because an arbitrator's authority is derived from a private contract, she lacks "coercive power to enforce the award," which has no "legal effect without the stamp of judicial approval." *Schlumberger Tech. Corp. v. United States*, 195 F.3d 216, 220 (5th Cir. 1999) (citation and internal quotation marks omitted). Arbitration awards are "not self-enforcing, they must be given force and effect by being converted to judicial orders [to confirm or vacate] by courts." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) (citation and internal quotation marks omitted); *see also Hannibal Pictures v. Les Films de L'Elysee*, No. 12-cv-6434, 2012 WL 6608595, at * 2 (C.D. Cal. Dec. 18, 2012) ("A motion to confirm an arbitration award … 'merely makes the arbitrators' award a final, enforceable judgment of the court.'" (citing *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994))).

Absent confirmation, which results in a court judgment, an arbitration award merely establishes a contractual right to whatever relief has been awarded by the arbitrator. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (pointing out that absent the statutory procedures for confirmation or vacatur of awards, a "separate contract action … would usually be necessary to enforce or tinker with an arbitral award in court"). Although the Federal Arbitration Act (FAA), 9 U.S.C. § 9, and its state analogs provide a mechanism for conversion of the award into a judgment without the necessity of a separate contract action, they do not permit judgment to be entered on an arbitration award unless the court has exercised its power to determine whether the arbitrator exceeded her authority under the agreement or engaged in some other conduct that requires vacatur of the award. *See Hall St.*, 552 U.S. at 589 (holding that statutory grounds for vacatur are exclusive when parties invoke the FAA's procedures for vacatur or confirmation of an award); *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 295 (3d Cir. 2010) (citing 9 U.S.C. § 10(a)(1)-(4)) (setting forth statutory grounds for vacatur).

That arbitration awards must be confirmed by a court to be enforceable stands in marked contrast to judicial orders issued in civil actions. Although arbitration awards may "flow[] *almost* always into" enforceable court orders, "[t]he existence of state enforcement mechanisms" is a hallmark of the latter that is a

"decisive distinction" from the former. *Schlumberger*, 195 F.3d at 221 (emphasis added). Indeed, without the ability to issue enforceable orders, courts would lack means to "'vindicate [their] jurisdiction and authority'" without assistance of the judiciary's co-branches of government and would be reduced to "'mere boards of arbitration whose judgments and decrees would be only advisory.'" *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

Unlike a conventional arbitration, the proceeding established by § 349 provides for entry of an enforceable final judgment of the Chancery Court "[u]pon the granting of a final award." Del. Ch. R. 98(f)(3). There is no need for a party to a § 349 proceeding to convert the judge's award into an enforceable judgment by taking steps to confirm the award first. The judge's ability to issue an executable judgment at the conclusion of a § 349 proceeding derives from her state-conferred power to "vindicate [the court's] jurisdiction and authority," *Young*, 481 U.S. at 796 (citation and internal quotation marks omitted), rather than from the parties' contractual agreement to arbitrate. The district court recognized this critical distinction in finding the § 349 proceeding to be "essentially a civil trial." JA 29-30 ("In Delaware … the judge's final award results in a judgment enforced by state power.").

The Chancery judge defendants gloss over this distinction by asserting that "[e]liminating the ministerial step of confirming the arbitrator's award does not transform the arbitration proceeding into a judicial one." Appellants' Br. 42 n.21. But courts do not confirm arbitration awards as a matter of course or as a "ministerial" exercise; rather, they exercise their power to confirm or vacate arbitration awards according to criteria provided by governing statutes when there is an actual dispute among the parties over the award's validity. *See Derwin v. Gen. Dynamics Corp.*, 719 F.2d 484, 492 (1st Cir. 1983) (holding that courts should not "ministerial[ly] confirm[]" an arbitration award, but should only exercise their power to confirm or vacate when there exists a "concrete dispute" between the parties concerning the award's effect); *Steris Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 489 F. Supp. 2d 501, 515 (W.D. Pa. 2007) (adopting *Derwin*'s logic and refusing to confirm award); *Chi. Reg'l Council of Carpenters v. Onsite Woodwork Corp.*, No. 11-cv-8365, 2012 WL 6189635, at *4-*5 (N.D. Ill. Dec. 12, 2012) (declining to confirm award where there is no evidence of a party's non-compliance).

The Chancery judges further assert that the confirmation of an award as a judgment is essentially meaningless because "the overwhelming number of arbitrator's awards … are complied with voluntarily." Appellants' Br. 42 n.21 (citation and internal quotation marks omitted). Of course, the "overwhelming

number" of all contracts are voluntarily complied with, but that does not mean that there is no difference between a contractual right and a judgment enforcing that contractual right. Voluntary compliance with an arbitration award indicates only acceptance of or unwillingness to challenge the process that led to the result, regardless of the parties' satisfaction with the award itself. The Chancery judges are correct that an arbitration is not a judicial proceeding simply because parties are likely to comply with an arbitral award without its being confirmed as a judgment. But by the same token, a judicial proceeding that results in an executable judgment that is neither resisted nor appealed, but satisfied without further enforcement action, remains fundamentally different from an arbitration proceeding that does not yield such a judgment.

Moreover, the Chancery judges' contention that "a party to the arbitral award … is automatically entitled to [judicial] review in the Delaware Supreme Court," *id.*, does not alter the nature of the judgments issued in a § 349 proceeding, which can be executed on like any other judgment in the absence of further review—a fact that the Chancery judges do not dispute. Indeed, that "automatic" entitlement to review in the Supreme Court fails to differentiate judgments issued as a result of a § 349 proceeding from final judgments issued in other civil actions by the Chancery Court (and the Superior Court), which are likewise "automatically" subject to appellate review if a party chooses to seek it.

The Chancery judges rely heavily on the fact that both parties must voluntarily elect to have their disputes heard in a § 349 proceeding, contending that this consent to the process "is the reason why courts in a variety of contexts have expressly distinguished arbitration from judicial proceedings." *Id*. 36. But focusing exclusively on the parties' consent to a process as the hallmark distinguishing arbitration from civil litigation ignores the fact that many courts around the country offer parties the option of participating in expedited case management systems designed to resolve cases more efficiently if both parties consent. Fast-track litigation "merges the goals of [alternative dispute resolution] with necessary changes in court rules to make those goals achievable within the context of … [the] *existing* judicial system." Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Tract Alternative Under the Federal Rules of Civil Procedure*, 60 Notre Dame L. Rev. 431, 438 (1985) (emphasis added). In 2012, for example, the Western District of Pennsylvania introduced an expedited docket offering parties an "alternative, abbreviated, efficient, and cost-effective litigation and trial" in which participation is voluntary and consensual.[3] Under this program, discovery is curtailed and summary judgment motions are not allowed.[4] Each party may present

[3] *See* Pilot Program for Expedited Civil Litigation 1, http://www.pawd.uscourts.gov/Documents/Forms/EXPEDITED_DOCKET.pdf.

[4] *Id.* at 2-3.

no more than three hours of testimony at a trial, and the right of appeal is waived in most cases.[5] Other courts similarly provide a fast-track option for consenting parties.[6] Because a § 349 proceeding shares this essential attribute of optional "rocket docket" judicial proceedings, the Chancery judges' reliance on the parties' consent as a characteristic that meaningfully distinguishes an arbitration from a judicial proceeding is misplaced. A fast-track proceeding, even if voluntary, remains essentially judicial in nature if it results in the issuance of an enforceable judgment by a court. *See* McMillan, 60 Notre Dame L. Rev. at 433 (describing fast track litigation as "efforts to reform the formal litigation process through improved management and simplified court procedures, reform of the rules of civil procedure, and use of innovative trial techniques in certain categories of civil cases").

By contrast, court-annexed arbitration systems in other states, which the Chancery judges discuss in their brief, Appellants Br. 44-45, do not vest authority to issue executable judgments in the arbitrator, even when judges are permitted to step into that role. This distinction further underscores the significant difference

[5] *Id.* at 1.

[6] *See, e.g.*, Optional Fast Track Procedure for Civil Cases Assigned to Judge DeGiusti 1, http://www.okwd.uscourts.gov/files/fast_track_pro.pdf (last visited Jan. 10, 2013); Notice of Availability of a United States Magistrate Judge to Exercise Jurisdiction 2, http://www.innd.uscourts.gov/judges/nuechterlein/docs/FastTrack.pdf (last visited Jan. 10, 2013).

between a § 349 proceeding and conventional arbitration. California, Connecticut, and Oregon expressly provide parties to an arbitration the option of seeking a trial de novo, thus making clear that decisions by an arbitrator in these fora not only are not judgments, as in the § 349 proceeding, but are not binding in any sense. *See* Cal. Civ. Proc. Code § 1141.20 (allowing parties to seek trial de novo); Conn. Gen. Stat. § 51-193u (timely demand for trial de novo renders arbitrator's decision "null and void"); Or. Uniform Trial Ct. R. 13.040(3) (allowing parties to raise issues previously decided by arbitrator in trial de novo). Similarly, the Business Division of the Fulton County Court in Georgia allows judges of that court to conduct non-binding arbitrations only. Ga. Fulton Cty. R. 1004(12). North Carolina permits *retired* judges who are eligible to be recalled as part-time emergency judges to serve as arbitrators in malpractice cases, but it does not permit them to enter judgments; judgment can be entered on those awards only through the procedures normally applicable to confirmation of arbitration awards. N.C. Gen. Stat. §§ 90-21.62, 90-21.66, 90-21.68; *see also id.* § 7A-50 (defining "emergency judge"). New York, Wyoming, and West Virginia permit judges to serve as arbitrators provided that the judges do so *outside* of their official duties and where it does not conflict with their judicial obligations. *See* N.Y. Advisory Comm. J. Ethics, Op. No. 07-12 (Sept. 6, 2007) (providing that "[a] Supreme Court justice … may serve as a volunteer arbitrator for the New York City Civil Court" so long as there is no

conflict with judicial duties); W. Va. Code R. § 158-13-4.5.f.1 (allowing an administrative law judge to serve as an arbitrator "if such activity does not affect … the conduct of his official duties."); Wyo. Code of Judicial Conduct R. 3.9 ("A judge shall not act as arbitrator … or perform other judicial functions apart from the judge's official duties unless expressly authorized by law."). The Chancery judges' reliance on these statutes and court rules thus is misplaced.

Moreover, the Chancery judges' contention that the Delaware proceeding is akin to conventional commercial arbitration proceedings overlooks that Delaware's statutory procedures governing conventional arbitration differ in kind from those established by § 349 and the implementing Chancery Court rules. Notably, Delaware's Uniform Arbitration Act, which provides Delaware courts, including the Chancery Court, with jurisdiction to compel arbitration, Del. Code Ann. tit. 10, § 5703(a), and to appoint neutral arbitrators where parties are unable to make the selections themselves, *id.* § 5704, requires judicial confirmation of an arbitration award, *id.* § 5713. These provisions of the Uniform Arbitration Act underscore that § 349 and the implementing Chancery Court rules represent a fundamental departure from conventional arbitration principles. The existence of conventional arbitration with judicial confirmation of awards pursuant to the Uniform Arbitration Act also undercuts the Chancery judges' claim that "[o]ffering a government-sponsored arbitration forum, with judges of the Court of Chancery

serving as arbitrators" is necessary "to provide [Delaware's] corporate citizens with an expert, efficient dispute resolution system competitive with those available in other parts of the country and the world." Appellants' Br. 64-65.

For all these reasons, the district court properly concluded that, notwithstanding the arbitration label applied to it, a § 349 proceeding is a civil judicial proceeding.

II. THE CONFIDENTIALITY PROVISIONS OF SECTION 349 AND THE IMPLEMENTING CHANCERY COURT RULES VIOLATE THE QUALIFIED FIRST AMENDMENT RIGHT OF PUBLIC ACCESS.

Section 349 and Chancery Court Rules 96-98 broadly provide for confidentiality of the proceeding: The proceeding "shall be considered confidential and not of public record." Del. Code Ann. tit. 10, § 349(b). The petition to commence the proceeding is not listed on the Chancery Court's public docket. Del. Ch. R. 97(a)(4). The arbitration proceeding may be attended only by parties and their representatives, and any communications "made in or in connection with the arbitration" relating to the dispute are confidential. *Id.* 98(b). Further, the judge's case file, including any memoranda submitted by the parties, is confidential. *Id.* Although Chancery Court Rule 98, which provides for entry of judgment upon issuance of an award, *see* Del. Ch. R. 98(f)(3), is silent on whether a final award or judgment is confidential,

§ 349 provides that *nothing* about the proceeding will become public record unless and until a party appeals the decision to the Delaware Supreme Court, at which time the "record shall be filed by the parties with the [Delaware] Supreme Court." § 349(b).[7] Indeed, the district court found only one arbitration judgment entered on the Chancery Court's public docket. JA14 at n.4.

Appellants do not dispute that, under this Court's decision in *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984), the public has a right of access to civil trials. Appellants' Br. 16. Although this right is not absolute, cases falling within a § 349 proceeding, including business disputes with at least $1 million at stake, are the kinds of matters to which the access right applies.[8] Yet the confidentiality provisions ensure that the state-sponsored adjudication that occurs in a § 349 proceeding, distinguished from conventional arbitration by the judge's power to issue judgments, is conducted entirely out of public view. In light

[7] Even the notion of a "record" to be filed on appeal runs contrary to conventional arbitration principles. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting) ("An arbitral award can be made without explication of reasons and without development of a record. …").

[8] The right of access is not absolute and may be restricted by sealing parts of a court record to protect, for example, trade secrets or confidential commercial information. *See Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (explaining that court records may be sealed to prevent competitive harm); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 104 F. Supp. 2d 390, 396 (D. Del. 2000) (holding that "legitimate trade secrets" were "entitled to confidential protection." (citations and internal quotation marks omitted)).

of the many judicial characteristics of the proceeding, *see* Part I, its secrecy violates the public's right of access, as "it is the presence of the exercise of a court's coercive powers that is the touchstone of the recognized right to access." *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 905 (6th Cir. 1988) (finding no right of access to non-binding summary jury trials held for settlement purposes because the trials "do not present any matters for adjudication by the court."); *see also Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (describing adjudication as "a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny").

Under the scheme contemplated by § 349 and Chancery Court Rules 96 through 98, a sitting Chancery Court judge may hear and decide disputes with the imprimatur of the court pursuant to his state-conferred authority, in which the facts, arguments, rationales for judgment, and even the identity of the parties and the nature of their dispute, are secret. The statute and rules provide for secrecy without any demonstration of "good cause" that would justify closing the process or result to the public. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (permitting restriction of access to judicial proceeding only upon a "showing that disclosure will work a clearly defined and serious injury to the party seeking closure").

Moreover, the public has a strong interest in the oversight of a proceeding conducted by a court through a judge acting in her official government role (or in a capacity that cannot be meaningfully distinguished from her official role). "When [parties] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (citations omitted). Access, which includes "the right of the public to inspect and to copy judicial records[,] … promotes public confidence in the judicial system." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (citations omitted). Public oversight "diminishes possibilities for injustice, incompetence, perjury, and fraud … [and] provide[s] the public with a more complete understanding of the judicial system and a better perception of its fairness." *Id.* (citations omitted).

Delaware's § 349 proceeding offers businesses all of the benefits of Chancery Court litigation, including an adjudicator experienced in conducting such litigation who has the power to issue enforceable judgments. But unlike Chancery Court litigation, a § 349 proceeding is shrouded in secrecy that prevents the public from understanding how Delaware's sizable corporate jurisprudence will be applied and further developed. A primary criticism of conventional arbitration is that its informal and confidential nature stunts development of the law. Clyde W.

Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. Pa. J. Lab. & Emp. L. 685, 704 (2004). Further, when the public does not have access to proceedings in which statutory rights are adjudicated, that lack of understanding of how statutes are interpreted and applied stifles discourse on the utility of those statutes. *Id.* This problem is compounded when, as here, interpretations of the law by *judges* that result in *binding judicial decrees* are concealed from the public. Further, the body of secret law that the Chancery Court will develop in proceedings under the statute is unlikely to be available to the public because appeals to the Delaware Supreme Court, which are the only avenue to making the court's decisions in § 349 proceedings public, will be stifled by the very narrow standard of appellate review, which does not allow reversal even where significant factual or legal error has occurred. Under the Federal Arbitration Act, 9 U.S.C. § 10, which governs appellate review of decisions issued in a § 349 proceeding, *see* Del. Code Ann. tit. 10, § 349(c), a court may not reverse on the basis that the arbitrator made an error of law or fact. *See Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991) (stating that arbitration award cannot be set aside even where arbitrator has made error in determining factual issues).

In addition, the secrecy of a § 349 proceeding prevents interested non-parties from learning about a dispute in which they otherwise might intervene. For

example, Chancery Court Rule 23.1, which governs derivative actions brought by shareholders asserting claims on behalf of a corporation against the corporation or its directors, requires notice to other shareholders in the event the parties settle the case or voluntarily discontinue the action with prejudice so that other shareholders may choose to prosecute the claims on the corporation's behalf. Del. Ch. R. 23.1(c); *see also In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 698 A.2d 949, 956 (Del. Ch. 1996). Assuming such a dispute were to be heard in a § 349 proceeding, there is no provision in either § 349 or Chancery Court Rules 96 through 98 that would allow for this mandatory notice. Instead, the proceeding is restricted to the parties and their counsel unless the parties agree otherwise. *See* Del. Ch. R. 98(b).

These concerns are partially obviated in conventional arbitration, where the arbitrator is "'part of a system of *self*-government created by and confined to the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1774 (citing *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)) (emphasis added). The state's enforcement authority is absent and the arbitrator "'has no general charter to administer justice for a community that transcends the parties.'" *Id.* (citing *Steelworkers*, 363 U.S. at 581). Notwithstanding its private nature and confidentiality, the confirmation and enforcement aspects of arbitration provide a role for the public in the proceeding before a court engages in any exercise of government authority. *See Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (explaining that courts have "the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement" of laws is satisfied). A § 349 proceeding blocks even this basic accommodation by providing for binding judicial decrees without any public judicial proceedings.

Because a § 349 proceeding, unlike a conventional arbitration, involves the exercise of state enforcement power, its confidentiality violates the public's qualified right of access under the First Amendment. This Court should affirm the district court's holding that § 349 and Chancery Court Rules 96 through 98 are unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

January 14, 2013

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member of the Bar of this Court.

/s/ Scott L. Nelson

CERTIFICATION OF SERVICE

I certify that on January 14, 2013, a true and correct copy of the foregoing Brief of Amicus Curiae Public Citizen, Inc. was served on all parties to this appeal, via CM/ECF, pursuant to Third Circuit Rule 25.1(b) and L.A.R. Misc. 113.4, because counsel for all parties are Filings Users who will be served electronically by the Notice of Docket Activity.

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I certify that on January 14, 2013, I caused to be delivered by first-class mail ten copies of this brief to the Clerk of the Court, as follows:

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/s/ Scott L. Nelson

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I certify that the electronic and hard copies of this brief are identical.

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,139 words, excluding those parts of the brief excluded by Fed. R. App. Pro. 32(a)(7)(B)(iii).

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