

No. 17-610

In The
Supreme Court of the United States

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A.R. THANE RITCHIE, RITCHIE RISK-LINKED
STRATEGIES, LLC, RITCHIE PARTNERS, LLC,
RITCHIE CAPITAL MANAGEMENT, LLC,

Petitioners,

v.

HUIZENGA MANAGERS FUND, LLC,

Respondent.

◆

**On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois, First District**

◆

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE AND BRIEF OF AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE***

This case presents an issue of considerable practical and constitutional importance, and *amici curiae* are particularly well-suited to provide additional insight into the broad implications of the decision below for businesses across the country. *Amici* represent a bipartisan group of legislative and executive leaders from Delaware and Illinois with a unified interest in ensuring that their laws are applied faithfully and fairly to businesses operating under them. Because Respondent has withheld its consent to the filing of this brief, *amici* respectfully move this Court for leave to file the accompanying brief in support of the Petitioners.

On November 3, 2017, Petitioners and Respondent jointly filed a blanket consent pursuant to Supreme Court Rule 37.2(a). On November 15, 2017, *amici* advised Petitioners and Respondent of their intention to file this brief in support of Petitioners. The following day, counsel for Respondent refused to consent to the filing of this brief. The sole basis for counsel's refusal was that *amici's* formal notification of filing was received nine days – instead of the usual ten – before the due date.

The purpose of this Court's 10-day notice requirement is to permit counsel to seek an extension of time to respond to a petition for writ of *certiorari* so that counsel can, if desirable, respond to arguments advanced by *amici*. Accordingly, and to avoid the need for

amici to prepare this motion, Petitioners offered to consent to any requested extension of time sought by Respondent's counsel to alleviate any prejudice incurred by the loss of one day's advance notice that this brief would be filed.

Respondent's counsel rejected that offer. And, at the same time, Respondent moved for a 21-day extension to file its response to the petition for writ of *certiorari*, which this Court subsequently granted. As such, Respondent has suffered no prejudice by receiving one less day of advance notice that this brief would be filed, and *amici curiae* therefore respectfully move this Court for leave to file the accompanying brief in support of the Petitioners.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*¹

Jeffrey W. Bullock is Delaware's Secretary of State. He has served in that capacity for the past eight years and will continue in that role with the new administration of Delaware Governor John Carney. His office oversees nearly 20 State agencies, including the renowned Delaware Division of Corporations and Delaware's International Trade and Development Group.

Representative Peter C. Schwartzkopf is the Speaker of the Delaware House of Representatives. He has served in that capacity for the past four years. Representative Schwartzkopf is a member of the Delaware House Administration, Rules, and Ethics Committees, and has previously served as a member of the House Judiciary Committee.

James F. Clayborne, Jr. is the Democratic Majority Leader of the Illinois State Senate. In addition to his service as Majority Leader, Senator Clayborne chairs Senate Committees for Assignments, Executive Appointments, and Insurance. He is also involved in a

¹ As discussed in the motion preceding this brief, the parties filed a blanket notice of consent pursuant to Supreme Court Rule 37.2(a). However, since counsel of record received notice of *amici's* intention to file this brief nine days before its deadline, instead of ten days before, Respondent's counsel objected to its filing on that basis and withdrew its consent. Pursuant to Supreme Court Rule 37.6, the undersigned counsel, who authored the whole of this brief, hereby disclose that they also represent Petitioners in litigation in the State of Delaware. Petitioners funded the preparation of this brief. However, Petitioners' counsel of record in this appeal had no involvement in the authorship or drafting of this brief.

wide variety of local civic and community organizations in Illinois, and has received a host of awards and recognition for his civic and legislative accomplishments.

Representative Steven A. Andersson is the Republican Spokesman for the Judiciary (Civil) Committee of the Illinois House of Representatives and also serves as the House Republican Floor Leader. He is a member of the Appropriations General Services Committee, the Business Incentives for Local Communities Committee, the Industry and Code Enforcement Committee, the Mental-Health Committee, and the Museums, Arts, and Cultural Enhancement Committee.

Representative Lou Lang is the Democratic Deputy Majority Leader of the Illinois House of Representatives. Representative Lang has served on several Illinois House Committees, including Committees on the Judiciary, Insurance, Adoption Reform, and Gaming. He was awarded "Legislator of the Year" by, among others, the Illinois Hospital Association, the Illinois Council on Senior Citizens, the Service Employees Union, and the Illinois Public Action Council.

Representative Jay Hoffman is a Democratic Assistant Majority Leader in the Illinois House of Representatives. He serves as the Chairman of the Labor & Commerce Committee, as well as the Public Utilities, Judicial (Civil), and Appropriations Committees. Representative Hoffman concentrates on balancing the State budget, capital construction, education, economic

development, senior citizens, veterans and Illinois families.

Amici well understand the importance of consistency and reliability in the application of Delaware law, which is a key driver in Delaware's preeminence as the "Corporate Capital of the World." *Amici* similarly recognize the importance that businesses place in the ability of State courts (in this case, the courts of Illinois) to interpret and enforce agreements governed by the laws of other jurisdictions.

Consistent and predictable court rulings give private parties confidence that contracts will be interpreted and enforced reliably and according to their terms. A State court's decision jeopardizing that confidence is therefore a matter of grave concern to us and to businesses in both Delaware and Illinois. And that is why we file this *amicus* brief.



SUMMARY OF ARGUMENT

Two companies signed a contract for the sale of securities and selected Delaware law to govern its terms. When those companies later reached a disagreement over that contract, they proceeded to litigate their claims against one another in Illinois. The United States Constitution's Full Faith and Credit Clause compelled the Illinois courts hearing their dispute to resolve it under Delaware law as interpreted and applied by the Delaware Supreme Court.

The Delaware law giving rise to this appeal is the Delaware Securities Act (the “DSA”). In a decision issued in 2016, the Delaware Supreme Court confirmed that the DSA is a Blue Sky Law designed to regulate conduct occurring within the boundaries of the State of Delaware. The DSA is inapplicable to companies incorporated in Delaware who engage in potentially regulated securities transactions outside of the State.

The securities transactions litigated before the Illinois courts had no relationship to Delaware and were transacted outside of Delaware. As a result, the Illinois courts should have reviewed the Delaware Supreme Court’s interpretation of Delaware law, concluded that the DSA was inapplicable to the case in front of it, and dismissed all claims under the DSA from the action.

That did not happen. Instead, the Illinois courts ignored the Delaware Supreme Court’s decision, determined that the DSA *was* applicable to the companies’ litigation, and ruled that the disputed securities transactions violated its terms. While the Illinois courts’ decision was limited in this instance to the affected parties involved in the dispute below, its potential ramifications are far broader.

When parties enter into a contract, it is sensible for them to agree that if a breach occurs or a dispute arises, a specified State’s laws will govern the contract’s interpretation, enforcement, and redress. Choice of law provisions ensure that both parties may reasonably predict the principles a court will use in resolving a given dispute.

When courts effectively ignore choice of law provisions, as the Illinois courts did here, they unfairly change the rules of the game after they've already been agreed to. When a court interprets another State's law in the way that it prefers, rather than accepting that State's law as it is, the meaning and purpose of a contract can be lost or altered in ways the parties never agreed to or expected.

Business requires clear rules that are faithfully applied. Businesses should not be compelled to consider how the laws of every State might impact their contracts because of the risk that the law of the State they selected to govern their relationship might be ignored by the courts. This *amicus* brief seeks to redress those concerns.

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ARGUMENT

I. The Illinois Courts Should Have Deferred to the Delaware Supreme Court's Interpretation of a Delaware Statute.

Under the doctrine that a State's high court has the final say over the interpretation of its own State's laws, that court's holdings are respected as controlling precedent by the courts of other States. Bryan A. Garner et al., *The Law of Judicial Precedent* § 77, at 656 (2016). Indeed, as set forth in Petitioners' Petition for a Writ of Certiorari, Article IV, Section 1 of the United States Constitution, known as the Full Faith and Credit Clause, mandates such a result. In this case, the

Illinois Appellate Court, in applying Delaware law under the governing contract's choice of law provision, ignored binding Delaware Supreme Court precedent that the DSA is a Blue Sky Law that regulates only intrastate security transactions. Given that Illinois courts should defer to Delaware precedent when applying Delaware law, that result is manifestly incorrect and should not stand.

A. A sovereign State enjoys the privilege of making, enforcing, and interpreting its own law. Just as the Illinois Supreme Court has the power to interpret Illinois law and establish precedents, the Delaware Supreme Court has the same power over Delaware law.

In the 1873 case of *Walker v. State Harbor Commissioners*, this Court held that the interpretation of a California statute by the California Supreme Court is the accepted interpretation, no matter what the Court thought of the interpretation's correctness. *Walker v. State Harbor Comm'rs*, 84 U.S. (17 Wall.) 648, 651 (1873). So the authoritative ruling of a State high court is the interpretation for all jurisdictions that choose to apply that law. Garner et al., *supra*, § 77, at 656.

The rulings from the Delaware Supreme Court are the full and final interpretation of Delaware State law. The interpretation is changed only when the Delaware Supreme Court sets a new precedent that is contrary to the one set before. *Id.* When the Delaware Supreme

Court establishes such a precedent, the courts of other States are not free to ignore it.

B. The Delaware Supreme Court has interpreted the Delaware Securities Act's nexus requirement. It is still good law that has been perfected as recently as September 2016 by an *en banc* Delaware Supreme Court.

In this case, the specific Delaware law under scrutiny is the Delaware Securities Act ("DSA"). The Delaware Supreme Court first examined the DSA 40 years ago in *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701, 705 (Del. 1983). There, the Delaware Supreme Court explained that the DSA implicates, with some specificity, the registration of securities offered or sold in Delaware. *Singer*, 380 A.2d at 981.

The Delaware Supreme Court further observed that the DSA was "a Blue Sky Law governing transactions that are subject to Delaware jurisdiction under traditional tests" and expressly noted that Blue Sky Laws are presumed inapplicable outside of a State's territorial jurisdiction. *Id.* at 981. As a result, the court explained that a Delaware corporation can be bound by the Securities Act if: (1) the company is a resident of Delaware and solicited there; (2) the contract for the transaction in question was made in Delaware; or (3) any part of the sale occurred in Delaware. *Id.*

In the decades that followed, Delaware Court of Chancery opinions interpreting *Singer* consistently held that the DSA “only applies where there is a sufficient nexus between Delaware and the transaction at issue.” See, e.g., *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *19 (Del. Ch. Dec. 1, 2009); *Eurofins Panlabs, Inc. v. Ricera Biosciences, LLC*, 2014 WL 2457515, at *18 (Del. Ch. May 30, 2014); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842 (Del. Ch. 2016). Recently, on appeal in *FdG Logistics*, the Delaware Supreme Court confirmed that this result holds true even in the face of a contractual choice of law provision specifying the application of Delaware law. See *A&R Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (TABLE) (Del. Sept. 30, 2016).

C. The Delaware Supreme Court’s decision in *FdG Logistics* definitively resolved that a Delaware contractual choice of law provision does not permit a litigant to pursue a DSA claim to establish liability for conduct occurring outside of Delaware.

In *FdG Logistics*, a decision issued while the Illinois action was pending, the Court of Chancery explained that the intent of a Delaware choice of law provision is to permit contracting parties to incorporate the law of Delaware – primarily, Delaware’s common law – to decide questions concerning the interpretation and enforceability of their contract. *FdG Logistics*, 131 A.3d at 855. The Court of Chancery explicitly rejected the

notion that a Delaware choice of law provision could also implicate the DSA or otherwise serve as “a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties.” *Id.* at 855.

FdG Logistics’ determination that a Delaware choice of law provision was insufficient to implicate the DSA was appealed and squarely presented to the Delaware Supreme Court. Following oral argument, the Delaware Supreme Court accepted the Court of Chancery’s reasoning by issuing an *en banc* opinion broadly affirming the Court of Chancery’s underlying opinion “on the basis of and for the reasons assigned in its well-reasoned decision.” *A&R Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (TABLE) (Del. Sept. 30, 2016).

Under controlling Delaware precedent, then, a contractual Delaware choice of law provision does not implicate the DSA without a separate and independent jurisdictional basis for its application. That jurisdictional basis does not exist here.

D. Because the Illinois Appellate Court did not adhere to the Delaware Supreme Court’s precedent on the Delaware Security Act’s territorial jurisdiction, this Court should grant *certiorari* to remedy the Illinois courts’ failures.

Application of the DSA requires a nexus between the alleged misconduct and the State of Delaware, and without such a nexus, the DSA has no jurisdiction over

the conduct at issue. Such a Delaware nexus is only present, when, at a minimum: (1) the companies and individuals are based in Delaware; (2) the transaction was conducted, negotiated, or documents were signed in Delaware; and (3) the alleged violation of the Securities Act took place in Delaware. *FdG Logistics*, 131 A.3d at 853. In this case, none of these three qualifications were met:

The Delaware Securities Act requires that:	In this case:
1. The companies and individuals be based in Delaware;	The parties were based in Illinois and Bermuda;
2. The transaction be conducted or negotiated, or the documents signed in Delaware; and	Transaction documents show that the deal was negotiated and executed in Illinois;
3. The alleged violation of the DSA take place in Delaware.	The alleged violation took place in Illinois.

The Delaware Supreme Court has explicitly held that the DSA does not apply without this physical nexus. Nevertheless, the Illinois courts applied the DSA in resolving a dispute between Huizenga and Ritchie Capital – even though all activities and events related to that dispute occurred outside of Delaware. That decision is irreconcilable with the DSA’s purpose of protecting investors *in Delaware* and incompatible with binding Delaware Supreme Court precedent.

This is not a case of ambiguity in the study of choice of law application and State sovereignty. Nor is it a case where Delaware's highest court has not given direct guidance. In every State, it is a settled principle that the State's highest court is entrusted and empowered with interpreting its own State's laws. This Court should grant this petition to hear this case and rectify the lower courts' blurring the line of a State's right to interpret its own laws free from the interference of another State's courts.

II. By Failing to Follow Binding Delaware Supreme Court Precedent, in Contravention of the Full Faith and Credit Clause of the United States Constitution, the Illinois Courts Have Altered the Meaning of the Parties' Contracts.

The freedom to contract is a fundamental principle of law. Therefore, when parties enter a contract for business purposes, it is sensible for them to agree that if a breach occurs or a dispute arises, the law stipulated in their contract will govern its interpretation, enforcement, and remedies. These laws should be stable, predictable, and transparent so the parties can predict how a court will resolve any dispute based on the contract. When errors occur in the interpretation or application of the stipulated law, the contract's meaning and purpose may assuredly be altered in ways that the parties never agreed to.

A. Delaware law is a common choice as the controlling law because it lends predictability and stability in business relationships.

Delaware business law is considered a premier standard, and it is the law that lawyers, law students, and judges often refer to when tackling business-related issues. Indeed, more American companies incorporate in Delaware than any other State, and Delaware is the State of incorporation for 66% of the Fortune 500 companies. *See* Jeffrey W. Bullock, *Delaware Division of Corporations 2015 Annual Report*, State of Delaware 1 (June 23, 2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf. Similarly, in 2015, 86% of U.S.-based initial public offerings were Delaware companies. *Id.*

Because of this foundation, business people and lawyers are more familiar with Delaware law and choose it because it sets forth a “reliable and fair set of rules for their commercial relationship.” Lewis S. Black Jr., *Why Corporations Choose Delaware* 1 (2007), https://corp.delaware.gov/eng/why_delaware.shtml. There is no uncertainty about the rules that apply. And the law is portable: disagreements need not be litigated in Delaware courts. With this one body of State law to ensure consistency and predictability, companies in any State can rely on it to guide their actions.

Uniformity in the law, particularly in business law, is crucial to ensure that interstate transactions are governed by consistent rules regardless of where the

forum court sits. *Id.*; Garner et al., *supra* § 83, at 706. It would be difficult to overstate the importance of freedom to contract and of certainty and predictability in contractually stipulated meanings. Parties have the constitutional right to agree on the rules and the law that govern their contracts. And parties should rightfully expect courts to uniformly interpret and apply the law that the parties have chosen to guide and control their dealings.

B. As a matter of public policy, courts should consistently interpret and apply Delaware law to ensure transparency, stability, and predictability.

The rules regulating proper forum and venue for a lawsuit do not always allow for a contract dispute using Delaware law to be heard in Delaware. But that does not mean that the courts of other States cannot interpret and apply the relevant laws of Delaware correctly. By looking to the Delaware Supreme Court and to the Delaware Assembly for guidance, a foreign court can ensure the consistent interpretation and application of Delaware law.

Under the Constitution's Full Faith and Credit Clause, each State must respect the laws and judgments of sister States. When parties to a contract have chosen a particular State's law, the forum courts in other States must apply the law of that sister State. The Full Faith and Credit Clause prevents parties from avoiding their contractual responsibilities by

simply moving to another State or taking other steps only to gain access to more favorable laws. A State may refuse to apply the law that parties specify in a choice of law provision only if it has good reason for refusing to do so. Frederic L. Kirgis Jr., *Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 110-11 (1976).

It is a settled principle of law that a State's highest court has the final say on the meaning of a State statute. Garner et al., *supra*, § 83, at 706; § 84, at 711. Simply put, Delaware law must be applied by every forum State's courts as if that court were sitting as the Delaware Supreme Court using Delaware law. Hence, the Delaware Supreme Court's interpretation of the DSA must be accepted as correct by the courts of other States even if those courts would have produced a different interpretation or if the other States' law is different. *Id.*, § 77, at 656-57; *id.*, § 84, at 711.

C. Illinois' failure to faithfully apply Delaware law to this dispute erodes the confidence of contracting parties that their agreements will be honored and enforced.

The forum State's court should not view Delaware law through the lenses of its own laws because that could create anything from subtle changes to extreme shifts of Delaware's laws as applied only within the forum State. Any changes made to Delaware law by non-Delaware courts risks destroying the transparency, predictability, and stability of the law, leaving

uncertainty and unreliability in its wake. That should never be the case.

But that's exactly what happened here. The Illinois Appellate Court, while purporting to apply Delaware law under the governing contract's choice of law provision, ignored the Delaware Supreme Court's precedent that the DSA is limited by territorial jurisdiction – it regulates only intrastate security transactions. See *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 852-53 (Del. Ch.), *aff'd*, 148 A.3d 1171 (Del. 2016) (*en banc*). And when a forum State's courts should choose to interpret Delaware law differently from Delaware courts' interpretations, it creates far-reaching difficulties, including interstate commerce.

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CONCLUSION

Companies, no matter the size, could be forced to familiarize themselves with the laws of every State in the event a suit arises in a State whose courts have interpreted Delaware law slightly, or significantly, different from the Delaware courts. A company would be compelled to plan for each State's slight variations of Delaware law instead of considering only the laws of

the States where they are doing business. This is unreasonable, untenable, and unjust.

Respectfully submitted,

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