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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of significant concern to the nation's business community.

The Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the total value of the U.S. stock market and pay more than $200 billion in dividends to shareholders. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amicus curiae* where important business interests are at stake.

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that they timely informed all parties of their intent to file this brief in support of petitioners' petition for certiorari. All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

This case presents a question of great importance to the nation's business community. Many of *amici's* members routinely call for arbitration agreements in their business contracts, thereby avoiding the costs and delays associated with litigation. As the demand for arbitration has grown, so has the need for venues where businesses can resolve their disagreements fairly and efficiently. Arbitration by Delaware's Court of Chancery judges, widely viewed as among the country's leading experts on business and corporate matters, presents a particularly promising method for resolving significant business disputes.

The court of appeals' divided decision in this case squanders the potential of Delaware's arbitration system by holding that the First Amendment requires arbitrations by state judges be open to the public. Because confidentiality is a time-honored and common-sense prerequisite for successful arbitration, the decision below effectively deals a fatal blow to Delaware's arbitration system. And the reasoning in the decision effectively dooms any similar arbitration systems enacted by other states. *Amici* therefore have a direct interest in the question presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with the strong national policy in favor of arbitration, the Delaware General Assembly unanimously enacted a law that authorized its renowned Court of Chancery to "arbitrate business disputes" upon the parties' consent. Del. Code Ann. tit. 10, § 349(a). By offering businesses the opportunity to select jurists with corporate and business expertise as arbitrators, Delaware aimed "to preserve [its] pre-eminence in offering cost-effective options for resolving

disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. 49 synopsis, 145th Gen. Assemb. (2009). Of particular relevance here, and in line with accepted and uniform practice, the Delaware law provided that "[a]rbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal" to the Delaware Supreme Court. Del. Code Ann. tit. 10, § 349(b).

The law is aimed at just the kind of significant corporate disputes that the State of Delaware has traditionally attracted given its expertise in the area. "To qualify for arbitration [under the law], at least one party must be a 'business entity formed or organized' under Delaware law, and neither party can be a 'consumer.' The statute is limited to monetary disputes that involve an amount-in-controversy of at least one million dollars." Pet. App. 3a (citations omitted).

Particularly given the well-known advantages of arbitration, it did not take long for commentators to predict that "Chancery Court arbitration is likely to become an increasingly preferred method of dispute resolution." Lewis H. Lazarus, *Court of Chancery Arbitration Likely to Become More Prevalent*, Delaware Business Litigation Report (Sept. 28, 2011), *available at* http://www.delawarebusinesslitigation.com/2011/09/articles/case-summaries/arbitration/court-of-chancery-arbitration-likely-to-become-more-prevalent/; *id.* ("And as [deal lawyers] counsel their clients to specify Chancery Court arbitration in their agreements, we can expect that it will be an increasingly utilized tool for dispute resolution."). Delaware's system was carefully designed to take on that role and, indeed, as the dissenting judge below

observed, "creates a perfect model for commercial arbitration." Pet. App. 28a (Roth, J., dissenting).

The divided court of appeals' decision in this case guts Delaware's arbitral scheme, declaring its confidentiality requirements invalid after concluding that the First Amendment provides the public a right of access to arbitration by Chancery Court judges. *See* Pet. App. 20a. The majority applied the "logic and experience" analysis devised by this Court in the context of access claims to criminal proceedings. In so doing, the majority determined that—despite the longstanding practice of arbitrations being conducted on a confidential basis—arbitrations involving state judges in state courthouses must be open to the public.

As petitioners explain, the circuits are divided over how to apply this Court's "logic and experience" test. *See* Pet. 18-22. This conflict of authority is alone a sufficient reason to grant certiorari. Given that the Court has yet to analyze a right-of-access case in the civil context, and has not decided a right-of-access case for nearly two decades, it is unsurprising that its guidance is now sorely needed. The decision below makes matters worse by misapplying both the "experience" and "logic" inquiries. This Court can and should bring needed uniformity to this area of law.

Amici submit this brief to focus on another reason why this Court's review is warranted: this case raises a question of significant national importance. Arbitration has become an increasingly important tool in resolving commercial disputes across the country. The court of appeals' decision effectively destroys the potential of arbitration programs conducted by state judges, since businesses, like anyone else, will rarely agree to arbitrate without the assurance of

confidentiality. In other words, deciding whether a right of access applies to arbitration by state judges goes to the very heart of whether this form of alternative dispute resolution can meaningfully exist. If arbitrations are opened to the public, as a practical matter, they will rarely, if ever, be used.

This case therefore presents an important opportunity for the Court to provide necessary guidance about the scope of the logic and experience test outside the context of criminal prosecutions.

ARGUMENT

THE COURT OF APPEALS' DECISION NEGATES AN IMPORTANT ARBITRATION PRACTICE AND WARRANTS REVIEW

1. As this Court has repeatedly recognized, there is a strong "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (The Federal Arbitration Act "establishes 'a liberal federal policy favoring arbitration agreements.'" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *accord Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46, 1749 (2011); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

Arbitration often provides advantages over civil litigation. In particular, as discussed below, arbitration is conducted on a confidential basis, and such confidentiality is especially valuable in resolving commercial disputes. Confidentiality not only facilitates the resolution of disputes, but "protect[s]

trade secrets and sensitive financial information." Pet. App. 26a (Roth, J., dissenting); *infra* at 9-11.

Arbitration also provides an alternative to costly and time-consuming litigation. In contrast to much litigation today, arbitration offers "'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (citation omitted); *Concepcion*, 131 S. Ct. at 1749 (arbitration "allow[s] for efficient, streamlined procedures tailored to the type of dispute"); *see also* Pet. App. 26a (Roth, J., dissenting) (observing businesses "need to get commercial conflicts resolved as quickly as possible so that commercial relations are not disrupted"). These reduced costs in turn reduce the costs of doing business, allowing for lower prices for consumers and higher wages for employees. *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5-7 (1995).

The greater flexibility that arbitration offers also has its advantages. For example, parties consenting to arbitration may specify "that the decisionmaker be a specialist in the relevant field," *Concepcion*, 131 S. Ct. at 1749, thereby "saving the costs of educating a judge or jury about the factual setting and increasing the parties' confidence that a sensible result will be reached," Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 Colum. Bus. L. Rev. 1, 2 (2003). In addition, "the informality of arbitral proceedings is itself desirable," *Concepcion*, 131 S. Ct. at 1749, and a means to expediting the resolution of disputes and reducing costs, *id.*

Given the significant benefits that attend arbitration, the nation's business community (including many of *amici*'s members) has increasingly turned to arbitration as a means of dispute resolution. Indeed, "[i]n some practice areas, such as labor, banking, securities, construction, and medical malpractice, the use of arbitration is so wide-spread that it is rapidly becoming standard practice for certain types of disputes." 1 Bette J. Roth et al., *Alternative Dispute Resolution Practice Guide* § 2:1 (2013); *see also* Pet. App. 26a (Roth, J., dissenting) (noting the rise of "arbitration as a method of resolving business and commercial disputes"). The number of arbitration cases that this Court has seen is itself a testament to the importance of, and attraction to, the practice.

2. Given the advantages and increasingly important role of arbitration in dispute resolution, it is unsurprising that states such as Delaware have sought to develop their own arbitration systems. For strong reasons, states—and the greater public—benefit from allowing their judges to conduct binding arbitration.

First, arbitration by state judges provides a state's citizens and corporate entities another attractive option for resolving disputes in an efficient and effective manner. This is particularly true for jurisdictions that possess judicial expertise in resolving certain types of disputes. As noted, one of the virtues of arbitration is the ability of the parties to agree that the adjudicator should be a specialist in the relevant field. Delaware, for example, has long been recognized for "its national preeminence in the field of corporation law due in large measure to its Court of Chancery." William H. Rehnquist, *Bicentennial of the Delaware Court of Chancery*, 48 Bus. Law. 351, 354 (1992).

Delaware naturally sought to take advantage of that expertise by making the Chancellor and Vice-Chancellors of its Court of Chancery available as arbitrators. *See* Pet. App. 28a (Roth, J., dissenting) ("The Legislature established the arbitral system in the Court of Chancery where the judges are the most experienced in corporate and business litigation.").

Second, and relatedly, states that establish arbitration systems for commercial disputes are more likely to retain—and attract—businesses that typically resort to arbitration when resolving disputes. When companies decide where to locate their operations, a critical factor is the quality and cost of a jurisdiction's legal infrastructure. Delaware has long been a leading destination for incorporation, in part because of its nationally-renowned courts and jurists. *See* Pet. App. 27a (Roth, J., dissenting); *see also, e.g.*, Lewis S. Black, Jr., Del. Dep't of State Div. of Corps., *Why Corporations Choose Delaware* at 5 (2007), *available at* http://corp.delaware.gov/whycorporations_web.pdf ("Many experienced lawyers believe that the principal reason to recommend to their clients that they incorporate in Delaware is the Delaware courts" and, in particular, its Court of Chancery.). Seeking to maintain that reputation, Delaware adopted the arbitration system at issue in this case with the "inten[t] to preserve [its] pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. 49 synopsis.

By offering arbitration services, states like Delaware also may "prevent the diversion elsewhere of complex business and corporate cases." Pet. App. 28a (Roth, J., dissenting); *id.* at 32a ("[Delaware's] new

system was created to provide arbitration in Delaware to businesses that consented to arbitration—and that would go elsewhere if Delaware did not offer arbitration before experienced arbitrators in a confidential setting."). Indeed, a main reason Delaware authorized arbitration by Court of Chancery judges was to compete against arbitral tribunals in other forums, thereby increasing its competitiveness in an increasingly global economy. *See* Del. H.B. 49 synopsis.

In short, arbitration by state judges is a natural and welcome development that advances the strong national policy in favor of arbitration and provides public benefits to states and businesses alike.

3. This case concerns an indispensable feature of virtually any successful system of arbitration—confidentiality. "[C]onfidentiality is a paradigmatic aspect of arbitration …." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004). The tradition and practice of confidentiality in arbitration goes back centuries. Pet. 25; *see* Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 Tex. Int'l L.J. 121, 122 (1995) ("In English law … it has for centuries been recognized that arbitrations take place in private."). Confidentiality is particularly important in resolving commercial disputes like those covered by Delaware's law.

The ability to keep sensitive information from falling into the hands of competitors is one of the "primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes, involving corporate earnings and business secrets." Pet. App. 30a (Roth, J., dissenting); *Concepcion*, 131 S. Ct. at 1749 (observing that arbitration "proceedings

[can] be kept confidential to protect trade secrets"); Roth et al., *supra*, § 7:12 ("In many practice areas, the parties consider the private disposal of their case to be a substantial advantage over traditional court litigation, and for that reason alone, choose arbitration as their means of dispute resolution."); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. on Disp. Resol. 433, 452 (2010) (observing that one reason parties arbitrate is because "arbitration may better protect confidential information from disclosure"). Because confidentiality is such a central feature of arbitration, the rules of every "major national and international arbitral bod[y]" "provide that arbitration proceedings are not open to the public unless the parties agree they will be." Pet App. 31a (Roth, J., dissenting) (citing examples of such rules).

Consistent with this accepted, longstanding, and international practice, Delaware provided that commercial arbitrations by its judges would also be confidential (unless and until an appeal was filed in the Delaware Supreme Court). *See* Del. Code Ann. tit. 10, § 349(b) ("Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal."); Del. Ch. Ct. R. 97(a)(4) (same); Del. Ch. Ct. R. 98(b) ("Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise.").

Because confidentiality is typically essential to parties arbitrating business disputes, the majority below was wrong to suggest that "disputants might still opt for arbitration if they would like access to Chancery Court judges in a proceeding that can be

faster and more flexible than regular Chancery Court trials." Pet. App. 18a-19a. As Judge Roth observed, "[c]onfidentiality is one of the primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes." *Id.* at 30a. Absent a confidential forum, businesses will invariably seek to arbitrate their disputes elsewhere. *See id.* at 32a.

4. For the reasons explained in the petition (at 22-31) and by Judge Roth in dissent (Pet. App. 26a-32a), the majority's decision finding a First Amendment right of access to arbitration by state judges is deeply flawed. As petitioners explain (at 18-19), the decision in this case extends the right of access that this Court has recognized only in the context of criminal proceedings to a new context.

Furthermore, as petitioners have explained (at 22-31), the decision below stretches both the "experience" and "logic" prongs of the Court's right-of-access test. Far from an "unbroken" or "uncontradicted" practice of *openness* in arbitrations, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), the longstanding tradition (as explained) is of *confidential* proceedings. The panel majority rested its decision on the proposition that the history is "mixed." Pet. App. 14a. That is incorrect. But even accepting that characterization as true, holding that such a "mixed" record is sufficient to trigger right of access under the First Amendment conflicts with the decisions of this Court and other courts of appeals. Pet. 18-29.

The court's treatment of the "logic" prong is equally misguided. Far from the public "play[ing] a significant positive role in the functioning of [arbitration]," *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986), inserting the public into arbitrations would cripple that

process. Quite unlike litigation—which of course is conducted in public—open proceedings are not only illogical as a general matter in the context of arbitration, they are particularly *incompatible* with commercial arbitration, in which the parties usually insist on confidentiality. *See* Pet. App. 31a-32a (Roth, J., dissenting). Together, the court's application of the "experience" and "logic" prongs to create a constitutional right of access to arbitration by state judges vastly expands this Court's doctrine—exacerbating a conflict in the lower courts on the application of this Court's cases. Pet. 18-22.

The doctrinal flaws in the court's decision—and the conflict of authority worsened by it—are sufficient reasons to grant review. But *amici* are particularly concerned with the practical ramifications of the decision. The decision effectively precludes states such as Delaware from creating useful (and needed) arbitration systems. An arbitration system lacking confidentiality is a system lacking participants, especially when it comes to commercial disputes. The development of additional arbitration options like that established by Delaware is of vital importance to the nation's business community and the greater public.

There is no reason, moreover, for this Court to delay review of this significant national question. Respondents fail to identify any vehicle issue that would prevent the Court from reaching the question presented. And further percolation is unwarranted as the issue has been thoroughly vetted by the opinions

below, as well as the briefs filed by the parties and multiple amici that have participated in the case.[2]

Finally, while some states have already adopted arbitration programs similar to Delaware's, *see* Pet. 33 & n.16, there is reason to believe that the success or failure of Delaware's system will be viewed as a bellwether by other states. Delaware is, after all, "the leading state for incorporation in the U.S." Pet. App. 27a (Roth, J., dissenting); State of Del., *Why Businesses Choose Delaware*, http://corplaw.delaware.gov/eng/why_delaware.shtml (last visited Feb. 19, 2014) (explaining that more than one million companies are incorporated in Delaware, including more than 60% of the Fortune 500 companies). The decision below therefore threatens to stunt the growth of arbitration by state judges, particularly for commercial disputes like those covered by Delaware's law.

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[2] Underscoring the widespread importance of the question presented, numerous amici have participated in this case to date, including: Business Roundtable, Chamber of Commerce of the United States of America, Corporation Law Section of the Delaware State Bar Association, NASDAQ OMX Group Inc., NYSE Euronext, Public Citizen, Inc., The Reporters Committee for Freedom of the Press, American Society of News Editors, The Associated Press, Atlantic Media, Inc., Bloomberg L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Maryland-Delaware-District of Columbia Broadcasters Association, The New York Times Company, NPR, Inc., Reuters, and The Washington Post.

CONCLUSION

For the foregoing reasons, and those in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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