No.

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

PETITION FOR A WRIT OF CERTIORARI

ANDRE G. BOUCHARD
JOEL FRIEDLANDER
Bouchard Margules & Friedlander, P.A.
222 Delaware Ave., Suite 1400
Wilmington, DE 19801

LAWRENCE A. HAMERMESH
4601 Concord Pike
Wilmington, DE 19803

ANDREW J. PINCUS
Counsel of Record
E. BRANTLEY WEBB
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

QUESTION PRESENTED

This Court has evaluated "two complementary considerations" in assessing claims of a First Amendment right of access to criminal proceedings: *first*, whether "the favorable judgment of experience" is demonstrated by a long-standing "tradition of accessibility" to the particular proceeding; *second*, whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co.* v. *Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986) (quotation marks omitted).

The question presented is:

Whether this "experience and logic" test requires invalidation on First Amendment grounds of a Delaware statute authorizing state judges to act as arbitrators in business disputes—when the parties voluntarily select arbitration—because the arbitration proceedings are not open to the public.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, who were defendants-appellants below, are the Honorable Leo E. Strine, Jr., in his official capacity as Chancellor, Delaware Court of Chancery; and the Honorable John W. Noble, the Honorable Donald F. Parsons, Jr., the Honorable J. Travis Laster, and the Honorable Sam Glasscock, III, in their official capacities as Vice Chancellors, Delaware Court of Chancery. Respondent, plaintiff-appellee below, is the Delaware Coalition for Open Government, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 733 F.3d 510. The opinion of the district court (App., *infra*, 33a-54a) is reported at 894 F. Supp. 2d 493 (2012).

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Section 349 of title 10 of the Delaware Code, entitled "Arbitration proceedings for business disputes" and the rules promulgated thereunder are set forth at App., *infra*, 55a-63a.

STATEMENT

A divided court of appeals panel held unconstitutional a Delaware law designed to provide the State's corporate citizens with an innovative option for resolving business disputes—arbitration conducted by judges widely recognized as expert in business law issues. Delaware created this program to address an issue of national importance: the competitive threat to our country's attractiveness as a domicile for multi-national businesses posed by the cost and delay of litigating in U.S. courts, especially in light of the increasing appeal of non-U.S. domiciles with user-friendly arbitral forums.

Even though confidentiality is a long-standing hallmark of arbitration proceedings, the majority below concluded that a right of access grounded in the First Amendment requires that Delaware's arbitration proceedings be open to the public. Judge Roth dissented and rejected the majority's analysis.

The First Amendment standard applied by the majority squarely conflicts with the approach utilized by other courts of appeals and state supreme courts and cannot be reconciled with this Court's decisions. The constitutional right-of-access issue arises frequently in a variety of contexts; this case provides an opportunity to address the lower courts' conflicting standards. Moreover, the ruling below calls into question the constitutionality of state and federal laws providing for court-sponsored confidential arbitration. Review by this Court is plainly warranted.

A. The First Amendment Right Of Access.

The First Amendment right of access at issue in this case is rooted in three decisions of this Court.

In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), the Court recognized a qualified First Amendment right of public access to criminal trials. Chief Justice Burger's plurality opinion emphasized that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open" and that this openness had "long been recognized as an indispensable attribute of an Anglo-American trial." *Id.* at 569 (plurality opinion).

This historical pedigree was crucial to the constitutional ruling:

> The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. * * * * In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.

Id. at 575. Subsequently in *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501 ("*Press I*") (1984), a majority of the Court found a First Amendment right of access to *voir dire* examination of potential jurors in criminal cases—because "[p]ublic jury selection * * * was the common practice in America when the Constitution was adopted." *Id.* at 508.

Two years later, addressing whether the First Amendment right applied to preliminary hearings in criminal cases, the Court stated that "[i]n cases dealing with the claim of a First Amendment right of access to criminal proceedings" the Court had "emphasized two complementary considerations." *Press-Enter. Co.* v. *Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986) ("*Press II*").

First, "because a 'tradition of accessibility implies the favorable judgment of experience,'" the Court examined the historical openness of the proceeding to the press and public. *Id.* at 8 (quoting *Globe Newspaper Co.* v. *Super. Ct.*, 457 U.S. 596, 605 (1982)). It found that "preliminary hearings conducted before neutral and detached magistrates have been open to the public," citing the public's attendance at the probable cause hearing in Aaron Burr's prosecution for treason. *Id.* at 10. "From *Burr* until the present day, the near-uniform practice of state and federal

courts has been to conduct preliminary hearings in open court." *Ibid.*

Second, "the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8 (quotation marks omitted). It found that openness reinforced the fairness and appearance of fairness in the administration of the criminal justice system. *Id.* at 8-9; see also *El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147, 148-151 (1993) (per curiam) (applying *Press-Enterprise* to preliminary hearings in Puerto Rico criminal proceedings).

This Court has not addressed the First Amendment right of access in the twenty years since *El Vocero*—and has never addressed the application of that principle to any non-criminal proceeding—but the issue has been litigated frequently in the lower courts during those two decades in a large variety of contexts. For example, plaintiffs have sought access to administrative agency proceedings; documents filed by criminal defense attorneys to obtain compensation under the Criminal Justice Act; hearings and documents filed in civil cases in state and federal courts; executions of individuals sentenced to death; and government wildlife management activities. As discussed below, the lower courts have applied sharply differing legal standards in determining whether to recognize a First Amendment right of access.

B. The Growing Demand For Arbitration Of Business Disputes.

Businesses' use of arbitration to resolve significant commercial disputes has increased dramatically. Over the last decade, the number of requests for

arbitration in the International Chamber of Commerce (ICC) rose by over 40 percent;[1] the number in the London Court of International Arbitration rose by 300 percent.[2]

This trend has been driven by the desire for more expeditious and less costly resolution of disputes through the use of flexible, informal procedures. The growth in cross-border economic relationships—and therefore in cross-border disputes—has been an especially significant factor, particularly when the dispute would otherwise be resolved in the U.S. litigation system. Non-U.S. parties are typically reluctant to become enmeshed in the U.S. litigation system because of the multiple features that differ significantly from judicial dispute resolution in the rest of the world. App., *infra*, 26a (Roth, J., dissenting).

Arbitration satisfies this need. "The point of affording parties discretion in designing arbitration processes is to allow 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." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011). Confidentiality in arbitration not only avoids

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[1] In 2011, the ICC received 796 requests for arbitration, representing a more than 40 percent increase over the 566 requests received in 2001. See Int'l Chamber of Commerce, *Statistics – ICC Arbitration*, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/.

[2] Compare the London Court of International Arbitration's *Director General's Report* of 2001 with the *Director General's Report* for 2010 and 2011, http://www.lcia.org/LCIA/Casework_Report.aspx.

the need for cumbersome, piecemeal and uncertain judicial determinations regarding protection of proprietary and competitively sensitive information, it also allows businesses to take full advantage of arbitration's informality and flexibility. When a proceeding is conducted in the public arena, any information or statement, no matter how tangential to the merits of the case, may be used against a party. Arbitration's benefits would become irrelevant as the parties were forced into a formal and protracted public struggle. Public proceedings would largely eliminate the significant advantages of commercial arbitration—particularly its informality, which, as this Court has observed, "is itself desirable, reducing the cost and increasing the speed of dispute resolution." *Ibid.*

In response to the increasing global demand for arbitration, "jurisdictions around the world, many with government support, are taking steps to increase their arbitration case load"—including by creating government-sponsored arbitral fora and authorizing judges to arbitrate disputes. N.Y. State Bar Ass'n, Task Force on N.Y. Law in Int'l Matters, *Final Report* 4 (June 25, 2011); see also Arbitration Act, 1996, c. 23, § 93(1) (U.K.) ("A judge of the Commercial Court or an official referee may * * * accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement."); Deutsches Richtergesetz [DRiG] [German Law on Judges], Apr. 19, 1972, last amended July 11, 2002, § 40 (Ger.), http://www.iuscomp.org/gla/statutes/DRiG.pdf (judges may act as arbitrators subject to certain conditions).

Delaware strives to maintain a body of corporate law and set of dispute resolution mechanisms that

are up-to-date, fair, predictable, efficient, and respected—which is one of the key reasons why most large businesses organize there.[3] If other developed nations provided a dispute resolution system for their corporate citizens better than what is available to businesses organized in Delaware, large multinational companies would have an incentive to relocate.

Importantly, companies' ability to relocate is much greater today than in the past. Technology has made communication instantaneous, seamless, and cheap; trade and other cross-border economic relationships are ubiquitous; and non-U.S. entities can access our capital markets with ease. See, *e.g.*, *Sustaining New York's and the US' Global Financial Services Leadership*, 11, 42 (2007), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

The Delaware legislature in 2009 addressed this competitive threat by enacting a law "to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. 49 syn. Mirroring the measures adopted by other nations authorizing judges to serve

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[3] "The most important transaction-specific asset in the chartering relation is an intangible asset, Delaware's reputation for responsiveness to corporate concerns," and that reputation stems from "a comprehensive body of case law, judicial expertise in corporation law, and administrative expertise in the rapid processing of corporate filings." Roberta Romano, *The Genius of American Corporate Law* 38-39 (1993). As a result, "1,000,000 business entities have made Delaware their legal home [including] more than 50% of all U.S. publicly-traded companies in the United States [and] 64% of the Fortune 500." See Delaware Division of Corporations, http://corp.delaware.gov/aboutagency.shtml.

as arbitrators, the Delaware statute empowers the judges of Delaware's Court of Chancery—the state court that resolves business disputes and whose members are widely respected for their expertise in business law issues—to arbitrate business disputes.

C. The Delaware Statute.

The law at issue here—Section 349 of title 10 of the Delaware Code—which was adopted unanimously by both houses of the Delaware General Assembly, grants the Court of Chancery "the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute." Del. Code Ann. tit. 10, § 349(a).

Consistent with the purpose of providing an arbitration forum for Delaware businesses, the statute's focus is on "business-to-business disputes about major contracts, joint ventures, or technology. Specifically excluded are cases involving consumers." Del. H.B. 49 syn. To be eligible for arbitration, a dispute must meet the following criteria:

- The parties must consent to the arbitration;
- At least one party must be a "business entity" as defined in Del. Code Ann. tit. 10, § 346 (a statute authorizing mediation of technology disputes in the Court of Chancery);
- At least one party must be a business entity formed or organized under the laws of Delaware or having its principal place of business in Delaware;

- No party may be a "consumer," as defined in Del. Code Ann. tit 6, § 2731(1);[4] and
- For disputes involving solely monetary damages, the amount in controversy must be at least $1,000,000.

Del. Code Ann. tit. 10, § 347(a).

Consistent with the tradition of privacy in arbitration, the statute provides for confidentiality in the proceedings until a party seeks judicial review of the arbitrator's determination. Proceedings before the arbitrator "shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal," in which case "the record shall be filed by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery." Del. Code Ann. tit. 10, § 349(b).

Any award by an arbitrator is subject to review by the Delaware Supreme Court, which may vacate, stay, or enforce the arbitrator's determination. The statute provides that the Supreme Court "shall exercise its authority in conformity with the Federal Arbitration Act ["FAA"], and such general principles of law and equity as are not inconsistent with that Act." *Id*. § 349(c).

To implement the statute's provisions, the Court of Chancery adopted Rules 96, 97, and 98. These set forth procedures for conducting arbitrations, but also provide that the "parties with the consent of the Arbitrator may change any of these arbitration rules by

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[4] Del. Code Ann. tit. 6, § 2731(1) defines "consumer" as "an individual who purchases or leases merchandise primarily for personal, family or household purposes."

agreement and/or adopt additional arbitration rules." Del. Ch. R. 96(c).

Parties initiate an arbitration by submitting to the Register in Chancery a petition demonstrating that they meet the eligibility criteria and that they have each consented to arbitrate in the Court of Chancery. *Id.* 97(a)(3).

This petition is not included as part of the Register's public docketing system, and both "[t]he petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal." *Id.* 97(a)(4).

If a petition is accepted, the Chancellor will appoint an arbitrator, either a Court of Chancery judge or a "special master." *Id.* 96(d)(2), 97(b). Within ten days, the arbitrator will convene a telephonic "preliminary conference" with the parties to obtain information about the dispute and to "consider * * * whether mediation or other non-adjudicative methods of dispute resolution might be appropriate." *Id.* 96(d)(3), 97(c). "[A]s soon as practicable" after this conference, the arbitrator will convene a telephonic "preliminary hearing" to address, among other topics, the scope of discovery, whether a record of the proceedings will be maintained, and, again, the "possibility of mediation or other non-adjudicative methods of dispute resolution." *Id.* 96(d)(4), 97(d). In the absence of agreement on the prehearing exchange of information, the arbitrator may "direct such prehearing exchange of information as he/she deems necessary and appropriate." *Id.* 97(f).[5]

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[5] Rule 96(c) provides that Court of Chancery Rules 26 through 37 (which govern depositions and discovery proce-

The arbitration hearing "generally will occur no later than 90 days following receipt of the petition." *Id.* 97(e). At the hearing, each party presents its position and must "submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case." *Id.* 96(d)(6). The arbitrator "may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties," *id.* 98(f)(1), and any appeal "to vacate, stay, or enforce an order" must be taken in the Delaware Supreme Court. Del. Code Ann. tit 10, § 349(c).

Rule 98 also provides that the arbitration hearings "are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise." Del. Ch. R. 98(b). Materials and evidence not prepared specifically for the arbitration are subject to disclosure, but all other materials and statements are confidential unless the parties agree otherwise. *Ibid.*

D. District Court Proceedings.

Respondent instituted this action under 42 U.S.C. § 1983, alleging that the First Amendment grants the public a right to access arbitration proceedings conducted under the statute and that the confidentiality provisions in the statute and court rules therefore violate the Constitution. It named as defendants the State of Delaware; the Delaware

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dure) will apply to the arbitration proceeding unless "modified by the Arbitrator or the parties," or inconsistent with Rules 96, 97, and 98.

Court of Chancery and that Court's five members in their official capacities.

The district court held the statute unconstitutional, granting judgment for respondent on the pleadings. App., *infra*, 54a.[6] It determined that "the Delaware proceeding functions essentially as a non-jury trial before a Chancery Court judge. Because it is a civil trial, there is a qualified right of access and this proceeding must be open to the public." *Id.* at 34a.

The court described several key distinctions between arbitration and judicial litigation:

- That "consent is one of arbitration's defining features. The parties' voluntary agreement to resolve their dispute through a decisionmaker of their own choosing is the 'essence of arbitration,'" *id.* at 46a-47a;
- "In litigation, a court can compel an unwilling party. In arbitration, the parties agree to participate in a specified forum," *id.* at 47a;
- "The parties can specify the scope of the arbitrator's authority and design the applicable procedural rules. Litigation follows the court's procedures and guidelines," *ibid*;
- "Because they are outside the judicial system, arbitration decisions are ad hoc, lacking any precedential value," *ibid*;
- "The chief advantage of arbitration is the ability to resolve disputes without aspects often associated with the legal system: procedural

[6] The court dismissed the claims against the State and the Court of Chancery on Eleventh Amendment grounds.

> delay and cost of discovery, the adversarial relationship of the parties, and publicity of the dispute," *id.* at 48a.

The court did not dispute that the Delaware proceeding has all of the characteristics of arbitration. *Id.* at 53a-54a.

The linchpin of the district court's holding was its view that "judges in this country do not take on the role of arbitrators." *Id.* at 50a. "A judge bears a special responsibility to serve the public interest. * * * [T]he public role of that job[] is undermined when a judge acts as an arbitrator bound only by the parties' agreement." *Id.* at 51a; see also *ibid* ("A sitting judge presides over the proceeding. It is this fact which distinguishes the Delaware proceeding from court-annexed arbitrations where third parties sit as arbitrators.").

Based on its determination that the service of judges as arbitrators required Delaware's commercial arbitration proceeding to be treated as the equivalent of a civil trial for purposes of the First Amendment, the district court concluded that a right of access applies to arbitrations conducted under the statute and that the confidentiality requirement for those proceedings violates the First Amendment. *Id.* at 51a-54a.

E. The Court Of Appeals' Decision.

The court of appeals affirmed by a divided vote. App., *infra*, 20a. The majority (Sloviter and Fuentes, JJ.) "examine[d] Delaware's proceeding under the experience and logic test," after finding that the district court had erred by concluding that the right of access attached simply because the Delaware pro-

ceeding "was 'sufficiently like a [civil] trial.'" *Id.* at 8a.

With respect to history, the majority found that "an exploration of both civil trials and arbitrations is appropriate here." *Id.* at 10a. It observed that "there is a long history of access to civil trials." *Ibid.*

The majority then determined that "[e]arly arbitrations involved community participation, and evidence suggests that they took place in public venues"—citing two sources. *Id.* at 11a. "By the eighteenth century," the majority stated, "arbitrations adopted increasingly formal procedures, and at least some appear to have taken place in public." *Id.* at 12a (citing one secondary source). As arbitration developed, "proceedings were occasionally supervised by a member of the judiciary 'not acting in his official capacity.'" *Ibid.*

It was the enactment of statutes providing for the enforcement of arbitration agreements, such as the Federal Arbitration Act in 1925, that enabled "private arbitration to take on the important role it now serves in resolving commercial disputes." *Id.* at 13a. "These arbitrations, unlike some of their antecedents," the majority stated, "are distinctly private." *Ibid.*

Thus, the majority determined,"[t]he history of arbitration * * * reveals a mixed record of openness. Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed, especially in the twentieth century. This closure, however, can be explained by the private nature of most arbitrations." *Id.* at 14a. "Taking the private nature of many arbitrations into account, the history of civil trials and arbitrations

demonstrates a strong tradition of openness for proceedings like Delaware's government-sponsored arbitrations." *Ibid.* That "history of openness is comparable to the history that * * * the Supreme Court found in *Richmond Newspapers*." *Id.* at 15a.

Turning to the "logic" inquiry, the majority stated that public access to arbitrations would have the same benefits as public access to judicial proceedings: it would "give stockholders and the public a better understanding of how Delaware resolves major disputes"; allay concerns about a process "only accessible to litigants in business disputes who are able to afford the expense of arbitration"; expose participants "to scrutiny from peers and the press"; and "discourage perjury and ensure that companies could not misrepresent their activities to competitors and the public." *Id.* at 16a.

It found the drawbacks of public access "relatively slight" because parties can protect confidential information under otherwise-applicable court rules; the injury to goodwill that a litigant might suffer from open proceedings is not relevant; and "informality, not privacy, appears to be the primary cause of the relative collegiality of arbitrations." *Id.* at 17a-18a.

The majority rejected the argument that prohibiting confidentiality "would effectively end Delaware's arbitration program," because "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"—and would still have the option of confidential private arbitration. *Id.* at 18a-19a.[7]

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[7] Judge Fuentes' concurring opinion stated that only the provisions of the Delaware statute and rules providing for

Judge Roth dissented. App., *infra*, 26a-32a. She stated that "[a]n examination of confidentiality in arbitration should begin in colonial times. The tradition of arbitration in England and the American colonies reveals a focus on privacy." *Id.* at 30a. "The majority asserts that some early arbitrations took place in public. While this may be true, arbitrations even during this period were overwhelmingly private." *Id.* at 31a n.5.

"In the twentieth century, the modern arbitration bodies began to develop rules for arbitration proceedings that emphasize privacy and confidentiality. * * * Today, the major national and international arbitral bodies continue to emphasize confidentiality." *Id.* at 31a. She concluded that "historically, arbitration has been private and confidential." *Ibid.*

"Logically," Judge Roth stated, "the resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential so that the par-

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confidentiality were invalidated by the First Amendment. App., *infra*, 21a-25a.

Respondent argued below that Court of Chancery Rule 98(f)(3), which interprets Section 349 to permit the issuance of self-enforcing arbitration awards subject to review in the Delaware Supreme Court, demonstrated that the Delaware arbitration proceeding closely resembles a judicial trial. Judge Fuentes rejected this contention, stating that the Rule "does not alone alter the First Amendment right of access calculus one way or another." App., *infra*, 25a. (Judge Sloviter did not address the contention.) As petitioners explained below, if that Rule were relevant, it could be declared invalid—nothing in the text of Section 349(c) requires a self-executing order. Reply Br. for Appellants, at 29-30 n.5, *Strine,* 733 F.3d 510 (3d Cir. 2013) (No. 12-3859), 2013 WL 596652.

ties do not suffer the ill effects of this information being set out for the public—and especially competitors—to misappropriate." *Id.* at 31a-32a.

"Delaware did not intend the arbitration system to supplant civil trials. Delaware did not intend to preclude the public from attending proceedings that historically have been open to the public. The 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." *Id.* at 32a.

REASONS FOR GRANTING THE PETITION

This case presents a question of very substantial importance regarding the scope of the First Amendment right-of-access doctrine.

The majority below invalidated Delaware's statute by applying a legal standard that squarely conflicts with the principle employed by other courts—finding that the "experience" test is satisfied by what the majority itself admitted was at most a "mixed" tradition regarding public access (the history in fact confirms the long tradition of confidentiality for arbitration proceedings). Other courts, by contrast, require proof of a long tradition of access to find a right under the First Amendment. Delaware's statute would have been upheld if that standard had been applied below.

Indeed, the latter approach is compelled by this Court's right-of-access cases, which require a *long and unbroken* history of access to the proceeding. The ruling below is typical of numerous lower court decisions that cut this Court's First Amendment holdings loose from their historical moorings in the

centuries-old tradition of open criminal proceedings and find First Amendment rights of access to a variety of noncriminal government proceedings. In the process, courts overturn legislative determinations regarding the degree of public access appropriate for such proceedings—deferring not at all to the balance struck by the legislature, just as the majority below did here.

The majority's erroneous decision does not just invalidate Delaware's statute. Numerous state and federal laws provide for confidential government-sponsored arbitration, some of which closely resemble the program Delaware implemented here. The broad reasoning employed by the court of appeals would invalidate the latter and cast significant doubt on the constitutionality of all such measures. The decision thus creates significant uncertainty regarding the ability of state and federal courts to utilize innovative ADR techniques, which are critical to addressing the overcrowding that plagues the judiciary.

This Court's review is needed to resolve the conflict regarding the legal standard governing the First Amendment right of access, and clarify the extent to which legislatures and courts are empowered to resolve public access questions.

A. The Lower Courts Are Deeply Divided Over How To Apply This Court's Experience And Logic Test.

This Court has recognized a right of access only in the context of criminal proceedings, but the lower courts have found a First Amendment right for a wide variety of government proceedings.

Virtually all of the courts of appeals have concluded that the right of access applies to civil trials,

on the ground that the history of public access is just as clear and long-standing as that of public access to criminal trials. *NBC Subsidiary (KNBC-TV), Inc.* v. *Super. Ct. of Cal.*, 980 P.2d 337, 358 (Cal. 1999) (collecting cases); but see *Flynt* v. *Rumsfeld*, 355 F.3d 697, 704 (D.C. Cir. 2004) ("'[N]either the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings'"); *IDT Corp.* v. *eBay*, 709 F.3d 1220, 1224 n.1 (8th Cir. 2013) (similar).

Beyond the traditional criminal or civil trial—and the "unbroken, uncontradicted history" of public access to those proceedings, *Richmond Newspapers,* 448 U.S. at 573—the lower courts disagree sharply on the historical showing needed to satisfy the experience standard. Three different standards are applied.

Some hold that a long and unbroken history of openness is required. See, *e.g.*, *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (Scalia, J.) (no right of access to documents admitted into evidence but sealed until entry of judgment; "we cannot discern an historic practice of such clarity, generality, and duration as to justify" a First Amendment right); *United States* v. *Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989) (no First Amendment right of access to presentence reports in light of absence of any tradition of public access); *WBZ-TV4* v. *Exec. Office of Labor*, 610 N.E.2d 923, 925 (Mass. 1993) (no right of access to state administrative proceedings because "[n]othing * * * suggests that [those proceedings] were 'historically * * * open to the press and general public * * * at the time when our organic laws were adopted.'").

If that standard had been applied in this case, the claim of a First Amendment right of access would have been rejected. Thus, if Massachusetts or Illinois enacted a statute just like Delaware's, the First Amendment would not invalidate the law.

The Third Circuit, like some other courts, holds a much more ambiguous historical showing sufficient for the First Amendment to apply—particularly if the government proceeding at issue did not exist (or its openness was not clear) at the time the First Amendment was adopted. An uncertain history of openness, or a history of openness for "analogous" proceedings, is sufficient. App., *infra*, 8a-15a (finding sufficient "experience" based on historical openness of civil trials and some examples of government-sponsored arbitrations open to the public); *Detroit Free Press* v. *Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002) (analogizing deportation hearings to "judicial proceeding[s]" and finding a right of access); *Whiteland Woods, L.P.* v. *Twp. of W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (finding a tradition of openness based on a recent statutory guarantee); see also *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) ("Tradition is not meant, we think, to be construed so narrowly; we look also to analogous proceedings and documents of the same 'type or kind.'").

Still other courts uphold the First Amendment claim notwithstanding the absence of *any* tradition of openness. *United States* v. *Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (finding First Amendment right of access to forms filed by counsel compensated under the Civil Justice Act; "[t]he lack of 'tradition' with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice");

NBC Subsidiary, Inc., 980 P.2d at 806 ("[A]lthough evidence of such a historical tradition is a factor that strengthens the finding of a First Amendment right of access, the absence of explicit historical support would not * * * negate such a right of access.") (internal citation omitted); *Ex parte Consol. Publ'g Co.*, 601 So. 2d 423, 429-30 (Ala. 1992) (per curiam) (finding right of access to certain pretrial hearings with no historical tradition of openness).

The fact that these three different legal standards would have produced conflicting results in this case is confirmed by the outcomes of cases decided by these courts.

For example—depending on which legal standard they apply for determining whether the experience requirement is satisfied—courts have either recognized or denied First Amendment rights of access to state administrative proceedings,[8] the meet-

[8] Compare *N.Y. Civ. Liberties Union* v. *N.Y. City Transit Auth.*, 684 F.3d 286, 300 (2d Cir. 2012) (right of access to state administrative hearings), with *Copley Press, Inc.* v. *Super. Ct. of Cal.*, 141 P.3d 288, 308-09 (Cal. 2006) (no right of access to state administrative hearings or records), and *WBZ-TV4*, 610 N.E.2d at 925 (no right of access to state administrative licensing proceedings).

ings of legislative bodies,[9] search warrant affidavits,[10] and executions.[11]

This Court should grant review to clarify the historical showing necessary to satisfy the "experience" prong of the First Amendment right-of-access standard, so that whether a right is recognized does not depend on which State's statute is at issue.

B. There Is No Constitutional Right Of Access To State Arbitration Proceedings—Even When A Judge Serves As The Arbitrator.

This Court's precedents make clear that Delaware's statute is not invalid under the First Amendment because of its confidentiality requirement for arbitration proceedings.

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[9] Compare *Mayhew* v. *Wilder*, 46 S.W.3d 760, 776-77 (Tenn. Ct. App. 2001) (no right of access to state legislative meetings), and *Abood* v. *League of Women Voters*, 743 P.2d 333, 340 (Alaska 1987) (declining to apply experience and logic test to meetings of state legislature), with *Whiteland Woods*, 193 F.3d 180-85 (finding right of access to municipal meeting).

[10] *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div.*, 531 N.E.2d 1261, 1266 (Mass. 1988) (no right of access to search warrant affidavits), with *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 572-75 (8th Cir. 1988) (right of access to search warrant affidavits).

[11] Compare *Halquist* v. *Dep't of Corr.*, 783 P.2d 1065, 1067-68 (Wash. 1989) (en banc) (journalist has no right either to attend or videotape state executions), with *Associated Press* v. *Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (right of access to state executions).

1. Arbitration Lacks the Long Tradition of Public Access Needed to Satisfy the Experience Requirement.

This Court has found a constitutional right of access only for proceedings as to which there was a long history of openness to the public. That history is completely absent here.

In *Richmond Newspapers* and the two *Press-Enterprise* cases, the Court traced each particular proceeding's history of openness to the Nation's earliest days—and even before the Founding. Thus, "throughout [the criminal trial's] evolution"—since before the Norman Conquest—it "has been open to all who care to observe." *Richmond Newspapers*, 448 U.S. at 564 (plurality opinion).

Similarly, in finding a constitutional right of access to jury *voir dire*, the Court determined that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause." *Press I*, 464 U.S. at 505. With respect to preliminary hearings, the Court cited the probable-cause hearing in Aaron Burr's 1807 prosecution for treason, and the "near uniform practice of state and federal courts" since then "until the present day." *Press II*, 478 U.S. at 10.

A lengthy historical tradition is critical to the constitutional analysis. The theory of the *Richmond Newspapers* plurality decision—the analysis adopted by the Court in the *Press-Enterprise* rulings—was that the adoption of the First Amendment in the context of then-existing access rights precluded the government from abrogating those rights:

> The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. * * * * In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.

448 U.S. at 575.

As then-Judge Scalia observed for the D.C. Circuit, "[a]n historical tradition of at least some duration is obviously necessary, particularly to support a holding based upon the remote implications of a constitutional text," because "[w]ith neither the constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential." *In re Reporters Comm.*, 773 F.2d at 1332.

A clear standard for the "experience" test is especially important given the inherent malleability of the "logic" inquiry. See *Richmond Newspapers*, 448 U.S. at 588 ("'the stretch of [the logic inquiry] is theoretically endless'") (Brennan, J., concurring). Indeed, we are not aware of a single case in which a court has found the requisite "experience" but rejected a First Amendment right under the "logic" test. The historical inquiry thus places the only real limit on the reach of the First Amendment right.

The necessary tradition of openness is entirely absent here.

a. "[C]onfidentiality is a paradigmatic aspect of arbitration." *Guyden* v. *Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008); accord, *Concepcion*, 131 S. Ct. at 1749. All major arbitral bodies specify that arbitration pro-

ceedings are confidential unless the parties agree otherwise. App., *infra*, 31a (Roth, J., dissenting).

Confidentiality was just as prevalent in the early days of arbitration as it is today. 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.") (citing Sir Michael J. Mustill & Steward C. Boyd, Commercial Arbitration, 432-34 (2d ed. 1989)); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 545 U. Kan. L. Rev. 1211, 1223 (2006) ("The New York Chamber of Commerce * * * established an arbitral regime at the Chamber's inception in 1768 * * * * [and] relied on arbitration's privacy and independence to foster efficient resolution of disputes among the American and British merchants during and after the American Revolutionary War.").

"Unlike litigation, arbitration was inexpensive, expeditious, *and private*." Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443, 444 (1984) (emphasis added); see also *id.* at 480 (referring to the "privacy of the process" in describing characteristics of arbitration).

Judge Sloviter's opinion for the majority conceded that arbitrations "have often been closed," but asserted that the historical evidence was "mixed." App., *infra*, 14a. It stated that "evidence *suggests* that [early arbitrations] took place in public venues" and "at least some [eighteenth-century arbitrations] *appear* to have taken place in public." *Id.* at 11a-12a (emphases added). Even if they were supported by the historical record, these equivocal findings do not come close to the long established, clear historical

practices relied upon in this Court's right-of-access decisions.

But the sources cited by the majority fall far short of establishing even a "mixed" historical record. Thus, a secondary source regarding arbitration in fifteenth-century England does *not* state that arbitrations were open to the public, but merely that "[e]ach party was accompanied by a retinue of servants, advisors, and supporters, and there was a danger that one side would attempt to overawe the proceedings with a show of armed force." Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 Law & Hist. Rev. 21, 33-34 (1984).

Moreover, the article makes clear that it is discussing only a subset of arbitrations—those "whose purpose was primarily to repair the consequences of acts of violence"—which "were comfortably outnumbered * * * by arbitrations involving property disputes." *Id.* at 29. And the article does not state that the latter category of arbitrations was open to the public.[12]

The second article cited by the majority is the one stating that "[u]nlike litigation, arbitration was inexpensive, expeditious, and private." Mann, 59 N.Y.U. L. Rev. at 444. The majority ignores that

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[12] The majority also cites an example of a single arbitration in 1447 regarding a dispute between the City of Exeter and the Catholic Church, recounted in a letter from the Mayor of Exeter to city officials. Letters and Papers of John Shillingford, Mayor of Exeter 1447-50 at 8 (Stuart A. Moore ed., 1871). But a single example cannot provide the necessary historical tradition, and the government-ecclesiastical dispute Shillingford described is entirely different from the private disputes encompassed by the Delaware statute.

statement and instead cites a passage regarding petitions to the Connecticut General Assembly challenging arbitrators' decisions; it states that some depositions accompanying the petitions were provided by individuals who were present, but were not parties or witnesses—and assumes they were there "as spectators." *Id.* at 468.

But the article says nothing about whether these individuals were invited to attend by the parties or chose to attend as members of the public—and only the latter would possibly be relevant for purposes of First Amendment analysis.

In sum, there is no tradition of public access to arbitration proceedings—whether conducted by the government or not—that comes close to the history of openness of criminal proceedings.[13]

b. Although the majority below purported to require historical evidence of openness for arbitrations (and acknowledged that the district court erred insofar as it simply analogized Delaware's arbitration proceeding to a civil trial), it ultimately resorted to the same shortcut. App., *infra*, 14a-15a. The majority invoked the long-standing openness of *civil trials*,

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[13] The majority tried to distinguish between privately conducted arbitrations—which it conceded "tend to be closed"—and government-sponsored arbitrations, which it concluded "have been presumptively open." App., *infra*, 14a. But the majority's historical evidence does not support this distinction. Two of the three historical sources cited by the majority detail arbitrations conducted by *private citizens*; the remaining source, *supra* note 12, details an arbitration conducted by members of the High Court of Chancery in England, but as discussed above, *ibid.*, this source provides no evidence that arbitrations such as Delaware's have traditionally been open to the public.

apparently because a judge presides over the Delaware arbitrations. *Ibid*. But this "history by analogy" approach—using the historical openness of civil trials to find the "experience" standard satisfied for a completely different proceeding—cannot satisfy the First Amendment.

To begin with, the mere fact that a state judge presides over a proceeding does not make that proceeding "judicial." The States—not constrained by federal separation-of-powers principles—are free to assign powers among their branches of government in any manner that suits their needs. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("[W]hether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.").[14]

In addition, this Court's cases require the experience test to focus on the particular proceeding at issue (see, *e.g.*, *Press II*, 478 U.S. at 8). An "analogous proceedings" standard introduces a substantial degree of subjectivity and uncertainty into the historical inquiry. If the question is simply whether a proceeding has some similarities to a civil trial, virtually all adjudicative proceedings would trigger the right—a nonsensical result. And, adding a flexible historical standard to the already malleable "logic" component would leave courts with no clear standard

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[14] For example, States have authorized their judges to conduct rulemakings and issue permits. *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 322 (1943); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

for determining when a First Amendment right applies and when it does not.

Here, moreover, there is a fundamental distinction between judicial trials and arbitration. A court is a "'public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.'" *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 n.16 (1974). Arbitrators, on the other hand, "derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Commc'n Workers*, 475 U.S. 643, 648-49 (1986); see also *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) ("'[A]rbitration is a matter of consent, not coercion'").

The historical tradition of public access to trials stems in significant part from the interest in promoting public confidence that government is exercising its coercive authority properly. "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it." *Richmond Newspapers*, 448 U.S. at 571-72 (plurality opinion) (citation omitted). Because arbitration rests on the parties' consent—and not on coercive government authority—the history applicable to trials is particularly inapposite.

2. Mandating Public Access Would Effectively Nullify Delaware's Arbitration Process.

The relevant inquiry under the "logic" element of the First Amendment standard is "whether public access plays a significant positive role in the func-

tioning of the particular process in question." *Press II*, 478 U.S. at 8-9.

The majority below considered whether openness "promot[es] * * * informed discussion of governmental affairs * * * [and] the public perception of fairness"; "provid[es] * * * significant community therapeutic value as an outlet for community concern, hostility and emotion"; "serv[es] as a check on corrupt practices"; and "enhance[s] the performance of all involved." App., *infra*, 16a (quotation marks omitted) (quoting *PG Publ'g Co.* v. *Aichele*, 705 F.3d 91, 110-11 (3d Cir. 2013)).

Applying these broad criteria, the majority determined that "[t]he benefits of openness weigh strongly in favor of granting access to Delaware's arbitration proceedings." App., *infra*, 16a. And, notwithstanding the Delaware legislature's determination that confidentiality was essential to the arbitration procedure, the majority found the drawbacks of public access "relatively slight." *Id.* at 17a. That conclusion is just as flawed as the majority's assessment of the "experience" prong.

Confidentiality plays a critical role in the arbitration process. Not simply to safeguard trade secrets, as the majority below asserted (App., *infra*, 17a), but also to enable contracting parties to protect the terms of their contract, the nature of their dispute, and their commercial dealings. Parties can present the issues at the core of their dispute, knowing that every fact or argument advanced during the arbitration will *not* be available to competitors, future litigants, and interested members of the public. Confidentiality thus enables parties to utilize the informality and flexibility of arbitration. Eliminating con-

fidentiality will transform the arbitration into a judicial trial.

That is the reason why all modern arbitration fora have confidentiality rules: parties recognize that it is essential to the proper functioning of arbitration. And that is why Delaware included a specific confidentiality guarantee in its statute.

The majority below is simply wrong in asserting—without any support—that requiring public access would not "effectively end Delaware's arbitration program" because "disputants might still opt for arbitration." App., *infra*, 18a-19a. In fact, Delaware's proceeding would fall into disuse—that is why the Legislature specified that proceedings must be confidential, just as Congress specified that arbitrations conducted under the auspices of the federal courts must be confidential. See page 35, *infra*.

Indeed, as the majority itself recognized, parties seeking to arbitrate a dispute could simply choose an alternative forum—either a private forum or one with a non-U.S. governmental sponsor. App., *infra*, 19a n.3. That outcome would prevent Delaware and any other state from providing its domiciliaries with "cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters" (Del. H.B. 49 syn) equivalent to foreign nations' dispute resolution mechanisms, and thereby encourage companies to maintain their U.S. domicile.

Because public access will effectively eliminate the arbitration proceeding, it would not serve a "significant positive role." The logic inquiry therefore weighs heavily against a constitutional right of access.

C. The Question Presented Is Important.

The question presented warrants review by this Court for three interrelated reasons.

First, the ruling below applies the First Amendment to invalidate a duly-enacted state law, thereby preventing Delaware from providing a dispute-resolution option that it determined to be necessary to further important state interests.

Indeed, the decision has the practical effect of declaring unconstitutional two Delaware statutes, because—shortly after it enacted the statute at issue in this case—the General Assembly enacted a virtually identical statute that permits the State's superior court judges to arbitrate smaller business disputes. See Del. Code Ann. tit. 10, § 546. The majority's rationale would invalidate that law as well.[15]

Second, the impact of the majority's constitutional ruling extends far beyond these Delaware statutes to numerous federal and state laws providing for court-sponsored binding arbitration.

Alternative dispute resolution is widely recognized as a critical tool in addressing the pressing problem of overcrowded court dockets. Binding arbitration is an important form of ADR and has been adopted by multiple States as part of comprehensive ADR programs.

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[15] The majority criticized Section 349's requirement that the dispute involve at least $1 million, stating "[o]ne wonders why the numerous advantages set forth in Judge Roth's dissenting opinion (which apparently motivated the Delaware legislature) should not also be available to businesspersons with less than a million dollars in dispute." App., *infra*, 19a-20a. Section 546 authorizes superior court judges to arbitrate disputes involving $100,000 or more.

A number of States have adopted arbitration programs similar to Delaware's, including Minnesota, South Carolina, and Washington DC, which each permit active judges (or senior judges eligible for recall) to conduct binding, confidential arbitrations in state courthouses.[16]

Other States permit court officials or other parties to conduct binding, confidential arbitrations in state courthouses, including Indiana, Kansas, Massachusetts, Missouri, Nevada, New Hampshire, and New Jersey.[17]

The reasoning employed by the majority would invalidate each of these state arbitration regimes. Given this broad applicability, review by this Court is essential.

Moreover, the uncertainty created by the majority's ruling leaves States considering adopting or revising ADR laws with no clear guidance regarding the constitutionality of court-sponsored arbitration systems. The majority's rationale, which is "situational" (see App., *infra*, 14a), could easily extend to nonbinding, judge-conducted arbitrations once the parties agree to accept the judge's award—as frequently occurs. In fact, many States impose coercive measures on parties in order to induce them to ac-

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[16] Minn. Stat. § 484.76(2); Minn. Gen. R. Prac. 114.08; S.C. ADR Rule 5(d), 223, http://www.judicial.state.sc.us/courtReg/; D.C. Super. Ct. R. P. for Small Claims and Conciliation, R. for Arbitration 1, http://www.dccourts.gov/internet/documents/SC-Rules-Jan-2012.pdf.

[17] See Ind. R. for ADR 3.4(E), (F); Kan. Stat. §§ 5-502(g), 5-512(a); Mass. Uniform R. on Dispute Resolution 2, 9(h), http://www.mass.gov/courts/admin/legal/new-adrbook.pdf; Mo. Sup. Ct. R. 17.01(d), 17.06; Nev. Arbitration R. 3(D); N.H. Super. Ct. R. 170-A; N.J. Cts. 4:21A-6.

cept nonbinding awards. See, *e.g.*, Ariz. Rev. Stat. § 12-133(I) (providing that if appealing party does not *improve* on the original award, it is liable for the costs, fees, and other expenses of appellee, including arbitrators' compensation); Cal. Civ. Proc. Code § 1141.21(a) (similar); Or. Rev. Stat. § 36.425(4) (similar); Wash. Rev. Code § 7.06.060 (similar).

Since most "nonbinding" arbitrations in fact result in a binding decision—and would fail to achieve their docket-clearing goal absent such a result—the ruling below provides grounds for requiring that all such proceedings be opened to the public, because retroactive public access is not a practical option. The ruling therefore calls into question the constitutionality of the federal Alternative Dispute Resolution Act of 1998, which authorizes federal magistrate judges to conduct nonbinding arbitrations subject to a confidentiality requirement. Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651 *et seq.*); see 28 U.S.C. § 652(d) (requiring confidentiality); *id.* § 653(b) (authorizing magistrates to act as arbitrators).

Further, in the middle of a nonbinding mediation, the parties may agree to be bound by the judge's resolution of their remaining differences, as often happens in "mediation-arbitration." Would a constitutional right-of-access be triggered in such cases? If so, it would surely frustrate the dispute resolution process and threaten any common ground the parties had reached.

Intervention by this Court is needed to clarify the constitutional rule so that state officials will know whether a contemplated ADR program will pass constitutional muster.

Third, as the discussion of the lower courts' conflicting decisions demonstrates, many lower courts have construed this Court's First Amendment right-of-access rulings to provide a roving license to upend legislative policy choices about the propriety of public access to government proceedings.

Congress and the States have enacted laws providing public access to some government proceedings and information. See Freedom of Information Act, 5 U.S.C. § 552; Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-14; Government in the Sunshine Act, 5 U.S.C. § 552b; Reporters Comm. for Freedom of the Press, *The First Amendment Handbook*, 73-75 (7th ed. 2011) (discussing state sunshine laws). These statutes, like Delaware's arbitration statute, reflect careful policy judgments weighing competing individual and government interests.

"This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control"—and to hold otherwise "invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9, 12 (1978) (plurality opinion).

But the lower courts' expansive application of the First Amendment right-of-access doctrine has the effect of doing just that: constitutionalizing questions of access to government proceedings and thereby overriding the considered decisions of Congress and state legislatures. Thus, courts have found First Amendment rights of access to municipal planning commission meetings,[18] federal agency investigative

[18] *Whiteland Woods*, 193 F.3d 177.

hearings,[19] and state driver's license revocation hearings.[20] In the last few years alone, courts have held that the test applies to wildlife management activities on federal land,[21] state executions,[22] state administrative hearings,[23] and "the polling place and the process of voting occurring inside."[24]

Indeed, it is telling that lower courts undertake the "logic" inquiry without deferring at all to judgments made by the political branches—as the majority did here in dismissing Delaware's decision that confidentiality is essential to the arbitration process.

The frequency of the litigation and the uncertainty regarding the governing legal standard impose significant burdens on government entities. Applica-

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[19] *Soc'y of Prof'l Journalists* v. *Sec'y of Labor*, 616 F. Supp. 569 (D. Utah 1985) (right of access to Mine Safety and Health Administration investigative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

[20] *Freitas* v. *Admin. Dir. of Courts*, 92 P.3d 993 (Haw. 2004).

[21] *Leigh* v. *Salazar*, 677 F.3d 892 (9th Cir. 2012) (experience and logic test applies to viewing restrictions on BLM horse gathers); see also *Kohleriter* v. *Jewell*, 2013 WL 5718963 (D. Nev. 2013) (test applies to request for "meaningful access" to wildlife at federal wildlife refuge).

[22] *Phila. Inquirer* v. *Wetzel*, 906 F. Supp. 2d 362 (M.D. Pa. 2012) (preliminary injunction directing full visual and auditory access to Pennsylvania executions); *Otter*, 682 F.3d at 822 (right of access "to view executions from the moment the condemned is escorted into the execution chamber, including those 'initial procedures' that are inextricably intertwined with the process of putting the condemned inmate to death") (quoting *Cal. First Amendment Coal.* v. *Woodford*, 299 F.3d 868, 877 (9th Cir. 2002)).

[23] *N.Y. Civ. Liberties Union*, 684 F.3d at 300.

[24] *PG Publ'g Co.*, 705 F.3d at 109 (emphasis omitted) (applying test but finding no right of access).

tion of the First Amendment to override the considered judgments of state and federal legislatures regarding public access to myriad types of proceedings imposes even greater harm, threatening the integrity and utility of those proceedings. For these reasons as well, this Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDRE G. BOUCHARD
JOEL FRIEDLANDER
Bouchard Margules & Friedlander, P.A.
222 Delaware Ave., Suite 1400
Wilmington, DE 19801

ANDREW J. PINCUS
Counsel of Record
E. BRANTLEY WEBB
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

LAWRENCE A. HAMERMESH
4601 Concord Pike
Wilmington, DE 19803

Counsel for Petitioners

JANUARY 2014

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3859

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.

v.

THE HONORABLE LEO E. STRINE, JR.;
THE HONORABLE JOHN W. NOBLE;
THE HONORABLE DONALD F. PARSONS, JR.;
THE HONORABLE J. TRAVIS LASTER;
THE HONORABLE SAM GLASSCOCK, III;
THE DELAWARE COURT OF CHANCERY;
THE STATE OF DELAWARE

The Honorable Leo E. Strine, Jr.;
The Honorable John W. Noble;
The Honorable Donald Parsons, Jr.;
The Honorable J. Travis Laster;
The Honorable Sam Glasscock, III,

Appellants

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-11-cv-01015)
District Judge: Honorable Mary A. McLaughlin

Argued: May 16, 2013

Before: SLOVITER, FUENTES, and ROTH, *Circuit Judges*

(FILED: OCTOBER 23, 2013)

OPINION

SLOVITER, *Circuit Judge.*

This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program. Chancellor Strine and the judges of the Delaware Chancery Court ("Appellants"), who oversee the arbitrations, appeal a judgment on the pleadings entered in favor of the Delaware Coalition for Open Government (the "Coalition"). The District Court found that Delaware's proceedings were essentially civil trials that must be open to the public. Appellants dispute the similarities and argue that the First Amendment does not mandate a right of public access to Delaware's proceedings.

I.

In early 2009, in an effort to "preserve Delaware's preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters," Delaware amended its code to grant the Court of Chancery "the power to arbitrate business disputes." H.B. 49, 145th Gen. Assemb. (Del. 2009). As a result, the Court of Chancery created an arbitration process as an alternative to trial for certain kinds of disputes. As currently implemented, the proceeding is governed both by statute and by the Rules of the Delaware Court of Chancery. *See* 10 DEL. CODE ANN. tit. 10, § 349 (2009); Del. Ch. R. 96-98.

Delaware's government-sponsored arbitrations are not open to all Delaware citizens. To qualify for arbitration, at least one party must be a "business entity formed or organized" under Delaware law, tit. 10 § 347(a)(3), and neither party can be a "consumer," *id.* § 347(a)(4). The statute is limited to monetary disputes that involve an amount-in-controversy of at least one million dollars. *Id.* § 347(a)(5).

Once qualified parties have consented "by agreement or by stipulation" to avail themselves of the proceeding, they can petition the Register in Chancery to start arbitration. *Id.* § 347(a)(1); Del. Ch. R. 97(a). The fee for filing is $12,000, and the arbitration costs $6,000 per day after the first day. Standing Order of Del. Ch. (Jan. 4, 2010). After receiving a petition the Chancellor selects a Chancery Court judge to hear the arbitration. *See* Del. Ch. R. 97(b); tit. 10, § 347(a).[1] The arbitration begins approximately ninety days after the petition is filed, and, as the parties agreed in oral argument, is conducted in a Delaware courthouse during normal business hours. *See* Del. Chr. R. 97(e). Regular Court of Chancery Rules 26-37, governing depositions and discovery, apply to the proceeding, but the rules can be modified by consensual agreement of the parties. *See id.* at 96(c); *id.* at 26-37.

The Chancery Court judge presiding over the proceeding "[m]ay grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties." *Id.* at

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[1] Although the statute governing Delaware's procedure allows for the Chancellor to appoint non-Chancery Court judges as arbitrators, *see* tit. 10, § 347(a), the Coalition only challenges arbitration by a member of the court.

98(f)(1). Once a decision is reached, a final judgment or decree is automatically entered. *Id.* at 98(f)(3). Both parties have a right to appeal the resulting "order of the Court of Chancery" to the Delaware Supreme Court, but that court reviews the arbitration using the deferential standard outlined in the Federal Arbitration Act. Tit. 10, § 349(c). Arbitrations can therefore only be vacated in relatively rare circumstances, such as when a party can prove that the "award was procured by corruption, fraud, or undue means" or that the "arbitrator[] w[as] guilty of misconduct." 9 U.S.C. § 10; *see also Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005).

Both the statute and rules governing Delaware's proceedings bar public access. Arbitration petitions are "considered confidential" and are not included "as part of the public docketing system." Tit. 10, § 349(b); Del. Ch. R. 97(4). Attendance at the proceeding is limited to "parties and their representatives," and all "materials and communications" produced during the arbitration are protected from disclosure in judicial or administrative proceedings. Del. Ch. R. 98(b).

If one of the parties appeals to the Supreme Court of Delaware for enforcement, stay, or vacatur, the record of the proceedings must be filed "with the Supreme Court in accordance with its Rules." *Id.* at 97(a)(4). "The petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal." *Id.* The Delaware Supreme Court has yet to adopt rules that would govern the confidentiality of appeals from Delaware's arbitration program, and there is no record of a public appeal from an arbitration award.

In the District Court, the Coalition moved for judgment on the pleadings, arguing that the confidentiality of Delaware's government-sponsored arbitration proceedings violated the First Amendment. The District Court granted the Coalition's motion. The judges of the Delaware Chancery Court appeal.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise de novo review over the District Court's grant of a motion for judgment on the pleadings. *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 259 (3d Cir. 2008).

"The First Amendment, in conjunction with the Fourteenth, prohibits governments from 'abridging the freedom of speech, or of the press . . . .'" *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (quoting U.S. CONST. amend. I). This protection of speech includes a right of public access to trials, a right first elucidated by the Supreme Court in *Richmond Newspapers*. In that case the Court found that a Virginia trial court had violated the First Amendment by closing a criminal trial to the public. *See id.* at 580. Chief Justice Burger's opinion for the plurality emphasized the important role public access plays in the administration of justice and concluded that "[t]he explicit, guaranteed rights to speak and publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily." *Id.* at 576-77.

The Court has since found that the public also has a right of access to voir dire of jurors in criminal trials, *see Press-Enter. Co. v. Superior Court*, 464

U.S. 501, 511 (1984) ("*Press I*"), and to certain preliminary criminal hearings. *See El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 149-50 (1993) (per curiam) (preliminary criminal hearings as conducted in Puerto Rico); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press II*") (preliminary criminal hearings as conducted in California).

We have found a right of public access to civil trials, as has every other federal court of appeals to consider the issue. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *see also F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984). In addition to finding a right of public access to civil trials, we have also found a First Amendment right of the public to attend meetings of Pennsylvania city planning commissions and post-trial juror examinations. *See Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180-81 (3d Cir. 1999) (planning commissions); *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994) (post-trial juror examinations). We have declined, however, to extend the right to the proceedings of judicial disciplinary boards, the records of state environmental agencies, deportation hearings, or the voting process. *See First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477 (3d Cir. 1986) (en banc) (judicial disciplinary board); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175-76 (3d Cir. 1986) (en banc) (records of state environmental agencies); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir.

2002) (deportation hearings); *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 112 (3d Cir. 2013) (voting process).

The Experience and Logic Test

A proceeding qualifies for the First Amendment right of public access when "there has been a tradition of accessibility" to that kind of proceeding, and when "access plays a significant positive role in the functioning of the particular process in question." *Press II*, 478 U.S. at 10, 8. The examination of the history and functioning of a proceeding has come to be known as the "experience and logic" test. *See*, *e.g.*, *Simone*, 14 F.3d at 838. In order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public. *See N. Jersey Media Grp.*, 308 F.3d at 213-14. Once a presumption of public access is established it may only be overridden by a compelling government interest. *Press II*, 478 U.S. at 9.

The District Court did not apply the experience and logic test. Instead, it concluded that because Delaware's government-sponsored arbitration was "sufficiently like a trial," and because a right of public access applies to civil trials, a right of public access must also apply to Delaware arbitrations. *See Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 500 (2012) (quoting *El Vocero*, 508 U.S. at 149). We find the District Court's reliance on *El Vocero* misplaced and its decision to bypass the experience and logic test inappropriate. In *El Vocero* the Supreme Court held in a per curiam opinion that the First Amendment right of public access applies to preliminary criminal hearings in Puerto Rico. The Supreme Court did not engage in an experience and logic analysis in that case, but that was because it

had already conducted such an inquiry in *Press I*, a case concerning nearly identical preliminary hearings in California. *See El Vocero*, 508 U.S. at 149 (citing *Press I*, 478 U.S. at 12).

Although Delaware's arbitration proceeding shares a number of features with a civil trial, the two are not so identical as to fit within the narrow exception articulated by the Supreme Court in *El Vocero*. We therefore must examine Delaware's proceeding under the experience and logic test.

A. Experience

Under the experience prong of the experience and logic test, we "consider whether 'the place and process have historically been open to the press and general public,' because such a 'tradition of accessibility implies the favorable judgment of experience.'" *N. Jersey Media Grp.*, 308 F.3d at 211 (quoting *Press II*, 478 U.S. at 8). In order to satisfy the experience test, the tradition of openness must be strong; however, "a showing of openness at common law is not required." *PG Publ'g Co.*, 705 F.3d at 108 (quoting *N. Jersey Media Grp.*, 308 F.3d at 213) (internal quotation marks omitted).

The litigants in this case disagree over which history is relevant to Delaware's proceedings. The Appellants suggest that we only examine the history of arbitrations, whereas the Coalition suggests we only examine the history of civil trials. Neither suggestion is appropriate in isolation. If we were to only analyze the history of arbitrations as the Appellants suggest, we would be accepting the state's designation of its proceedings as arbitrations at face value. Uncritical acceptance of state definitions of proceedings would allow governments to prevent the public

from accessing a proceeding simply by renaming it. A First Amendment right that mandated access to civil trials, but allowed closure of identical "sivel trials" would be meaningless. Thus, the Supreme Court has held that "the First Amendment question cannot be resolved solely on the label we give the event, i.e., trial' or otherwise." *Press II*, 478 U.S. at 7. The Coalition's suggestion—that we rely solely on the history of civil trials—is also flawed. Defining Delaware's proceeding as a civil trial at the outset would beg the question at issue here, and elide the differences between Delaware's arbitration proceeding and other civil proceedings.

There is no need to engage in so narrow a historical inquiry as the parties suggest. In determining the bounds of our historical inquiry, we look "not to the practice of the specific public institution involved, but rather to whether the particular *type* of government proceeding [has] historically been open in our free society." *PG Publ'g Co.*, 705 F.3d at 108 (quoting *Capital Cities*, 797 F.2d at 1175) (internal quotation marks omitted) (emphasis in *PG Publ'g Co.*). In prior public access cases we have defined the type of proceeding broadly, and have often found "wide-ranging" historical inquiries helpful to our analysis of the First Amendment right of public access. *Id.* Thus in *North Jersey Media Group*, a case involving deportation hearings, we considered the entire history of access to "political branch proceedings." *N. Jersey Media Grp.*, 308 F.3d at 209. We exercised a similarly broad approach in *PG Publishing Company*, a case involving a challenge to a state statute restricting access to polling places in which we analyzed "not just the act of voting, but also the act of entering the polling place and signing in to vote." *See PG Publ'g Co.*, 705 F.3d at 109.

Following this broad historical approach, we find that an exploration of both civil trials and arbitrations is appropriate here. Exploring both histories avoids begging the question and allows us to fully consider the "judgment of experience." *Press II*, 478 U.S. at 11 (internal quotation marks omitted).

1. Civil Trials and the Courthouse

As we explained in *Publicker*, there is a long history of access to civil trials. *See Publicker*, 733 F.2d at 1068-70. The English history of access dates back to the Statute of Marlborough passed in 1267, which required that "all Causes . . . to be heard, ordered, and determined before the Judges of the King's Courts [were to be heard] *openly* in the King's Courts." *Id.* at 1068 (citing 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681)) (emphasis in *Publicker*). This tradition of openness continued in English Courts for centuries, ensuring that evidence was delivered "'in the open Court and in the Presence of the Parties, their Attorneys, Council, and all By-standers, and before the Judge and Jury . . . .'" *Id.* (quoting MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 163 (Charles M. Gray ed., U. Chicago Press 1971) (1713)). Thus, "bone of the most conspicuous features of English justice, that *all* judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.'" *Id.* at 1069 (quoting EDWARD JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967)).

This tradition of access to trials and the courthouse was adopted by the American colonies and preserved after the American Revolution. *See id.* Courthouses served a central place in colonial life, encouraging "the active participation of community

members" in shaping the "local practice of justice." Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 318-19 (2012). As courthouses grew increasingly elaborate in the late-eighteenth century, they continued to encourage public viewing, albeit in more formal surroundings. *See id.* at 329-32. The courtroom also maintained its important public role: "[w]ith juries, spectators from the community, and press all present," the courtroom "became a public state—a familiar, indeed immediately recognizable enclosure, in which the process of rights definition was made public . . . ." *Id.* at 332.

Today, civil trials and the court filings associated with them are generally open to the public. *Id.*; *see, e.g.*, Del. Ch. R. 5.1(g)(1). The courthouse, courtroom, and trial remain essential to the way the public conceives of and interacts with the judicial system. *See* David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 Ind. L.J. 1225, 1233-34 (2007); *see also Spaulding*, 24 YALE J.L. & HUMAN. at 342.

2. Arbitrations

Arbitrations also have a long history. Written records of proceedings resembling arbitrations have been found in England as early as the twelfth century. *See* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 2:5 (3d ed. 2011); 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 4.2.1 (1999). Early arbitrations involved community participation, and evidence suggests that they took place in public venues. *See* Edward Powell, *Settlement of Disputes by Arbi-*

tration in Fifteenth-Century England, 2 LAW & HIST. REV. 21, 29, 33-34 (1984); *see generally* LETTERS AND PAPERS OF JOHN SHILLINGFORD, MAYOR OF EXETER 1447-50 at 8 (Stuart A. Moore ed., 1871) (detailing arbitration proceeding overseen by chancellor and judges). The use of arbitrations to resolve private disputes, however, was limited by English precedent, which prevented the enforcement of binding agreements to arbitrate. *See* MACNEIL § 4.2.2.

In the American colonies, arbitrations provided a way for colonists who harbored "suspicion of law and lawyers" to resolve disputes in their communities in a "less public and less adversarial" way. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS 4 (1983); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443, 454 (1984). By the eighteenth century, however, arbitrations adopted increasingly formal procedures, and at least some appear to have taken place in public. *See* Mann, *The Formalization of Informal Law* at 468.

As the American economy grew, disputes over business transactions led to the further development of arbitration proceedings. These proceedings were occasionally supervised by a member of the judiciary "not acting in his official capacity." *Id.* at 475. The popularity of commercial arbitration, however, was limited by precedent that made agreements to arbitrate essentially unenforceable. *See* MACNEIL § 4.3.2; *see also* Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRES L. 423, 445-46 (2009). It

was not until the passage of New York's Arbitration Act of 1920 and the Federal Arbitration Act of 1925, that arbitration agreements began to be treated by the courts like ordinary contracts. DOMKE § 2:8; *see also* MACNEIL § 4.1.2. These arbitration acts allowed private arbitration to take on the important role it now serves in resolving commercial disputes. *See* MACNEIL §§ 5.3, 5.4.

Modern arbitration law has led to the development of an industry devoted to offering arbitration services. Groups such as the American Arbitration Association and JAMS, Inc. facilitate arbitration by appointing arbitrators, organizing hearings, and setting arbitration standards. *See* Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 362-68 (1995). These arbitrations, unlike some of their antecedents, are distinctly private. Parties engaged in arbitration must pay both for the arbitrations and for the space in which the arbitrations occur, and they usually choose to close their arbitrations to the public. *See* Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J. 121, 122 (1995). *But See* 3 MACNEIL ET AL., FEDERAL ARBITRATION LAW § 32.6.1 (1999) (noting that parties can elect to allow access to proceedings).

Although modern arbitration is dominated by private actors, a number of jurisdictions offer alternative dispute resolution procedures as a supplement to civil litigation. *See generally* Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 50 FAM. CT. REV. 377 (2012). These procedures are sometimes called arbitrations, but unlike private arbitrations, they are usually non-binding,

and can sometimes be initiated without the parties' consent. *See* Amy J. Schmitz, *Nonconsensual + Non-binding = Nonsensical? Reconsidering Court-Connected Arbitration Programs*, 10 CARDOZO J. CONFLICT RESOL. 587, 588-89, 618 (2009).

The history of arbitration thus reveals a mixed record of openness. Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed, especially in the twentieth century. This closure, however, can be explained by the private nature of most arbitrations. Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings. Indeed, we would be surprised to find that private arbitrations—taking place before private arbitrators in private venues—had historically been accessible to the public.

Taking the private nature of many arbitrations into account, the history of civil trials and arbitrations demonstrates a strong tradition of openness for proceedings like Delaware's government-sponsored arbitrations. Proceedings in front of judges in courthouses have been presumptively open to the public for centuries. History teaches us not that all arbitrations must be closed, but that arbitrations with non-state action in private venues tend to be closed to the public.[2] Although Delaware's government-sponsored

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[2] Understood in this way, the closure of private arbitrations is only of questionable relevance. Meetings by private organizations, for example, are usually closed to the public, yet we did not consider this history of closure when we found a First Amendment right of public access to city planning commissions. *See Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177 (3d Cir. 1999). Nor did we consider the history of access to votes undertaken by private organi-

arbitrations share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal.

When we properly account for the type of proceeding that Delaware has instituted—a binding arbitration before a judge that takes place in a courtroom—the history of openness is comparable to the history that this court described in *Publicker* and the Supreme Court found in *Richmond Newspapers*. Thus, unlike the "recent-and rebuttable-regulatory (sic) presumption" of openness in deportation hearings we examined in *North Jersey Media Group*, 308 F.3d at 213, or the "long-standing trend away from openness" in the electoral process we found in *PG Publishing Co.*, 705 F.3d at 110, the right of access to government-sponsored arbitrations is deeply rooted in the way the judiciary functions in a democratic society. Our experience inquiry therefore counsels in favor of granting public access to Delaware's proceeding because both the "place and process" of Delaware's proceeding "have historically been open to the press and general public." *Press II*, 478 U.S. at 8.

B. Logic

Under the logic prong of the experience and logic test we examine whether "access plays a significant positive role in the functioning of the particular process in question." *Id.* We consider both the positive role that access plays, and also "the extent to which

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zations, when we examined the history of the voting process. *See PG Publ'g Co.*, 705 F.3d at 110.

openness impairs the public good." *N. Jersey Media Grp.*, 308 F.3d at 202.

> We have recognized that public access to judicial proceedings provides many benefits, including [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud].

PG Publ'g Co., 705 F.3d at 110-11 (quoting *Simone*, 14 F.3d at 839). All of these benefits would accrue with the opening of Delaware's proceeding. Allowing public access to state-sponsored arbitrations would give stockholders and the public a better understanding of how Delaware resolves major business disputes. Opening the proceedings 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. In addition, public access would expose litigants, lawyers, and the Chancery Court judge alike to scrutiny from peers and the press. Finally, public access would discourage perjury and ensure that companies could not misrepresent their activities to competitors and the public.

The benefits of openness weigh strongly in favor of granting access to Delaware's arbitration proceedings. In comparison, the drawbacks of openness that

Appellants cite are relatively slight. First, Appellants contend that confidentiality is necessary to protect "patented information, trade secrets, and other closely held information." Appellants' Br. at 60. This information, however, is already protected under Delaware Chancery Court Rule 5.1, which provides for the confidential filing of documents, including "trade secrets; sensitive proprietary information; [and] sensitive financial, business, or personnel information" when "the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause." Del. Ch. R. 5.1(b)(2). These tailored protections are compatible with the First Amendment right of public access. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-36 (1984).

Second, Delaware argues that confidentiality is necessary to prevent the "'loss of prestige and goodwill" that disputants would suffer in open proceedings. Appellants' Br. at 60 (quoting J. Noble Braden, *Sound Rules and Administration in Arbitration*, 83 U. PA. L. REV. 189, 195 (1934)). Although the loss of prestige and goodwill may be unpleasant for the parties involved, it would not hinder the functioning of the proceeding, nor impair the public good. As we have previously held, the exposure of parties to public scrutiny is one of the central benefits of public access. *See*, e.g., *PG Publ'g Co.*, 705 F.3d at 110-11.

The Appellants' third argument is that privacy encourages a "less hostile, more conciliatory approach." *See* Appellants' Br. at 61 (citing ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 601 (3d ed. 2002)). This may sometimes be true, but even private binding arbitrations can be contentious. *See* Raymond G. Bender,

Jr., *Arbitration—An Ideal Way to Resolve High-Tech Industry Disputes*, 65 DISP. RESOL. J. 44, 49 (2010) ("[A]dvocates seeking to achieve the best outcomes for their clients have interjected litigation-like techniques into arbitration—contentious advocacy, uncontrolled discovery, aggressive motion practice, and other adversarial techniques aimed at achieving a 'leg-up' in the contest."). Moreover, informality, not privacy, appears to be the primary cause of the relative collegiality of arbitrations. *See* ALAN SCOTT RAU ET AL, PROCESSES OF DISPUTE RESOLUTION, 601 (1989) (citing "relative informality" of arbitration as reason for reduced contentiousness); Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 SAINT JOHN'S L. REV. 907, 925 (2010) ("Arbitration is also less contentious than litigation because the formal rules of evidence do not apply, unless the parties agree otherwise."). We therefore do not find that a possible reduction in conciliation caused by public access should weigh heavily in our analysis.

Finally, Appellants argue that opening the proceeding would effectively end Delaware's arbitration program. This argument assumes that confidentiality is the sole advantage of Delaware's proceeding over regular Chancery Court proceedings. But if that were true—if Delaware's arbitration were just a secret civil trial—it would clearly contravene the First Amendment right of access. On the contrary: as the Appellants point out in the rest of their brief, there are other differences between Delaware's government-sponsored arbitration and regular Chancery Court proceedings. Arbitrations are entered into with the parties' consent, the parties have procedural flexibility, and the arbitrator's award is subject to more limited review. Thus, 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.[3]

I agree with Judge Roth on the virtues of arbitration. I cannot help but question why the Delaware scheme limits those virtues to litigants whose disputes involve an amount in controversy of at least a million dollars, and neither of whom is a consumer. One wonders why the numerous advantages set forth in Judge Roth's dissenting opinion (which apparently motivated the Delaware legislature) should not also be available to businesspersons with less than a million dollars in dispute. I see no explanation in Judge Roth's dissent for the limitation to rich businesspersons.

In her dissent, Judge Roth states that she believes that I do not appreciate the difference between adjudication and arbitration, *i.e.*, "that a judge in a judicial proceeding derives her authority from the coercive power of the state, while a judge serving as an arbitrator derives her authority from the consent of the parties." Indeed I do.

Delaware's proceedings are conducted by Chancery Court judges, in Chancery Court during ordinary court hours, and yield judgments that are enforceable in the same way as judgments resulting from ordinary Chancery Court proceedings. Dela-

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[3] Even if granting public access to Delaware's arbitrations were to limit their appeal, parties would still have two effective alternatives: private arbitration or public proceedings before the Chancery Court. Thus, Appellants' contention that allowing public access to Delaware's state-sponsored arbitration proceedings would lead to a mass exodus of corporations is overstated.

ware's proceedings derive a great deal of legitimacy and authority from the state. They would be far less attractive without their association with the state. Therefore, the interests of the state and the public in openness must be given weight, not just the interests of rich businesspersons in confidentiality.

Like history, logic weighs in favor of granting access to Delaware's government-sponsored arbitration proceedings. The benefits of access are significant. It would ensure accountability and allow the public to maintain faith in the Delaware judicial system. A possible decrease in the appeal of the proceeding and a reduction in its conciliatory potential are comparatively less weighty, and they fall far short of the "profound" security concerns we found compelling in *North Jersey Media Group*. *See* 308 F.3d at 220.

III.

Because there has been a tradition of accessibility to proceedings like Delaware's government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations. We will therefore affirm the order of the District Court.

Delaware Coalition for Open Government v. Strine, No. 12-3859

FUENTES, J., concurring:

Today we affirm the District Court's ruling, which concluded that "the right of access applies to the Delaware proceeding created by section 349 of the Delaware Code." *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 504 (D. Del. 2012). Specifically, the District Court held that "the portions of [section 349] and [of] Chancery Court Rules 96, 97, and 98, which make the proceeding confidential, violate that right." *Id.* I agree. I write separately because, given that not all provisions of § 349 of the Delaware Code or the Chancery Court Rules relating to Judge-run arbitration proceedings are unconstitutional, I think it is necessary to be more specific than the District Court's order in pointing out those that are problematic and those that are not.

I begin with § 349(b), which provides for the confidentiality in arbitration proceedings for business disputes. This section states that:

> 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. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery.

Del. Code. Ann., tit. 10, § 349(b).

I agree with Judge Sloviter that this provision violates the First Amendment right of public access and cannot stand. However, I see nothing wrong

with the other provisions of this statute. I do not believe that § 349(a), granting the Chancery Court the power to arbitrate business disputes, or § 349(c), providing for the filing of "applications to vacate, stay, or enforce an [arbitral] order" with the Delaware Supreme Court, violate the public right of access when § 349(b) is removed from the statutory scheme.

Similarly, not all provisions of the Court of Chancery Court Rules implementing § 349 arbitrations raise constitutional concerns. Chancery Court Rule 97(a)(4) provides:

> "The Register in Chancery will not include the petition [for arbitration] as part of the public docketing system. The petition and any supporting documents are considered confidential and not part of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its Rules, and to the extent applicable, the Rules of this Court."

Chancery Court Rule 98(b) likewise provides that:

> "Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any

> communication made in or in connection with the arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the arbitration hearing.

Again, I agree with Judge Sloviter that these provisions violate the First Amendment, but I do not find any problem with the remainder of the Chancery Court Rules implementing the § 349 arbitrations. Chancery Court Rule 96, containing certain definitions, is in my view constitutional in its entirety. Similarly, the remaining portions of Rules 97 and 98, which provide for the scope of arbitration, the proper procedures for an arbitration, and the logistics of hearings and dispute resolution, pass constitutional muster when Rules 97(a)(4) and 98(b) are excised from the law.

"The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions." *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932). It is well-settled that we must "refrain from invalidating more of a statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Even when construing

state laws "[w]e prefer . . . to enjoin only the unconstitutional applications of [a] statute while leaving other applications in force, or to sever its problematic portions." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006) (internal citation omitted).

The crux of today's holding is that the proceedings set up by § 349 violate the First Amendment because they are conducted outside the public view, not because of any problem otherwise inherent in a Judge-run arbitration scheme. Thus, Appellants are enjoined only from conducting arbitrations pursuant to § 349(b) of Title 10 of the Delaware Code or Rules 97(a)(4) and 98(b) of the Delaware Chancery Court. Nothing in today's decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions.

Appellants suggest that Judge-run arbitrations will not occur under § 349 unless they are conducted in private. This may be so, but neither Appellants nor the Delaware Legislature have presented us with an alternative confidential arbitration scheme sufficiently devoid of the air of official State-run proceeding that infects the system now before us, sufficient to pass constitutional muster. Nor have they otherwise suggested that we attempt to sever offending portions of the statute to construct such an alternative. Thus, we have no occasion to consider if different arbitration schemes pass constitutional muster, and we are left with no choice other than to sever the confidentiality provisions. *See generally Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (explaining that a court may not sever a portion of a law unless it can conclude that "the statute created in its ab-

sence is legislation that [the Legislature] would . . . have enacted").

Appellants only severability argument is a very limited one, that invalidating the self-executing aspect of the arbitral awards, Del. Ch. R. 98(f)(3), is enough to cure any constitutional infirmity. But as Appellants themselves describe it, the procedure contemplated in Rule 98(f)(3) is merely "a matter of convenience." Appellants' Reply Br. at 28. It eliminates the need to file the arbitral award in court, a step that is only significant if a party refuses to abide by an arbitrator's award, a rarely occurring contingency. For essentially the reasons stated in Judge Sloviter's opinion, the mere formality of filing that award in Court, which Rule 98(f)(3) skirts, does not alone alter the First Amendment right of access calculus one way or another.

But I reiterate that we do not express any view regarding the constitutionality of a law that may allow sitting Judges to conduct private arbitrations if the system set up by such a law varies in certain respects from the scheme before us today. Indeed, it is likely that the Delaware Legislature has at its disposal several alternatives should it wish to continue to pursue a scheme of Judge-run arbitrations.

With this understanding of the scope of today's decision, I join in Judge Sloviter's opinion and concur in the judgment.

ROTH, Circuit Judge, dissenting:

The use of arbitration as a method of resolving business and commercial disputes has been increasing both here and abroad. For example, the caseload of the American Arbitration Association's International Center for Dispute Resolution grew by almost 330 per cent between 1994 and 2004.[1] The number of requests for arbitration in the London Court of International Arbitration grew by 300 per cent in the last decade. [2]

There are a number of factors that have caused this growth in arbitration. One is the importance of resolving disputes expeditiously. Businesses in this country and abroad need to get commercial conflicts resolved as quickly as possible so that commercial relations are not disrupted. Another factor in the growth of arbitration is the increase in commercial disputes between businesses located in different countries. In particular, non-U.S. companies, with no familiarity — or with too much familiarity — with the American judicial system, may prefer arbitration with the rules set by the parties to lengthy and expensive court proceedings. In addition, arbitration permits the proceedings to be kept confidential, protecting trade secrets and sensitive financial information. The Supreme Court has summarized these advantages as follows:

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[1] Loukas Mistelis, *International Arbitration – Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Report,* 15 Am. Rev. Int'l Arb. 525, 527 (2004)

[2] Compare London Court of International Arbitration's *Director General's Report* for 2001 with the *Director General's Reports* for 2010 and 2011, *available at* http://www.lcia.org/LCIA/Casework_Report.aspx.

> The point of affording parties discretion in designing arbitration processes is to allow 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. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution..

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1749 (2011).

The State of Delaware has become interested in sponsoring arbitration as a part of its efforts to preserve its position as the leading state for incorporations in the U.S. One of the reasons that Delaware has maintained this position is the Delaware Court of Chancery, where the judges are experienced in corporate and business law and readily available to resolve this type of dispute. Nevertheless, judicial proceedings in the Court of Chancery are more formal, time consuming and expensive than arbitration proceedings. For that reason, the Court of Chancery, as a formal adjudicator of disputes, may not be able to compete with the new arbitration systems being set up in other states and countries. [3]

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[3] See N.Y. State Bar Ass'n, Task Force on N.Y. Law in Int'l Matters, *Final Report* 4 (June 25, 2011) ('[J]urisdictions around the world, many with government support, are taking steps to increase their arbitration case load. New arbitration laws were enacted in 2010 and 2011 in France, Ireland, Hong Kong, Scotland, Ghana and other nations to enhance their attractiveness as seats of arbitration. . . . In 2010, at least three jurisdictions established specialized courts to handle international arbitration matters Australia,

In order to prevent the diversion elsewhere of complex business and corporate cases, the Delaware Legislature in 2009 enacted legislation to create an arbitration system. The Legislature established the arbitral system in the Court of Chancery where the judges are the most experienced in corporate and business litigation. The Legislature declared that the new system was "intended to preserve Delaware's preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." H.B. 49, 145th Gen. Assem. (Del. 2009).

This Delaware arbitration system is offered to business entities (at least one of which must have been formed or organized under Delaware law; no party can be a consumer) to resolve expensive and complex disputes (for disputes involving solely monetary damages, the amount in controversy must be at least $1,000,000) with the consent of the parties. The arbitrators are judges of the Court of Chancery or others authorized under the Rules of the Court of Chancery. The proceedings are confidential. In my view, such a set-up creates a perfect model for commercial arbitration.

India and Ireland. Several other jurisdictions well-known for international arbitration, including France, the United Kingdom, Switzerland, Sweden and China, have designated certain courts or judges to hear cases to challenge or enforce arbitration awards. Among the cited reasons for this focus on arbitration is the governments' recognition of the importance of arbitration to their economies and to their position in toady's world of global commerce."); *id.* at 38, *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id= 340 27.

Judge Sloviter urges, however, that the Delaware system violates the First Amendment of the U.S. Constitution. Maj. at 23. In arriving at this conclusion, she does not rely solely on either the history of arbitration or the history of civil trials. She looks 'not to the practice of the specific public institution involved, but rather to whether the particular *type* of government proceeding [has] historically been open in our free society." Maj. at 11 (quoting *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013) (quoting *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3d Cir. 1986) (en banc)) (alterations in original).[4] She classifies that "particular type of government proceeding," which would occur in the Delaware arbitration system, as one that has traditionally been open to the public. Maj. at 11. In my view, her analysis begs the question.

On the other hand, Judge Fuentes, while concurring with Judge Sloviter, is less broad in his conclusion. His concern is with the confidentiality of the proceedings. He concludes that the confidentiality provisions of 10 Del. C. § 349(b) violate the First Amendment right of public access and cannot stand. He also concludes that the confidentiality provisions for docketing and holding hearings found in Chancery Court Rules 97(a)(4) and 98(b) violate the First Amendment. However, Judge Fuentes finds most of the statute and rules to be acceptable. He has no problem with a sitting judge arbitrating business

[4] I believe that Judge Sloviter does not appreciate the difference between adjudication and arbitration, *i.e.*, that a judge in a judicial proceeding derives her authority from the coercive power of the state while a judge serving as an arbitrator derives her authority from the consent of the parties.

disputes. He has no problem with the self-executing aspect of the arbitral awards.

I do not agree with Judge Fuentes`s contention that the Delaware Court of Chancery`s arbitration proceedings cannot be confidential. Confidentiality is one of the primary reasons why litigants choose arbitration to resolve disputes—particularly commercial disputes, involving corporate earnings and business secrets. *See* 1 Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* 7:12 (2013).

In this dissent, I will focus on the issue of confidentiality because that is the only area in which Judge Fuentes and I differ. I will not discuss the other issues raised by Judge Sloviter although I could, if necessary, respond to those also. I will limit my discussion to the difference between Judge Fuentes`s views and my own.

An examination of confidentiality in arbitration should begin in colonial times. The tradition of arbitration in England and the American colonies reveals a focus on privacy. *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."); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 545 U. Kan. L. Rev. 1211, 1223 (2006) ("The New York Chamber of Commerce . . . established an arbitral regime at the Chamber`s inception in 1765. . . . [and] relied on arbitration's privacy and independence to foster efficient resolution of disputes among the American and British merchants during and after the American

Revolutionary War.").[5] In the twentieth century, the modern arbitration bodies began to develop rules for arbitration proceedings that emphasize privacy and confidentiality. *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1271-72 (2006).

Today, the major national and international arbitral bodies continue to emphasize confidentiality. Their rules provide that arbitration proceedings are not open to the public unless the parties agree they will be. *See*, *e.g.*, 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). Thus, as a rule, arbitration has not "historically been open to the press and the general public." *Press II*, 478 U.S. at 8.[6]

With this history of arbitration in mind, looking at experience and logic, *see Press-Enterprise Co. v. Superior Court of Calif. for the Cnty. of Riverside*, 478 U.S. 1, 8 (1986), I conclude that, historically, arbitration has been private and confidential. Logically, the resolution of complex business disputes, involving sensitive financial information, trade secrets,

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[5] The majority asserts that some early arbitrations took place in public. While this may be true, arbitrations even during this period were overwhelmingly private. *See, e.g.,* Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 Tex. Int'l L.J. 121, 122 (1995).

[6] Judge Sloviter states that the "closure of private arbitrations is only of questionable relevance." Maj. At 16 n.2. I disagree. The development of private arbitration is key to understanding the functions of arbitration as a dispute resolution process and its tradition concerning public access and confidentiality.

and technological developments, needs to be confidential so that the parties do not suffer the ill effects of this information being set out for the public—and especially competitors—to misappropriate. For these reasons, there is here no First Amendment right of public access.

In conclusion, then, it appears to me to be very clear that, when the State of Delaware decided to create its arbitration system, it was looking at traditional arbitration, in a confidential setting, before arbitrators experienced in business and corporate litigation. Delaware did not intend the arbitration system to supplant civil trials. Delaware did not intend to preclude the public from attending proceedings that historically have been open to the public. The 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.

For the above reasons, I respectfully dissent. I would reverse the judgment of the District Court and uphold the statute and rules which establish the Delaware arbitration system.

APPENDIX B

United States District Court,
D. Delaware.
DELAWARE COALITION FOR OPEN GOVERNMENT
v.
Honorable Leo E. STRINE, Jr., et al.

Civil Action No. 1:11–1015.
Aug. 30, 2012.

MEMORANDUM

McLAUGHLIN, District Judge.

This is a challenge to a confidential arbitration proceeding established by Delaware law and implemented by the Delaware Court of Chancery.[1] The plaintiff argues that the First Amendment's qualified right of access prevents the defendants from closing this proceeding to the public and press. Both parties have cross-moved for judgment on the pleadings.[2]

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[1] The defendants named in this suit are the Delaware Chancery Court judges responsible for administering the law. The State of Delaware and the Court of Chancery were also named as defendants, but both parties agree they should be dismissed as immune from suit under the Eleventh Amendment. *See* Def. Br. at 34; Pl. Br. at 29.

[2] In addition to the parties' briefs, three briefs on behalf of amicus curiae have also been filed. The Corporate Law Section of the Delaware State Bar Association and the Nasdaq OMX Group Inc. and NYSE Euronext filed briefs in support of the defendants' motion. The Reporters Committee for Freedom of the Press and several news organizations filed a brief in support of the plaintiff's motion.

The Court will grant the plaintiff's motion and deny the defendants' motion. The First Amendment protects a qualified right of access to criminal and civil trials. Except in limited circumstances, those proceedings cannot be closed to the public. Under the Delaware law and Chancery Court rules, a sitting judge of the Chancery Court, acting pursuant to state authority, hears evidence, finds facts, and issues an enforceable order dictating the obligations of the parties. The Court concludes that the Delaware proceeding functions essentially as a non-jury trial before a Chancery Court judge. Because it is a civil trial, there is a qualified right of access and this proceeding must be open to the public.

I. *The Delaware Proceeding*

In April of 2009, the Delaware State Legislature amended the rules governing the resolution of disputes in the Court of Chancery. 10 Del. C. § 349 (West 2012); Compl. ¶ 12. This law gives the Court of Chancery "the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute." 10 Del. C. § 349(a). The arbitration procedure is "intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.B. No. 49, at 4 (2009).

Access to this arbitration procedure requires the parties' consent. There is no requirement that the parties have an agreement to arbitrate their disputes prior to the dispute arising, but both must consent to participate at the time the dispute is submitted to the court. 10 Del. C. § 349(a). In addition, parties must meet certain eligibility criteria to participate.

Id. §§ 349(a), § 347(a), (b). At least one party must be a "business entity" and one party must be a citizen of the state of Delaware, although the same party can meet both criteria. *Id.* § 347(a)(2), (3); Oral Arg. Tr. Feb. 9, 2012 at 8. Thus both businesses and individuals can utilize the procedure. If the remedy sought includes only monetary damages, the amount in controversy must be more than one million dollars; if any equitable remedy is sought, even in conjunction with monetary damages, there is no amount-in-controversy requirement. 10 Del. C. § 347(a)(5).

The parties cannot submit their dispute for arbitration if either is a "consumer," defined as an individual who purchases or leases merchandise for personal use. *Id.* § 347(a)(4); 6 Del. C. § 2731(1) (West 2012). The procedure is accessible for "business disputes" and the law provides no limit to the type of controversy that may be submitted. Because the law allows parties seeking only monetary damages to submit their disputes to the Chancery Court, it allows some cases which would otherwise be excluded under the Chancery Court's limited equitable jurisdiction to be decided by Chancery Court judges. Kevin F. Brady & Francis G.X. Pileggi, *Recent Key Delaware Corporate and Commercial Decisions*, 6 N.Y.U. J.L. & Bus. 421, 456 (2010).

On January 5, 2010, the Chancery Court adopted Rules 96, 97, and 98 in order to administer the arbitration proceeding. Compl. ¶ 13. To initiate the proceeding, the parties file a petition with the Register in Chancery, stating the nature of the dispute, the claims made, and the remedies sought. The parties must certify that the eligibility criteria described above are met. Del. Ch. Ct. R. 97(a). Once a petition is filed, the Chancellor appoints a Chancery Court

judge to preside over the case as the arbitrator.[3] *Id.* 96(d)(2).

Within ten days of the petition's filing, the arbitrator holds a preliminary conference with the parties, and then, as soon as practicable, a preliminary hearing. *Id.* 97(c)-(d). At the preliminary hearing, the parties and arbitrator discuss the claims of the case, damages, defenses asserted, legal authorities to be relied upon, the scope of discovery, and the timing, length, and evidence to be presented at the arbitration hearing. *Id.* 96(d)(4). At the preliminary hearing, the parties also consider "the possibility of mediation or other non-adjudicative methods of dispute resolution." *Id.*

An arbitration hearing occurs approximately ninety days after the petition's filing. *Id.* 97(e). At any stage of this process, the parties can agree to mediation through the Chancery Court or can seek the assistance of the judge in pursuing and reaching a settlement agreement. *Id.* 93(d)-(e).

Prior to the arbitration hearing, the parties exchange "information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute." *Id.* 97(f). The parties can agree to the scope of information to be exchanged or can have the arbitrator decide the scope of discovery. *Id.* Court of Chancery Rules 26 through 37, which govern depositions and discovery in all Chancery Court matters, apply to the

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[3] The rule allows the Chancellor to appoint a master sitting in the Chancery Court. The Court is not aware of any procedure creating these masters, nor do the parties address this aspect of the law. The Court considers only the situation where Chancery Court judges are appointed as arbitrators.

arbitration proceeding unless the parties and arbitrator together agree to different rules. *Id.* 96(c). Some discovery matters, such as the procedure for issuing subpoenas, must be created by the parties and the arbitrator. *Id.* 96(d)(4). All parties must participate in the arbitration hearing and at least one representative "with authority to resolve the matter must participate...." *Id.* 98(a).

The arbitrator has the power to issue a final award and to make interim, interlocutory, or partial rulings during the course of the proceeding. *Id.* 98(f). The arbitrator's final award, issued after the hearing, can include "any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties." *Id.* 98(f)(1). Finally, "[u]pon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree." *Id.* 98(f)(3).

Either party may apply to the Supreme Court of Delaware "to vacate, stay, or enforce an order of the Court of Chancery." 10 Del. C. § 349(c). The Supreme Court can consider these motions only "in conformity with the Federal Arbitration Act [("FAA")]." *Id.* § 349(c); Compl. ¶ 12. Under the FAA, an arbitration award cannot be vacated on the grounds of legal error. An arbitration judgment can only be vacated if there is a showing of fraud, corruption, undue means in procuring the award; partiality, corruption, or certain misconduct on the part of the arbitrator; or the arbitrator exceeded his powers or failed to make a final award. 9 U.S.C. § 10(a) (2006). Awards can also be modified if there was a material miscalculation of figures, if the arbitrator exceeded his authority, or if

the modification would not affect the merits of the controversy. *Id.* § 11.

The Delaware law and Chancery Court Rules governing the arbitration require that the proceeding be conducted out of the public view. The Delaware law provides:

> 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. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules....

10 Del. C. § 349(b).

The Chancery Court Rules require that all parts of the proceeding, including all filings and all contacts between the arbitrator and any party are "confidential and not of public record." Del. Ch. Ct. R. 97(a)(4), 98(b). The Register in Chancery does not file the parties' petition on the court's public docketing system. *Id.* 97(a)(4). None of the hearings is open to the public. Only parties are allowed to attend the arbitration hearing unless they agree otherwise. *Id.* 98(b). All "memoranda and work product contained in the case files of an Arbitrator," and "[a]ny communication made in or in connection with the arbitration that relates to the controversy being arbitrated" are likewise confidential. *Id.*

The arbitrator's final award is not made public, although a judgment is "entered in conformity therewith."[4] Judgments are publically available on

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[4] It is unclear exactly when or if a judgment becomes public. As quoted above, Rule 97(f)(3) appears to require that a

the LexisNexis File & Serve system, under the title "arbitration judgments." No case or party information is listed on the docket. To date, only one judgment has been made public. *See Chrysalis Ventures III, L.P. v. Mobile Armor, Inc.*, Arb. No. 001–A–2011–VCL, CA. No. 6069–VCL, 2011 WL 6892200 (Del.Ch. Dec. 30, 2011). This judgement is a one-and-a-half page order confirming the arbitration award already entered in favor of the respondents. It contains no information about the nature of the case, except that the suit was originally filed as a civil suit in the Chancery Court and then converted into an arbitration proceeding by consent of the parties. *Id.*

If the parties apply to the Supreme Court of Delaware for enforcement, stay, or vacatur of the award, then the confidential record of the proceedings "shall be filed by the parties with the Supreme Court in accordance with its Rules." Del. Ch. Ct. R. 97(a)(4). Once an appeal is filed, at least some of the record will become public. *See id.* ("The petition and any supporting documents are considered confidential and not of public record until such time, if any, as

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judgment enforcing the award is made publically available contemporaneously with issuing the award. The Delaware State law, however, seems to contemplate that the entire proceeding, including any judgment, remain confidential and not put on the public docket unless one party appeals the award to the Delaware Supreme Court. *See* 10 Del. C. § 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."). The only judgment currently available was made public after one party petitioned the Chancery Court to confirm the award. *Chrysalis Ventures III, L.P. v. Mobile Armor, Inc.*, Arb. No. 001–A–2011–VCL, CA. No. 6069–VCL, 2011 WL 6892200 (Del.Ch. Dec. 30, 2011).

the proceedings are the subject of an appeal."). The Delaware Supreme Court has not yet adopted rules for the procedure, nor is there any public record of an appeal before the Supreme Court.[5]

The question at issue in this case is whether there is a right of access to this proceeding which is violated by the confidentiality requirements of the law and implementing rules.

II. *The Right of Access*

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press...." U.S. Const. amend. I. The prohibitions of the First Amendment extend to the states through the Fourteenth Amendment and bar government interference with both the speaker and the listener. In 1980, the Supreme Court held that the First Amendment also protects the public's ability to attend criminal judicial proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

In *Richmond Newspapers*, a Virginia trial court excluded the public and press from a murder trial. In five separate opinions, seven of the eight participating Justices held that the First Amendment prevents the government from denying public access to historically open government proceedings. *Id.* at 580, 100 S.Ct. 2814 (plurality opin.); *id.* at 583, 100 S.Ct. 2814 (Stevens, J., concurring); *id.* at 585, 100 S.Ct. 2814

[5] Under Delaware Supreme Court Rule 9(bb), records sealed by order of a trial court remain sealed unless the Court "for good cause shown, shall authorize the unsealing of such document or record." Del. Sup.Ct. R. 9(bb). The Court is not aware of any arbitration awards or judgments which have been appealed to the Delaware Supreme Court.

(Brennan, J., concurring); *id.* at 599, 100 S.Ct. 2814 (Stewart, J., concurring); *id.* at 604, 100 S.Ct. 2814 (Blackmun, J., concurring).

In his plurality opinion, Chief Justice Burger began with the historic practice of open criminal trials. He traced the presumptive openness of the criminal trial from the earliest recorded trials in Anglo–American history through the organic documents of the states that would form this country. Reviewing several hundred years of records, the Chief Justice could not find "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court...." *Id.* at 573 n. 9, 100 S.Ct. 2814.

Chief Justice Burger also described the public benefits that explain this practice of openness. Public accountability encourages honesty from witnesses and reasoned decision making by jurists. Accessible court proceedings serve an educational function, informing the public about the judicial system and the important social and legal issues raised by many cases. Judicial rulings are more easily accepted and mistakes are more quickly corrected when the subject to the scrutiny of public and press. Access to criminal trials thus improves both the functioning of the judicial system and public confidence in its fairness. Given the experience of public openness and the benefits of that practice, the Court found that the First Amendment protects the public's right to access historically open proceedings.

In 1982, the Supreme Court extended the reasoning of *Richmond Newspapers*, holding that the right of access applies to the testimony of witnesses at a criminal trial, even when the state excluded the public in order to protect minor victims of sexual offenses. *Globe Newspaper Co. v. Superior Court*, 457 U.S.

596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). In two subsequent cases, the Supreme Court held that the right also applies to criminal proceedings beyond the criminal trials. The public and press have the right to attend the voir dire of jurors and preliminary hearings where evidence for and against the accused is presented. *Press–Enterprise Co. v. Superior Court of Cal. ["Press–Enterprise I"]*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Press–Enterprise Co. v. Superior Court of Cal. ["Press–Enterprise II"]*. 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). In this second case, the Supreme Court concluded that the nature and function of the preliminary hearing was so similar to a criminal trial that the same justifications for openness applied.

Although the Supreme Court has never addressed access to civil judicial proceedings, every Court of Appeals to consider the issue, including the Court of Appeals for the Third Circuit, has held that there is a right of access to civil trials. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir.1984); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir.1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir.1988); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir.1983); *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir.1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir.1983); *see also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir.1983) (holding right of access applies to civil trials related to incarceration of prisoners).

In *Publicker Industries*, the Court of Appeals explained why the reasoning of *Richmond Newspapers* applied to civil trials. As with criminal trials, the

English and American legal systems have historically presumed that civil proceedings are open to the public. *Publicker Indus.*, 733 F.2d at 1068–69; *see also Richmond Newspapers*, 448 U.S. at 580 n. 17, 100 S.Ct. 2814 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

Many of the same rationales supporting openness in criminal trials apply equally to civil trials. Disputes among private citizens may not be matters of public concern in the same way as criminal prosecutions. But the actions of those charged with administering justice through the judiciary is always a public matter.

Openness of civil trials promotes the integrity of the courts and the perception of fairness essential to their legitimacy. Public dissemination of the facts of a civil trial can encourage those with information to come forward, and public attention can discourage witnesses from perjury. The Court of Appeals for the Third Circuit has summarized the six benefits of open judicial proceedings, both criminal and civil as:

> [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scruti-

> ny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury.

N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 217 (3d Cir.2002).

In several en banc opinions, the Court of Appeals has declined to extend the right of access to proceedings before the executive branch, which lacked the history and public benefits of openness. Thus there is no right of access to the records and decisions of the Pennsylvania body charged with investigating complaints against judicial officers. *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 468 (3d Cir.1986) (en banc). The Court of Appeals found no historically recognized right of access to administrative proceedings, which use fundamentally different procedures than the judiciary, and determined that the benefits of public access did not outweigh the many harmful consequences of publicizing unsubstantiated accusations against judicial officers. For the same reason, there is no right to access an administrative agency's records, including internal memoranda analyzing the results of the department's investigations. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir.1986) (en banc).

The Court of Appeals also held that there is no right of access to executive branch deportation hearings involving citizens suspected of having ties to terrorists. *N. Jersey Media Grp.*, 308 F.3d at 220–221. Although deportation hearings have existed in the executive branch for approximately a century, the Court found that there was never a guarantee that they were open to the public. *Id.* at 200. In addition, the Court concluded that risks to national security of opening the deportation hearings outweighed the benefits of public access. *Id.* at 219–20.

III. *Analysis*[6]

To determine if there is a public right of access to a particular proceeding or record, the rule in the Third Circuit is to apply the "logic and experience" test. *N. Jersey Media Grp.*, 308 F.3d at 208–09.

> First, because a tradition of accessibility implies the favorable judgment of experiences, we have considered whether the place and process have historically been open to the press and general public.... Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.[7]

Id. at 206 (quoting *Press–Enterprise II*, 478 U.S. at 8, 106 S.Ct. 2735).

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[6] A motion for judgment on the pleadings should only be granted if "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 259 n. 25 (3d Cir.2010). When considering a motion under Rule 12(c), the court must view the facts alleged in the pleadings and view any inferences to be drawn in the light most favorable to the non-moving party. *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir.2008).

[7] Even when recognized, the First Amendment's right of access is not absolute. Protected proceedings can be closed to the public if a court finds "that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press–Enterprise II*, 478 U.S. at 13–14, 106 S.Ct. at 2743; *Publicker Indus.*, 733 F.2d at 1073. This part of the First Amendment analysis is not addressed by the parties or considered by the Court.

The defendants argue that this Court should apply the logic and experience test to determine if commercial arbitration should be subject to the right of access. The plaintiff argues that the Delaware proceeding is essentially a bench trial and *Publicker Industries* governs the state's ability to close the proceeding to the public.

A. *Threshold Question*

Before this Court can consider the experience and logic test, it must address this threshold question. Has Delaware implemented a form of commercial arbitration to which the Court must apply the logic and experience test, or has it created a procedure "sufficiently like a trial" such that *Publicker Industries* governs? *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149–50, 113 S.Ct. 2004, 124 L.Ed.2d 60 (1993). The label Delaware gives the proceeding offers little guidance. "[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the [proceeding at issue] functions much like a full-scale trial." *Press–Enterprise II*, 478 U.S. at 7, 106 S.Ct. 2735.

1. *Arbitration Verses Litigation*

In many ways, arbitration and civil litigation are similar. Arbitration is "a private system of justice." 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 1:1 (3d ed.2011). Parties select a neutral decision maker, often an expert in the relevant field, to resolve their dispute. *Id.* § 3:1. The parties consent to be bound by the decision of the arbitrator, and his resolution of the dispute is constrained by the parties' agreement. This consent is one of arbitration's defining features. The parties' voluntary agreement

to resolve their dispute through a decision maker of their choosing is the "essence of arbitration." *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir.2003).

Arbitration differs from litigation because it occurs outside of the judicial process. The arbitrator is not a judicial official. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*. 1956 Wash. U.L.Q. 193, 194; *see also* Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*. 32 Am. Bus. L.J. 583, 589–90 (1995) (comparing arbitration and litigation). In litigation, a court can compel an unwilling party. In arbitration, the parties agree to participate in a specified forum. Julie K. Bracker & Larry D. Soderquist, *Arbitration in the Corporate Context*, 2003 Colum. Bus. L.Rev. 1, 5.

Parties can craft arbitrations to their specific needs. Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*. 35 Am. Bus. L.J. 105, 106 (1997). The parties can specify the scope of the arbitrator's authority and design the applicable procedural rules. Litigation follows the court's procedures and guidelines.

Because they are outside the judicial system, arbitration decisions are ad hoc, lacking any precedential value.[8] Mentschikoff, above at 856. "Judicial proceedings are governed by established rules on procedure, evidence and substance and by rules on the review of judgments by higher courts." Edmonson, at § 1:1. Arbitration tribunals, in "sharp contrast ... are not generally required to apply principles of substan-

[8] In contrast, in England, an arbitrator can refer cases to the courts for adjudication on substantive issues of law. Mentschikoff, *above* at 856–57.

tive law or court-established rules of evidence[,] ... arbitrators give no reason for their decision, and the award is generally not open to review by courts for any error in finding facts and applying law." *Id.*

The chief advantage of arbitration is the ability to resolve disputes without aspects often associated with the legal system: procedural delay and cost of discovery, the adversarial relationship of the parties, and publicity of the dispute. Soia Mentschioff, *Commercial Arbitration*, 61 Colum. L.Rev. 846, 849 (1961), Lisa Bernstein, *Understanding the Limits of Court–Connected ADR: A Critique of Federal Court–Annexed Arbitration Programs*, 141 U. Pa. L.Rev. 2169, 2240–44 (1993). As the product of private agreement between the parties, historically, arbitrations have been conducted outside the public view. See, e.g., Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 Tex. Int'l L.J. 121, 122 (1995); 1 Larry E. Edmonson, *above* at § 1:5.

2. *Arbitrators Verses Judges*

Because arbitrations offer a private system of remedies that parallels the courts, a judge and arbitrator share many of the same attributes. An arbitrator is "[a]n impartial person selected ... to hear the evidence and deliver a final and binding decision as a determination" of parties' dispute. *A Dictionary of Arbitration and its Terms* 27 (Katharine Seide ed., Oceana Publications, Inc.) (1970). An arbitrator takes on judge-like functions when presiding over an arbitration and may look and act much like a judge. For example, arbitrations may occur in courthouses, and arbitrators, especially those acting within court-annexed programs, may be paid by the government for their services. *See, e.g.*, W.D. Pa, ADR Policies & Procedures 5.3(C); 5.4(B); E.D. Pa. Local R. 53.2(2),

(5). Because of their "quasi-judicial functions," arbitrators appointed by federal courts are immune from civil suit in performance of their duties. *See* 28 U.S.C. § 655(c) (2006).

But an arbitrator and a judge perform very different functions. This distinction is more than just semantic. Arbitrators act as a "private extraordinary Judge[ ], chosen by the Parties to give Judgments between them." *Dictionary of Arbitration, above* at 27–28. They are empowered by the parties' consent and limited by the scope of that consent. They serve the parties.

Judges, on the other hand, are empowered by their appointment to a public office. They act according to prescribed rules of law and procedure. They serve the public. The Court of Appeals for the Fifth Circuit described the difference between the judge and arbitrator this way: "The trial judge ... bears a special responsibility in the public interest to resolve the ... dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the [law], not merely to afford private relief.... The arbitrator's role in the grievance-arbitration process, on the other hand, is to carry out the aims of the agreement that he has been commissioned to interpret and apply, and his role defines the scope of his authority." *Hutchings v. U.S. Industs., Inc.*, 428 F.2d 303, 311–12 (5th Cir.1970).

The defendants argue against this distinction between judge and arbitrator, but there is little evidence to support that argument. Arbitration has a long history, but is characterized as an alternative to court administered justice. Edmonson, *above* § 2. One early treatise on arbitration suggests that judg-

es have served as arbitrators *in pais*, that is, outside their official obligations. John Torrey Morse, *The Law of Arbitration and Award* 106 (1872); *Black's Law Dictionary* (9th ed.2009). The American Bar Association's Code of Judicial Conduct permits a judge to "act as an arbitrator or a mediator" when "expressly authorized by law," but does not provide any examples of judges acting as arbitrators. Arthur Garwin, et al., *Annotated Model Code of Judicial Conduct* 393–95 (2d ed., 2011).

Even with the proliferation of alternative dispute resolution in courts, judges in this country do not take on the role of arbitrators. States with court-annexed arbitration programs appoint third party neutrals such as attorneys and retired judges, and not sitting judges, to serve as arbitrators. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 29–34 (1996). The California Court of Appeal has held that the judge's public role and obligations prevent a sitting judge from acting as an arbitrator for even consenting parties. *Elliott & Ten Eyck P'ship v. City of Long Beach*, 57 Cal.App.4th 495, 67 Cal.Rptr.2d 140, 144 (1997); *Heenan v. Sobati*, 96 Cal.App.4th 995, 117 Cal.Rptr.2d 532, 535–36 (2002).

The Alternative Dispute Resolution Act, which creates court-annexed arbitration in the federal courts, seems to allow magistrate judges to serve as arbitrators. But neither the parties nor this Court could find evidence of that practice, and several courts have noted the inherent tension between the role of judge and arbitrator. 28 U.S.C. § 653(b); *DDI Seamless Cylinder Int'l Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1165–66 (7th Cir.1994) (noting

that the procedures of the federal courts do not allow judicial officers to act as both an arbitrator and judge); *Ovadiah v. New York Ass'n for New Ams.*, Nos. 95–10523, 96–330, 1997 WL 342411, at *10 (S.D.N.Y. June 23, 1997) (noting the "inherent difficulty in and serious potential problems with having judicial officers step out of their traditional adjudicatory functions").

Laws giving courts jurisdiction to enforce arbitration agreements likewise do not cast judges as arbitrators. *See* 9 U.S.C. 9 et seq.

A judge bears a special responsibility to serve the public interest. That obligation, and the public role of that job, is undermined when a judge acts as an arbitrator bound only by the parties' agreement.

3. *The Delaware Proceeding*

The Delaware proceeding, although bearing the label arbitration, is essentially a civil trial.

When the parties file a petition for an arbitration proceeding, the Chancellor, and not the parties, selects the judge who will hear the case. Rather than set rules for arbitration discovery, many of the same rules governing discovery in the Chancery Court apply to the arbitration.

A sitting judge presides over the proceeding. It is this fact which distinguishes the Delaware proceeding from court-annexed arbitrations where third parties sit as arbitrators. Just as in any other civil case, the judge conducts the proceedings in the Chancery courthouse with the assistance of Chancery Court staff. The judges are not compensated privately by the parties; the Chancery Court judge and staff are paid their usual salaries for arbitration work.

In a usual arbitration proceeding, if one party refuses to comply, the other can enforce compliance only by pursuing enforcement through a court. In Delaware, the judge and arbitrator are the same, so the judge's final award results in a judgment enforced by state power. The judge can also issue interim, interlocutory, or partial orders and awards. Del. Ch. Ct. R. 98(f)(2). These orders, and the final arbitration award and judgment, bind the parties much as any court orders would. They are nearly identical to a judge's orders in a civil trial, but with one important difference. Because the Delaware proceedings and awards are confidential, the judge does not publish his rulings or reasoning. The public does not know the factual findings the judge has made or what legal rules the judge is, or should be, applying to these arbitrations.

In the Delaware proceeding, the parties submit their dispute to a sitting judge acting pursuant to state authority, paid by the state, and using state personnel and facilities; the judge finds facts, applies the relevant law, determines the obligations of the parties; and the judge then issues an enforceable order. This procedure is sufficiently like a civil trial that *Publicker Industries* governs.

The defendants argue that the Delaware proceeding is different from a civil trial. In the Delaware proceeding, the parties consent to participate and agree to procedures designed to facilitate quicker discovery and faster resolution of the dispute. With the consent of the judge, the parties can also amend any discovery procedures. In addition, the process encourages settlement and non-adversarial resolution at nearly every stage. By submitting to the Delaware proceeding, the parties agree to limit their ap-

peal rights. The judge's final award can only be challenged if the award is procured by corruption, fraud, undue means, partiality, misconduct, or where the arbitrator exceeded his powers. The decision cannot be reviewed for errors of fact or law.

These features do not transform the Delaware proceeding into an arbitration nor distinguish it from a civil trial. In fact, parties in civil litigation can agree to similar procedures to expedite discovery and reduce costs. For example, parties can agree to limit discovery, to a trial on stipulated facts or on summary judgment rather than oral testimony, and to waive or limit the right to appeal a judicial determination. *DDI Seamless*, 14 F.3d at 1166. The parties' consent cannot alter the judge's obligation in his public role as a judicial officer. Finally, courts across the country encourage parties to pursue settlement and alternative dispute resolution.[9] Plapinger & Stienstra, *above* at 4.

B. *The Experience and Logic Test*

Because the Court finds that the Delaware procedure is a civil judicial proceeding, it is not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*.

The public benefits of openness were well described by the Court of Appeals, and this Court does

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[9] Mediation and settlement negotiation are not at issue in this case. In a mediation, as in settlement negotiations, the parties come to a mutually agreed upon resolution of their dispute. The mediator's recommendation is not binding. Edmonson, *above* § 1:3. In arbitration, by contrast, a third party issues a binding ruling about each parties' rights and obligations.

not dwell on them except to note that they are clearly applicable to the Delaware proceeding. These benefits accrue to civil disputes among corporate citizens as well as to those between individuals, both of whom can participate in the Delaware procedure. Diverse business disputes may be submitted to the Chancery Court, and open proceedings can serve to educate the public about important legal and social issues. Public scrutiny discourages witness perjury and promotes confidence in the integrity of the courts. Public confidence that court proceedings are fair is protected when the public can access those proceedings and understand the reasoning supporting judicial findings and rulings.

The public benefits of openness are not outweighed by the defendants' speculation that such openness will drive parties to use alternative nonpublic fora to resolve their disputes. Even if the procedure fell into disuse, the judiciary as a whole is strengthened by the public knowledge that its courthouses are open and judicial officers are not adjudicating in secret.

IV. *Conclusion*

The Court concludes that the right of access applies to the Delaware proceeding created by section 349 of the Delaware Code. The portions of that law and Chancery Court Rules 96, 97, and 98, which make the proceeding confidential, violate that right.

An appropriate order shall issue.

APPENDIX C

Del. Code Ann. tit. 10, § 349

(a) The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute. For a dispute to be eligible for arbitration under this section, the eligibility criteria set forth in § 347(a) and (b) of this title must be satisfied, except that the parties must have consented to arbitration rather than mediation.

(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. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery.

(c) Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding under this section shall be filed with the Supreme Court of this State, which shall exercise its authority in conformity with the Federal Arbitration Act [68 P.L. 401; 68 Cong. Ch. 213, 43 Stat. 883, codified as 9 U.S.C. §§ 1-16, 201-208, and 301-307], and such general principles of law and equity as are not inconsistent with that Act.

APPENDIX D

Del. Ch. R. 96. Scope of Rules

(a) These rules shall govern the procedure in arbitration proceedings for business disputes pursuant to 10 Del. C. § 349.

(b) In the case of business disputes involving solely a claim for monetary damages, a matter will be eligible for arbitration only if the amount in controversy exceeds one million dollars.

(c) The parties with the consent of the Arbitrator may change any of these arbitration rules by agreement and/or adopt additional arbitration rules. Except to the extent inconsistent with these rules, or as modified by the Arbitrator or the parties, Court of Chancery Rules 26 through 37 shall apply to the Arbitration proceeding.

(d)(1) Definitions. "Arbitration" means the voluntary submission of a dispute to an Arbitrator for final and binding determination and includes all contacts between the Arbitrator and any party or parties, until such time as a final decision is rendered or the parties discharge the Arbitrator.

(2) "Arbitrator" means a judge or master sitting permanently in the Court. Absent agreement of the parties, the Arbitrator shall not have served as the Mediator in a mediation of the dispute under Court of Chancery Rules.

(3) "Preliminary conference" means a telephonic conference with the parties and/or their attorneys or

other representatives (i) to obtain additional information about the nature of the dispute and the anticipated length of hearing and scheduling, (ii) to obtain conflicts statements from the parties, and (iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

(4) "Preliminary hearing" means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation: (i) service of statements of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities upon which the parties rely, (ii) stipulations of fact, (iii) the scope of discovery, (iv) exchanging and premarking of exhibits for the hearing, (v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate, (vi) whether, and to what extent, any sworn statements and/or depositions may be introduced, (vii) the length of hearing, (viii) whether a stenographic or other official record of the proceedings shall be maintained, (ix) the possibility of mediation or other non-adjudicative methods of dispute resolution, and (x) the procedure for the issuance of subpoenas.

(5) "Scheduling order" means the order of the Arbitrator setting forth the pre-hearing activities and the hearing procedures that will govern the arbitration.

(6) "Arbitration hearing" means the proceeding, which may take place over a number of days, pursu-

ant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case.

(7) "Consent to Arbitrate," means a written or oral agreement to engage in arbitration in the Court of Chancery and shall constitute consent to these rules. Provided that the parties and the amount in controversy meet the eligibility requirements in 10 Del. C. § 347, which apply to the arbitration of business disputes under 10 Del. C. § 349, a consent to arbitrate is acceptable if it contains the following language: "The parties agree that any dispute arising under this agreement shall be arbitrated in the Court of Chancery of the State of Delaware, pursuant to 10 Del. C. § 349."

Del. Ch. R. 97. Commence of Arbitration

(a)(1) Petition. Arbitration is commenced by submitting to the Register in Chancery a petition for arbitration (hereinafter a "petition") and the filing fee specified by the Register in Chancery. The petition must be signed by Delaware counsel, as defined in Rule 170(b). Sufficient copies shall be submitted so that one copy is available for delivery to each party as hereafter provided, unless the Court directs otherwise.

(2) The petition shall be sent by the Register in Chancery, via next business-day delivery, to either a person specified in the applicable agreement between the parties to receive notice of the petition or, absent such specification, to each party's principal place of business or residence. The petitioning party shall provide the Register in Chancery with addresses of each party.

(3) The petition shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the claims and the remedy sought. The petition must also contain a statement that all parties have consented to arbitration by agreement or stipulation, that at least one party is a business entity, that at least one party is a business entity formed or organized under the laws of Delaware or having its principal place of business in Delaware, and that no party is a consumer with respect to the dispute. In the case of business disputes involving solely a claim for monetary damages, the petition must contain a statement of the amount in controversy.

(4) Confidentiality. The Register in Chancery will not include the petition as part of the public docketing system. The petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its Rules, and to the extent applicable, the Rules of this Court.

(b) Appointment of the Arbitrator. Upon receipt of a petition, the Chancellor will appoint an Arbitrator.

(c) Preliminary Conference. The Arbitrator will contact the parties' counsel to set the date and time of the preliminary conference, which shall occur within 10 days after the commencement of the arbitration, unless the parties and the Arbitrator agree, pursuant to Rule 96(c), to extend that time.

(d) Preliminary Hearing. The preliminary hearing shall take place as soon as practicable after the preliminary conference. The Arbitrator shall issue a scheduling order promptly after the preliminary hearing.

(e) Date, Time, and Place of Arbitration. The Arbitrator will set the date, time, and place of the arbitration hearing at the preliminary hearing. The arbitration hearing generally will occur no later than 90 days following receipt of the petition.

(f) Exchange of Information. There shall be prehearing exchange of information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the approval of the Arbitrator, to forego prehearing exchange of information. The parties shall, in the first instance, attempt to agree on prehearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the preliminary hearing or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of in-

formation to the Arbitrator. If the parties are unable to agree, they shall present the dispute to the Arbitrator who shall direct such prehearing exchange of information as he/she deems necessary and appropriate.

Del. Ch. R. 98. Arbitration Hearing

(a) Participation. At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the arbitration hearing. Delaware counsel, as defined in Rule 170(b), shall also attend the arbitration hearing on behalf of each party.

(b) Confidentiality. Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangi-

ble evidence otherwise subject to discovery, which were not prepared specifically for use in the arbitration hearing.

(c) Civil Immunity. Arbitrators shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

(d) Mediation Option. The parties may agree at any stage of the arbitration process to submit the dispute to the Court for mediation. The judge or master assigned to mediate the dispute may not be the Arbitrator unless the parties agree.

(e) Settlement Option. The parties may agree, at any stage of the arbitration process, to seek the assistance of the Arbitrator in reaching settlement with regard to the issues identified in the petition prior to a final decision from the Arbitrator. Any settlement agreement shall be reduced to writing and signed by the parties and the Arbitrator. The agreement shall set forth the terms of the resolution of the issues and the future responsibility of each party.

(f)(1) Award. The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.

(2) In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.

(3) Upon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.

(4) The Arbitrator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

(g) Costs for Arbitration. Costs for filing and per-day (or partial day) fees shall be assessed in accordance with a schedule to be maintained by the Register in Chancery.