No. 12-3859

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of Delaware
Honorable Mary A. McLaughlin, U.S. District Judge
Case No. 1:11-cv-01015

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PRELIMINARY STATEMENT

Recognizing businesses' increased use of arbitration, and seeking to maintain "Delaware's pre-eminence in offering cost-effective options for resolving disputes," H.R. 49, 145th Gen. Assemb., Reg. Sess. (Del. 2009) (Synopsis), Delaware in 2009 established a government-sponsored arbitration program, designating Court of Chancery judges to serve as arbitrators. Like all commercial arbitration proceedings, the Delaware program requires consent of the parties; establishes flexible procedures designed to reduce cost and enable expeditious determinations; provides for limited judicial review of the arbitrator's award; and closes to the public the arbitration hearing, but not judicial review of the arbitration award.

The district court held unconstitutional the state statute and court rules establishing the arbitration program, asserting that a First Amendment right of public access applies to the proceeding before the arbitrator. An access right may be recognized only when "there has been a tradition of accessibility" to the particular type of proceeding, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press II*"), and

"access plays a significant positive role in the functioning of the particular process in question," *id.* at 8.

No public access right can be justified under this standard, because there is no historical tradition of public access to commercial arbitration proceedings; to the contrary, the longstanding tradition is that such proceedings are confidential. That is dispositive, because a historical tradition is an essential prerequisite to the First Amendment right.

The second part of the test points to the same conclusion—far from playing a positive role, a public access requirement would render the Delaware procedure a nullity. Because privacy is a critical reason why businesses choose to arbitrate, they will be forced to select another arbitral forum in which confidentiality is available.

The district court did not apply the experience and logic test, but instead concluded that Delaware's commercial arbitration proceeding is "sufficiently like a civil trial" and therefore subject to the access right applicable to civil trials. *Del. Coal. for Open Gov't v. Strine*, No. 1:11-cv-01015, 2012 U.S. Dist. LEXIS 123980 (D. Del. Aug. 30, 2012); JA8. But there is no precedent for the district court's substitution of the

"sufficiently like" standard for the experience and logic test. And the single factor relied on by the district court—that "[t]he parties submit their dispute to a sitting judge," JA30—does not transform an arbitration proceeding into a trial.

State and federal judges are authorized to serve as arbitrators, and have done so. Moreover, States have broad authority to allocate non-judicial responsibilities to state judges. Since Delaware could establish a "Delaware Arbitration Authority" and hire state employees to act as arbitrators, nothing prevents Delaware from assigning that responsibility to Court of Chancery judges, and thereby providing businesses incorporated in Delaware with access to arbitrators expert in business law.

"[T]he presumption of validity attaching to state legislative and constitutional provisions weighs heavy. . . . [It] require[s] that the state's determination be upheld unless it is found to transgress a clear constitutional prohibition." *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 475 (3d Cir. 1986). Delaware's commercial arbitration procedure transgresses no such limitation and should be upheld by this Court.

JURISDICTION

This is an appeal from the final judgment in favor of appellee entered by the district court on August 30, 2012, enjoining the operation of Del. Code Ann. tit. 10, § 349 (2012) and Court of Chancery Rules 96, 97, and 98 on the ground that they violate the First Amendment. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Appellants filed a timely Notice of Appeal on October 1, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

The issue presented is whether the Delaware statute and Court of Chancery rules allowing Court of Chancery judges to act as arbitrators violate the First Amendment because arbitration proceedings conducted pursuant to the statute and rules are not open to the public.

RELATED CASES AND PROCEEDINGS

There are no related proceedings.

STATEMENT OF FACTS

1. The Global Growth Of Commercial Arbitration And Delaware's Response. Businesses' use of arbitration to resolve significant commercial disputes has increased dramatically. For example, 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] In the United States, the American Arbitration Association's (AAA) International Center for Dispute Resolution saw its caseload increase by almost 330 percent between 1994 and 2004.[3] Similar growth has characterized arbitral institutions around the world.[4]

A number of factors have driven this trend:

- the increased cost, complexity, and delay associated with litigation, especially litigation in the United States—factors

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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*, *available at* 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, *available at* http://www.lcia.org/LCIA/Casework_Report.aspx.

[3] 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).

[4] *Id.* at 527 & tbl. 1; *see also* Nat'l Arbitration Forum, *Business-to-Business Mediation/Arbitration vs. Litigation: What Courts, Statistics & Public Perceptions Show About How Commercial Mediation and Commercial Arbitration Compare to the Litigation System* 1 (2005), *available at* http://www.adrforum.com/users/naf/resources/GeneralCommercialWP.pdf.

that have been compounded recently by the reduction of government resources allocated to courts as a result of budget constraints;[5]

- the growth in cross-border disputes, with at least one party therefore unfamiliar with—and 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;[6]
- the importance of resolving disputes expeditiously in order to maintain ongoing business relationships and, more generally, because of the increased pace at which business

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[5] The median time from filing to disposition in federal court civil cases is almost two years. *See Judicial Business of the United States Courts – 2011 Annual Report of the Director*, at 156 & tbl. C-5 (2012), *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/C05Dec11.pdf. According to the most recent data collected by the Bureau of Justice Statistics on this subject, the average disposition time in state court from filing is approximately 27 months in jury trials and 21 months in bench trials. Thomas H. Cohen & Lynn Langton, Bureau of Justice Statistics, *Special Report, Civil Bench and Jury Trials in State Courts in 2005*, at 8 & tbl. 9 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.

[6] Joachim G. Frick, *Arbitration and Complex International Contracts* 7 (2001).

decisions must be made and issues resolved in today's interconnected "always on" environment;[7]

- the desire for decisionmakers with deep expertise in business law, in particular contractual and other transactional matters and technology issues;[8] and
- the private and more conciliatory atmosphere of arbitration, which preserves ongoing business relations and keeps joint projects afloat when disputes arise midstream.[9]

Other nations have recognized this phenomenon and established government-sponsored (and government-funded) arbitral fora, providing companies domiciled within their borders with access to expert arbitrators, including sitting judges with expertise in business law issues.[10]

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[7] *See* Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 Am. Rev. Int'l Arb. 243, 271-73 (2003).

[8] *Id.*

[9] *Id.*

[10] *See* N.Y. State Bar Ass'n, Task Force on N.Y. Law in Int'l Matters, *Final Report* 4 (June 25, 2011) ("[J]jurisdictions 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

Delaware has long sought to provide a legal environment for businesses that is up-to-date, predictable, and respected throughout the world.[11] As a result, "900,000 business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500."[12]

In view of the growing importance to Delaware businesses of easily-accessible, dependable, and expert arbitrators—and the steps taken by other nations to provide such services—the Delaware General Assembly in 2009 enacted a law "intended to preserve Delaware's pre-

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three jurisdictions established specialized courts to handle international arbitration matters—Australia, 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 today's world of global commerce."); *id.* at 38, *available at* http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentFileID=53613.

[11] *See* Roberta Romano, *The Genius of American Corporate Law* 38-39 (1993) ("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").

[12] *See* Delaware Division of Corporations, http://corp.delaware.gov/.

eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." Del. H.R. 49 syn.

2. The Delaware Statute And Court Rules. The statute, 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.

This measure provides Delaware entities with a convenient and expert forum for the arbitration of disputes, ensuring that Delaware businesses can obtain both the practical benefits of arbitration and direct access to members of its respected Court of Chancery:

> Many federal and international statutes specifically identify instances when tribunals will stay or defer to the parties' decision to have their dispute resolved by way of arbitration. These statutes often deal with issues, such as intellectual property disputes, that are of importance to Delaware entities. Thus, this bill, if enacted, will permit Delaware entities to have disputes of this kind arbitrated by a member of the Court of Chancery by voluntary agreement.

Del. H.R. 49, syn.

Consistent with the purpose of providing an arbitration forum for Delaware businesses, disputes under the statute generally involve "business-to-business disputes about major contracts, joint ventures, or technology. Specifically excluded are cases involving consumers." *Id.* 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);[13] and
- For disputes involving solely monetary damages, the amount in controversy must be at least $1,000,000.

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

Del. Code Ann. tit. 10, § 347(a). Section 347(b) authorizes the Court of Chancery to issue rules further defining eligible disputes.

Consistent with the tradition of privacy in arbitration, the General Assembly provided for confidentiality in the proceedings until a party seeks judicial review of the arbitrator's determination:

> the bill maintains proceedings in the Court of Chancery as confidential but makes clear that the record will be filed with the Supreme Court, in accordance with its Rules and the Rules of the Court of Chancery in the event of appeal.

Del. H.R. 49, syn. The statute specifies that 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 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." § 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 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."[14] *Id.* 97(f).

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

[14] Rule 96(c) provides that Court of Chancery Rules 26 through 37 will apply to the arbitration proceeding unless "modified by the Arbitrator or the parties," or inconsistent with Rules 96, 97, and 98. Rules 26 through 37 govern depositions and discovery procedure in the Court of Chancery.

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. *Id.*

STATEMENT OF THE CASE

On October 25, 2012, plaintiff-appellee Delaware Coalition for Open Government, filed a complaint asserting a cause of action under 42 U.S.C. § 1983 and naming as defendants the State of Delaware; the Delaware Court of Chancery and the Court's five members in their official capacities, Chancellor Leo E. Strine, Jr.; Vice Chancellor John W. Noble; Vice Chancellor Donald F. Parsons, Jr.; Vice Chancellor J. Travis Laster; and Vice Chancellor Sam Glasscock, III. JA43-44.

The complaint alleged 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 in the Court Rules therefore violate the Constitution. JA46-47. Plaintiff sought declaratory relief and a permanent injunction barring the appellants from conducting further closed arbitration proceedings under the statute. JA47. All parties moved for judgment on the pleadings.

On August 30, 2012, the district court granted judgment in favor of the Coalition.[15] The court held 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." JA9.

The district court acknowledged that "the rule in the Third Circuit is to apply the 'logic and experience' test" to determine "if there is a public right of access to a particular proceeding or record." JA21. And the court recognized that arbitration proceedings have traditionally been confidential: "[a]s the product of private agreement between the

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

parties, historically, arbitrations have been conducted outside the public view." JA25.

But instead of undertaking the experience and logic inquiries, the district court addressed what it termed a "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* [*Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984)] governs?" JA22. (*Publicker* applied the experience and logic test to hold that a right of access extends to civil trials.)

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,'" JA23;
- "In litigation, a court can compel an unwilling party. In arbitration, the parties agree to participate in a specified forum," JA24;

- "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," *id.*;
- "Because they are outside the judicial system, arbitration decisions are ad hoc, lacking any precedential value," *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," JA25.

The court also recognized that "[b]ecause arbitrations offer a private system of remedies that parallels the courts, a judge and arbitrator share many of the same attributes"—both preside over proceedings, hear evidence, and render decisions. JA25. Moreover, "arbitrations may occur in courthouses, and arbitrators . . . may be paid by the government for their services." JA25-26.

The court did not dispute that the Delaware proceeding has all of the characteristics of arbitration:

> 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 appeal 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.

JA30-31.

The linchpin of the district court's holding that the Delaware proceeding is "sufficiently like a civil trial such that *Publicker Industries* governs," JA22, was its view that "judges in this country do not take on the role of arbitrators," JA27. The court drew a sharp distinction between arbitrators and judges, stating, "an arbitrator and a judge perform very different functions." JA26. Arbitrators "are empowered by the parties' consent and limited by the scope of that consent. They serve the parties." *Id.* "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." *Id.* The court noted, "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." JA29.

Thus, in holding the statute unconstitutional, the court pointed exclusively to the fact that the arbitrator is a sitting judge:

> [T]he 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.

JA30; *see also* JA29 ("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 requires Delaware's commercial arbitration proceeding to be treated as the equivalent of a civil trial for purposes of the First Amendment, the district court found it "not necessary to reiterate the thorough analysis of the experience and logic test performed by the Court of Appeals in *Publicker Industries*." JA32. It concluded that a right of access applies to arbitrations conducted under Section 349 and Rules 96, 97, and 98, and that the confidentiality requirement for those proceedings violates the First Amendment. JA33.

The court entered an order on August 30, 2012, declaring the statute and court rules "unconstitutional as being in violation of the First Amendment" and enjoining all "further proceedings pursuant to that statute and those rules." JA4. On September 10, 2012, the court awarded plaintiff costs and fees. JA6. Appellants appealed both orders.

SUMMARY OF ARGUMENT

This Court and the Supreme Court have held repeatedly that a First Amendment right of public access to judicial proceedings may be recognized only if the claimed right is supported by both "experience"—a tradition of public access to the particular type of proceeding—and "logic"—that the tradition of public access aids in the functioning of the particular proceeding.

The district court erred by failing to undertake this inquiry and instead finding a First Amendment right based on its conclusion that Delaware's commercial arbitration proceeding is "sufficiently like a civil trial." No decision of this Court or the Supreme Court authorizes this circumvention of the experience and logic standard.

Moreover, the district court's assessment is incorrect even under its own impermissible approach. Arbitration differs significantly from a

civil trial: the authority of an arbitration proceeding rests on the consent of the parties, while civil litigation is an extension of government power; the hallmark of arbitration is procedural flexibility and efficiency, while litigation is governed by procedures specified in laws and court rules; and arbitrators' determinations are subject to much more limited judicial review than trial court judgments.

The district court acknowledged these distinctions, but concluded that one factor was sufficient to overcome them—that a sitting judge serves as arbitrator under the Delaware statute. However, state and federal judges historically have served as arbitrators, and continue to do so today. And the district court's view that designating a judge as the decisionmaker necessarily makes a proceeding "judicial" is inconsistent with the settled principle that States may endow judges with non-judicial responsibilities, as many States have done. Delaware's decision to authorize its judges to serve as arbitrators, rather than hiring a separate corps of state arbitrators, does not transform the commercial arbitration proceeding into a judicial trial.

A public access right cannot be justified under either prong of the experience and logic test. Proceedings before an arbitrator traditionally

have been confidential—there is no history of public access. Because "the role of history in the access determination is crucial," *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002) (citation omitted), that fact requires rejection of the Coalition's claim.

Indeed, arbitration proceedings have no history of openness because such access is inconsistent with the fundamental rationale of arbitration; a public arbitration procedure would quickly fall into disuse. The "logic" inquiry thus also weighs strongly against a public access requirement.

Of course, when an arbitrator's award is challenged in court, the public has historically had access to those proceedings. The Delaware statute provides for public access at this point.

The district court's invalidation of Delaware's statute on First Amendment grounds will effectively end Delaware's innovative arbitration program and will create significant doubt about the constitutionality of numerous arbitration programs conducted by judges in state and federal courthouses across the country. This Court should reject the district court's erroneous analysis, apply the experience and

logic test, and hold that Delaware's statute and rules comply with the First Amendment.

STANDARD OF REVIEW

This Court "exercise[s] *de novo* review over constitutional claims or questions of law and the application of law to facts." *Garcia v. Att'y Gen.*, 665 F.3d 496, 502 (3d Cir. 2011).

ARGUMENT

I. THE DISTRICT COURT ERRED BY FAILING TO APPLY THE "EXPERIENCE AND LOGIC" TEST.

The First Amendment embodies a right of public access to certain judicial proceedings. When "there has been a tradition of accessibility" to the particular type of proceeding, *Press II*, 478 U.S. at 10, and "access plays a significant positive role in the functioning of the particular process in question," *id.* at 8, a qualified First Amendment right of public access attaches that may be overridden only by a compelling government interest, *id.* at 9; *accord Publicker Indus.*, 733 F.2d at 1068.

Both parts of this test must be satisfied—in particular, this Court has held that a historical tradition of public access is an essential prerequisite to recognition of a First Amendment access right. *See N. Jersey Media Grp.*, 308 F.3d at 213 ("'[T]he role of history in the access

determination' is 'crucial.'" (quoting *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (en banc))).

The district court did not apply the "experience and logic" standard in finding a right of public access to the commercial arbitration proceedings conducted under the Delaware statute. It instead rested its holding on what it called a "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 [civil] trial' such that *Publicker Industries* governs?" JA22. The district court determined that arbitration under the Delaware statute constitutes "a civil judicial proceeding," and that the First Amendment access right accordingly applies.

The district court's holding cannot stand for three separate reasons. *First*, its novel standard has no basis in precedent: the Supreme Court and this Court have consistently resolved First Amendment access claims by applying the experience and logic test to the particular type of proceeding at issue and have never substituted a "similarity" analysis for that two-part inquiry. *Second*, the district

court's analysis is wrong even on its own terms: arbitration proceedings under the Delaware statute differ fundamentally from civil trials. *Third*, the district court's decision rests on the incorrect assumption that state court judges cannot be vested with the power to arbitrate disputes.

A. The Supreme Court And This Court Consistently Apply The Experience And Logic Test To First Amendment Access Claims.

The Supreme Court first addressed the First Amendment right of access in the context of a criminal trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). It subsequently has found the right applicable to the pre-trial phases of jury selection, *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press I*"), and to preliminary hearings, *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam); *Press II*, 478 U.S. at 10.

Each time the Supreme Court has addressed a claim that the First Amendment confers a right of access to a particular type of proceeding, it has resolved the question by applying the experience and logic test. Thus, in *Richmond Newspapers*, the Court began its analysis with an exhaustive review of the history of open criminal trials, finding

an "unbroken, uncontradicted history" of public access to criminal trials. 448 U.S. at 573; *see id.* at 564-69 (reviewing the historical record).

The Court conducted the same analysis in subsequent cases, finding in *Press I*, 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 shown." 464 U.S. at 505; *see id.* at 505-08 (tracing the history of access from pre-Norman England up to the present). In *Press II*, the Court determined that "the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court." 478 U.S. at 10; *see id.* at 10 n.3 (canvassing state practices).

The Supreme Court in each case also found that public access to the particular criminal proceeding was "essential to the proper functioning of the criminal justice system." *Press II*, 478 U.S. at 12; *see also Richmond Newspapers,* 448 U.S. at 569 ("[Openness] is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial."). In *Press I*, the Court determined that public jury selection "vindicate[s] the concerns of the victims and the community in knowing that offenders are being brought

to account for their criminal conduct by jurors fairly and openly selected." 464 U.S. at 509. In *Press II*, the Court found that access to preliminary hearings is just as essential to the functioning of the criminal justice system as access to the trial itself because preliminary hearings are "often the final and most important step in the criminal proceeding" and "'the sole occasion for public observation of the criminal justice system.'" 478 U.S. at 12 (citation omitted).

This Court has followed the same approach—in each case examining the historical record and assessing the effect of access on the functioning of the proceeding. *See, e.g.*, *Publicker Indus.*, 733 F.2d at 1070 (surveying historical record and benefits of openness in civil trials to find that "[a] presumption of openness inheres in civil trials as in criminal trials," and that "the civil trial, like the criminal trial, 'plays a particularly significant role in the functioning of the judicial process and the government as a whole'"); *see also Whiteland Woods L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180-81 (3d Cir. 1999) (concluding there was a history of access to Commission meetings under

Pennsylvania law and that access played a significant positive role in the functioning of the meetings).[16]

And this Court has declined to find an access right where both prongs of the experience and logic test were not satisfied. *See Capital Cities Media*, 797 F.2d at 1175 ("assum[ing] without deciding," that the logic component is met, the case must be dismissed, "because [plaintiff] has failed to allege that a tradition of public access exists" with respect to state environmental agency records); *First Amendment Coal.*, 784 F.2d at 472 (judicial disciplinary boards "do not have a long history of openness"); *id.* at 475 (openness would not play a positive role in judicial disciplinary proceedings in part because "the effectiveness of judicial disciplinary boards depends to a large extent on confidentiality"); *N. Jersey Media Grp.,* 308 F.3d at 212 ("We ultimately

[16] In *United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982), this Court found a right of access to a pretrial criminal hearing without proof of a historical tradition of public access. But in its subsequent decision in *North Jersey Media Group*, this Court held that the Supreme Court's 1986 decision in *Press II* precluded reliance on that aspect of *Criden*: "We are now obligated to apply [the *Richmond Newspapers* test, adopted by a majority of the Supreme Court in *Press II*], and we have recognized that 'the role of history in the access determination' is 'crucial.'" 308 F.3d at 213 (quoting *Capital Cities Media*, 797 F.2d at 1174); *see also id.* at 214 (limiting *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), "to the criminal context, or at least to those areas with 'overwhelming historical support for access'").

do not believe that deportation hearings boast a tradition of openness sufficient to satisfy *Richmond Newspapers*."); *id.* at 217 (finding "that upon factoring [various concerns] into the logic equation," including the threat to national security, "it is doubtful that openness promotes the public good in this context").

The Supreme Court and this Court have specified that the experience and logic test must be focused on "the *particular proceeding* in question." *Press II*, 478 U.S. at 9 (emphasis added); *see also El Vocero*, 508 U.S. at 150 ("'the experience in that *type* or *kind* of hearing'").

Thus, in determining whether to recognize a First Amendment right of access to judicial disciplinary proceedings, this Court held that the access determination should "be guided by the unique history and function of the Judicial Review Board"—not by some generalized category of proceedings in which judicial disciplinary proceedings could be included. *First Amend. Coal.*, 784 F.2d at 472; *see also Capital Cities Media*, 797 F.2d at 1175 ("whether the *particular type of government proceeding* ha[s] historically been open in our free society") (emphasis added).

The district court's contrary approach—looking instead to whether Delaware's commercial arbitration procedure is "sufficiently like a trial"—undermines the experience and logic test by substituting a vague and malleable "sufficiently like" standard. Because no clear criteria govern a "sufficiently like" test, it introduces tremendous subjectivity and uncertainty into the First Amendment inquiry.

Indeed, if the question were simply whether the proceeding at issue has some similarities to proceedings as to which a First Amendment access right has been recognized, virtually all adjudicative proceedings would trigger the right because there are always *some* similarities. But the Court's cases recognize that different proceedings have different histories, and that those histories matter. The district court's approach prevents consideration of those different historical traditions.

The district court's own analysis demonstrates the problem. Its assertion that "the English and American legal systems have historically presumed that civil proceedings are open to the public" is incorrect. Various subcategories of civil trials, such as family law proceedings, have *not* been open historically. *See generally* Emily

Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 Yale L. & Pol'y Rev. 155 (1999). But the district court's approach would allow categorization of any of them as "sufficiently like" a civil trial, without consideration of that history, as long as a judge is presiding.

By short-circuiting the "experience and logic" inquiry—or applying that inquiry at a high level of generality—the district court's approach inevitably will lead to erroneous results, which is precisely what occurred here. *See infra*, at 55-59 (discussing long tradition of confidential arbitration proceedings). And that error taints the "logic" analysis as well as the "experience" inquiry, because the analysis regarding the impact of public access on the proper functioning of the proceeding is not "independent of, and unrelated to, historical antecedents." *First Amend. Coal.*, 784 F.2d at 473.

The district court cited a single case—*El Vocero*—in support of its aberrant approach. But in that case the Supreme Court did *not* rest its decision on a determination that the proceeding at issue—preliminary hearings in criminal cases under Puerto Rican law—were "sufficiently like" a criminal trial. In a per curiam decision, the Court relied on its

own analysis of *preliminary hearings* in *Press II*, holding that the distinctions drawn by the Puerto Rico court between the California preliminary hearings at issue in *Press II* and Puerto Rico's preliminary hearings were "insubstantial," that the Puerto Rico rule's drafters had "relied on the California [preliminary hearing] law," and that "[a]t best" the Puerto Rico rule was "a subspecies of the [California] provision this Court found to be infirm seven years ago." *El Vocero*, 508 U.S. at 149-50.

The "sufficiently like a trial" language cited by the district court occurs in a separate passage of the opinion observing that the Puerto Rico rule has each of the characteristics on which the Court in *Press II* relied in applying the "logic" test, *see El Vocero*, 508 U.S. 149-50 (citing *Press II*, 478 U.S. at 12-13), thereby making clear that the only relevance of such comparisons is in determining the effect of public access on the proper functioning of the proceeding. *See also Press II*, 478 U.S. at 9, 11-12 (basing "logic" determination for preliminary hearings on *Richmond Newspaper*'s analysis regarding criminal trials).

Indeed, notwithstanding its conclusion that the Puerto Rico rule involved the same type of hearing as the California law, the Supreme

Court specifically reaffirmed the applicability of its historical analysis in *Press II*. Addressing the lower court's "reliance on Puerto Rican tradition," the Supreme Court stated that the court had erred by focusing solely on "the particular practice of any one jurisdiction" rather than on "'the experience in that *type* or *kind* of hearing throughout the United States' . . . . The established and widespread tradition of open preliminary hearings among the States was canvassed in *Press-Enterprise* and is controlling here." *El Vocero*, 508 U.S. at 150-51.

El Vocero thus provides no support for the district court's broad-brush approach of creating a general category of "civil proceeding" and concluding that a First Amendment access right should apply to every type of hearing meeting that vague standard. The differences between civil trials and commercial arbitrations under the Delaware statute are not "insubstantial,"[17] nor are arbitrations merely a "subspecies" of civil

[17] What the court called "insubstantial" differences in *El Vocero* involved minor procedural rules—"the Commonwealth's burden of proof, the rules governing the parties' access to, and presentation of, certain evidence, the fact that an indictment follows, rather than precedes, the preliminary hearing, and the ability of the prosecution to present the matter *de novo* before a higher court in cases where the magistrate finds no probable cause." 508 U.S. 149 & n.2. The crucial fact was that preliminary hearings under Puerto Rican law paralleled California's preliminary hearings in every critical respect. *Id.* at 149-

trials; and in any event the Supreme Court in *El Vocero* specifically affirmed the applicability of the historical determination in *Press II*, which the district court disregarded here.

In sum, the district court's novel "sufficiently similar proceedings" test is inconsistent with precedent and will inevitably lead to First Amendment determinations that are contrary to actual historical experience, in direct contravention of the holdings of the Supreme Court and this Court.

B. Statutory Commercial Arbitration in the Court of Chancery Differs Fundamentally From A Civil Trial.

The district court's "threshold" approach fails for the additional reason that its conclusion that arbitration under the Delaware statute "is a civil trial" is unsupportable. JA22. *First*, while a judge presiding over a civil trial derives his or her authority from the coercive power of the State, arbitrators—including arbitrators under the Delaware statute—derive their authority to resolve a particular dispute from the consent of the parties who have submitted that dispute to arbitration. *Second*, the Delaware arbitration has key structural and procedural

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50. Here, by contrast, there are significant differences between the Delaware commercial arbitration procedure and civil trials, as the district court itself acknowledged. *See infra*, at 38-40.

differences from a civil trial. *Third*, appellate review of the arbitrator's award is much more limited than appellate review of a trial court judgment.

1. Arbitration Proceedings Under The Delaware Statute Are A Product Of The Parties' Consent, While Judicial Proceedings Rest On Coercive Government Power.

"[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010); *see also AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."); *Charles Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 565 (1925) ("[I]n its usual acceptation the term [arbitration] indicates a proceeding based entirely on the consent of the parties.").

The arbitrator "'is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept'" but is rather "'part of a system of self-government,'" serving the parties at

"'their pleasure only, to administer the rule of law established by their collective agreement.'" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.16 (1974) (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)); *see also Stolt-Nielsen*, 130 S. Ct. at 1773 (noting "'basic precept that arbitration is a matter of consent, not coercion'") (citation omitted).

This critical distinction—that arbitration rests on consent while judicial processes are imposed through government power—is the reason why courts in a variety of contexts have expressly distinguished arbitration from judicial proceedings. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985) ("arbitration is not a judicial proceeding"); *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984) ("Arbitration is not a 'judicial proceeding.'"); *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) ("Arbitration is a creature of contract . . . rather than the judicial process.") (internal quotation mark omitted); *Harrison v. Nissan Motor Corp.,* 111 F.3d 343, 350 (3d Cir. 1997) ("Arbitration is creature of contract, a device of the parties rather than the judicial process.") (internal quotation mark omitted).

As the district court itself recognized, "[a]ccess to [Delaware's] arbitration procedure requires the parties' consent." JA9; *see also* Del. Code Ann. tit. 10, §§ 347(a)(1), 349(a) (arbitration available only if "[t]he parties have consented to the [arbitration] by the Court of Chancery by agreement or by stipulation"); Del Ch. R. 96(d)(7). The arbitrator has no power to force an unwilling party to arbitrate a dispute. That is in sharp contrast to judicial proceedings, where one party may invoke the coercive power of the State to compel another to answer in court.

The district court was therefore wrong in stating that "[i]n the Delaware proceeding, the parties submit their dispute to a sitting judge acting pursuant to state authority." JA30. When conducting an arbitration, a Court of Chancery judge, like any other arbitrator, is exercising authority conferred by the parties' consent. Without that consent, the arbitration could not take place. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties") (internal quotation marks omitted).

The district court's decision to lump arbitration proceedings together with judicial trials elides this critical distinction.

2. Delaware's Arbitration Proceedings Are Characterized By Procedural Flexibility Not Available in Civil Judicial Proceedings.

A second difference between arbitration and judicial proceedings is that parties to voluntary arbitration are free to design the governing process and procedures to meet their own specific needs. *Stolt-Nielsen*, 130 S. Ct. at 1774 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.") (internal quotation marks omitted); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("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.").

Judicial proceedings, by contrast, are governed by legal precedent and rules of procedure, evidence, and substantive law. 1 L.E. Edmonson, *Domke on Commercial Arbitration* § 1:1 (3d ed. 2011).

The district court agreed: "[t]he parties [to an arbitration] can specify the scope of the arbitrator's authority and design the applicable procedural rules," but "[l]itigation follows the court's procedures and guidelines."[18] JA24.

Commercial arbitration under the Delaware statute provides for the procedural flexibility associated with arbitration proceedings generally. With the consent of the arbitrator, moreover, the parties may agree to "change *any* of the[] arbitration rules . . . and/or adopt additional arbitration rules." Del. Ch. R. 96(c) (emphasis added).

The rules provide that the arbitrator, or the parties with consent of the arbitrator, may curtail discovery. *Id.* 96(c), (d)(4), 97(f). The arbitration hearing is informal: the arbitrator directs the hearing in

[18] Later in its opinion, the district court noted that in litigation "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." JA31. But a number of judicial procedures cannot be waived or modified—for example, the standard for granting summary judgment.

whatever fashion enables him or her to gather sufficient information to render a decision. *Id.* 96(d)(6), 97(f).

These flexible procedures allow the arbitration proceeding to reach resolution more quickly than a case that proceeds through motion practice, discovery, trial, and post-trial briefing. The preliminary conference takes place "within 10 days after the commencement of the arbitration," *id.* 97(c), and the preliminary hearing "as soon as practicable after the preliminary conference," *id.* 97(d). The arbitration takes place "*no later than 90 days* following receipt of the petition" to arbitrate. *Id.* 97(e) (emphasis added). In comparison, the median time period from filing to disposition for federal court civil cases is almost two years; mean times for civil cases in state courts can be even longer.[19]

3. An Arbitrator's Award Is Subject To More Limited Review Than A Trial Court's Judgment.

Arbitrators' decisions are subject to a narrow standard of judicial review. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate . . . , [a party] trades the

[19] *See* note 5, *supra.*

procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). This provides an important element of finality, which is often particularly important in resolving disputes between businesses engaging in joint, ongoing activities.[20]

Under the FAA, for example, a court may set aside an arbitrator's award only if "the award was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators, or either of them"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy"; "any other misbehavior by which the rights of any party have been prejudiced"; or "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10.

An appellate court reviewing a trial court judgment, by contrast, must decide legal issues de novo, and consider all factual

[20] *See* Gary B. Born, *International Commercial Arbitration in the United States: Commentary and Materials* 120 (1994).

determinations, albeit under a more deferential standard. *Bear Mt. Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 169 (3d Cir. 2010).

The Delaware statute incorporates the deferential standard of review generally applicable to arbitrators' determinations: "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, and such general principles of law and equity as are not inconsistent with that Act." Del. Code Ann. tit. 10, § 349(c).[21]

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[21] The district court observed that under the Delaware commercial arbitration rules, the "final [arbitration] award results in a judgment enforced by state power." JA29-30. But the statute specifically provides that a party to the arbitral award wishing to seek judicial review is automatically entitled to review in the Delaware Supreme Court.

Eliminating the ministerial step of confirming the arbitrator's award does not transform the arbitration proceeding into a judicial one. That is especially true because the overwhelming number of arbitrator's awards are registered without objection. Mistelis, *supra*, at 583-84 ("Statistically, over 90% of arbitration awards are complied with voluntarily, pursuant to anecdotal evidence from arbitration institutions and arbitration practitioners."). Indeed, the New York Convention, the leading international agreement regarding recognition of arbitral awards, does not require judicial intervention to make an award enforceable. Convention on the Recognition and Enforcement of

In this aspect as well, the Delaware commercial arbitration proceeding resembles arbitration generally much more than a civil trial.

C. Delaware's Decision To Authorize Judges To Act As Arbitrators Does Not Transform The Arbitrations Into Civil Judicial Proceedings.

The district court's determination that an arbitration proceeding under the Delaware statute "is sufficiently like a civil trial" to trigger the First Amendment access right rests on the fact that a judge acts as the arbitrator. In the district court's view, "judges in this country do not take on the role of arbitrators," JA27, and the Delaware statute's assignment of that responsibility to judges transforms the arbitration proceeding into a civil trial. That analysis is incorrect.[22]

Foreign Arbitral Awards art. 3, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[22] The district court also noted that the arbitrator under the Delaware statute is "paid by the state, and using state personnel and facilities." JA30. But that fact does not appear to be a basis for the district court's determination, because the court observed earlier in its opinion that "arbitrations may occur in [government] courthouses, and arbitrators . . . may be paid by the government for their services." JA25-26.

Surely a "Delaware Department of Arbitration" could pay all of the costs of arbitrations conducted under its auspices without transforming those arbitrations into judicial proceedings. The fact that the State is subsidizing this valuable service therefore provides no grounds for classifying it as a judicial proceeding.

First, there is nothing unusual about a judge taking on the role of arbitrator. Several States empower sitting judges to conduct arbitrations. In New York, judges may serve as arbitrators in binding small claims court arbitrations[23]; the District of Columbia requires small claims court judges to be "ready to serve as referee or

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Indeed, it is well settled that States have broad authority to subsidize services that benefit their citizens. If state financing were sufficient to trigger a First Amendment access right, then every government proceeding would qualify. Many States pay for the cost of arbitration and other ADR programs, which are also often conducted in state courthouses. For example, Arizona, California, District of Columbia, Georgia, New Mexico, and Ohio all pay arbitrations out of court funds. *See* Roselle L. Wissler & Bob Dauber, *A Study of Court-Connected Arbitration in the Superior Court of Arizona*, Arbitration Selection and Compensation, By State, at V.A-6 (2005), *available at* http://www.law.asu.edu/files/Programs/Clinic/LoadStar/AZ%20Arbitration%20Study%20Executive%20Summary.pdf. A public access right based on the presence of state financing would therefore extend that right to a broad swath of state proceedings.

[23] *See* N.Y. Advisory Comm. J. Ethics, Op. No. 07-12 (Sept. 6, 2007).

arbitrator"[24]; and California rules provides that judges may serve as arbitrators.[25]

Other States permit part-time judges, administrative law judges, and magistrates to conduct arbitrations, including Connecticut, Conn. Gen. Stat. § 51-193*l*–u; North Carolina, N.C. Gen. Stat. § 90-21.62; Oregon, Or. Uniform Trial Ct. R. 13.090(1); West Virginia, W. Va. Code R. § 158-13-4.5.f.1; Wyoming, Code of Judicial Conduct R. II(A)(2) (2009) (providing that judges who serve "on a part-time basis by retention election or under a continuing appointment, including a retired judge who has been given a general or special appointment to hear cases by the Wyoming Supreme Court" may serve as arbitrators).

Still other states utilize senior judges as arbitrators. In a program similar to Delaware's, Georgia's Fulton County Business Division offers businesses a variety of alternative dispute resolution options, including

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[24] *See* D.C. Super. Ct. R. P. for the Small Claims and Conciliation Branch, R. for Arbitration, R. 1 (Jan. 2012) ("The judge sitting in this Branch shall hold himself ready to serve as referee or arbitrator, either alone or in conjunction with other persons, as provided by law or rule. Procedure shall be as provided by [DC law] or upon written stipulation between the parties or their counsel."), *available at* http://www.dccourts.gov/internet/documents/SC-Rules-Jan-2012.pdf.

[25] Cal. Civ. Proc. Code § 1141.18(a).

binding arbitration conducted by active Senior Judges who are experts in resolving business disputes.[26]

Moreover, state court opinions make clear that state court judges have historically served as arbitrators.[27] The American Bar Association's *Annotated Model Code of Judicial Conduct* (2d ed. 2011) authorizes judges to arbitrate disputes as part of their official duties, *id* at 393-95.[28]

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[26] Sup. Ct. of Ga., Order of Oct. 11, 2012 amending R. 1004, *available at* http://www.fultoncourt.org/business/BusinessCourtRulesAmendedOctober2012.pdf.

[27] *See. e.g.*, *In re Goulds Pumps, Inc.*, 841 N.Y.S.2d 218 (table) (N.Y. Sup. Ct. 2007); *Shields v. Thunem*, 716 P.2d 217 (Mont. 1986) (noting that where judge acted as arbitrator for parties, he should recuse himself from also sitting as a trial judge in the same matter); *Dial Press, Inc. v. Phillips*, 81 N.Y.S.2d 324 (N.Y. Sup. Ct. 1948); *Truitt v. Mackaman*, 144 N.W. 22 (Iowa 1913) (where parties stipulated to arbitrate, with judge as "arbitrator" and no appeal, court entered judgment without a right of appeal); *see also* John T. Morse, Jr., *The Law of Arbitration and Award* 106 (1872) ("If no proceedings are pending or contemplated in court, there is of course no objection to selecting a judge to act as an arbitrator under a submission *in pais*. On the contrary, it is very common so to do, and no objection has ever been made to the arrangement before any tribunal of authority.").

[28] The district court recognized that federal law authorizes magistrate judges to serve as arbitrators but stated that "neither the parties nor this Court could find evidence of that practice." JA28. But, as we have discussed, there is considerable evidence of state and federal judges serving as arbitrators, and the number of statutes and rules authorizing judges to serve this role rebuts the court's conclusion that there is a

Congress has authorized federal magistrate judges to arbitrate disputes. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (1998) (codified at 28 U.S.C. §§ 651 et seq.); *see* §§ 653(b), 654(a)(3) (authorizing magistrate judges to arbitrate monetary claims of less than $150,000). As arbitrators, magistrates are empowered to conduct hearings, administer oaths, and make awards, § 655(a), in confidential arbitration proceedings, *id.* § 652(d).

Moreover, there are a number of historical examples of Supreme Court Justices serving as arbitrators. "[T]he Constitution does not prohibit Article III judges from undertaking extrajudicial duties." *Mistretta v. United States*, 488 U.S. 361, 398 (1989). Justice Nelson served on a Geneva Commission that arbitrated U.S. claims against England for building and equipping naval vessels for the Confederacy. Kermit Hall, *The Oxford Companion to the Supreme Court of the United States* 314 (2d ed. 2005). Chief Justice Fuller and Justice Brewer served as arbitrators in a boundary dispute between Venezuela and British Guiana, Justice John Marshall served as an arbitrator in the

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clear standard that bars judges from doing so, or one that transforms any arbitration over which a judge presides into a civil trial for First Amendment purposes.

Fur Seal arbitration proceedings, and Justice Van Devanter was an arbitrator in the dispute over the seizure of the vessel *Im Alone*. *Id.*

Thus, the district court's blanket assertion that judges "do not take on the role of arbitrators," JA27, is wrong as a matter of fact.[29] And relying on that fact to transform an arbitration into a judicial proceeding would improperly extend a First Amendment access right to all of these proceedings.

Second, the district court's analysis appears to rest on the view that any power exercised by a judge is by virtue of the judge's "judicial" involvement, and that judges therefore cannot engage in "non-judicial" activities. But it is well settled that a State is free to assign power among its own branches of government in ways that suit its needs. *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How

[29] The district court also claimed that "several courts have noted the inherent tension between the role of judge and arbitrator." JA28. But both opinions contain general comments regarding the propriety of federal magistrates acting as arbitrators, and because both were decided *before* Congress expressly authorized federal magistrate judges to serve as arbitrators in the Alternative Dispute Resolution Act of 1998, *see* 28 U.S.C. § 653(b), those general comments are doubly inapplicable here. *See DDI Seamless Cylinder Int'l Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1165-66 (7th Cir. 1994); *Ovadiah v. N.Y. Ass'n for New Ams.*, 1997 WL 342411, at *10 (S.D.N.Y. June 23, 1997).

power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

State judges therefore may exercise functions that would be "legislative" or "executive" under federal separation-of-powers principles. "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether 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." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

The functions that States have assigned to judges include ratemaking, *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908), permitting, *Burford v. Sun Oil Co.*, 319 U.S. 315, 322 (1943); supervising election recounts, *Roudebush v. Hartke*, 405 U.S. 15, 21 (1972); inspecting state facilities, Cal. Welf. & Inst. Code § 264 (requiring judges to physically inspect juvenile jails and halls); serving as *ex officio* trustees and visitors to state institutions, 24 Pa. Cons. Stat. § 19-1911-B (visitors of public technology college) 35 Pa. Cons. Stat. § 3 (visitors of state hospital); providing advisory opinions to other

branches of government, *In re Opinions of Justices*, 96 So. 487 (Ala. 1923) (justices may provide advisory opinions to the Governor and Legislature in their individual capacities), and exercising diverse appointment powers.[30]

Several State constitutions include provisions that authorize the vesting of nonjudicial or quasi judicial functions in the State's courts and judges. *See, e.g.*, *People v. Inghram*, 514 N.E.2d 977, 980-81 (Ill. 1987) (Illinois courts may perform "certain nonjudicial functions, as provided by a statute" consistent with the Illinois constitution).[31]

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[30] *See* 71 Pa. Cons. Stat. § 1301 (1962) (State Park and Harbor commissioners); 36 Pa. Cons. Stat. § 3216 (1961) (surveyors condemning Delaware River bridge); 29 Pa. Cons. Stat. Ann. § 2 (1958) ("fence viewers"); *Newton v. Edwards*, 155 S.W.2d 591 (Ark. 1941) (tax collectors); *Elliott v. McCrea*, 130 P. 785 (Idaho 1913) (drainage commissioners); *Minsinger v. Rau*, 84 A. 902 (Pa. 1912) (board of public education); *Citizens' Sav. Bank v. Town of Greenburgh*, 65 N.E. 978 (N.Y. 1903) (road commissioners); *Cahill v. Perrine*, 49 S.W. 344 (Ky. 1899) (guards); *City of Terre Haute v. Evansville & T.H.R. Co.*, 46 N.E. 77 (Ind. 1897) (city commissioners); *Fox v. McDonald*, 13 So. 416 (Ala. 1893) (police commissioners); *Walker v. City of Cincinnati*, 21 Ohio St. 14 (1871) (trustees for railroad).

[31] Even federal judges exercising authority under Article III of the Constitution may take on extrajudicial roles, *see Mistretta*, 488 U.S. at 398, 400), including—in addition to the role of arbitrator (*see supra*, at 48-49)—promulgating rules regulating practice and procedure, *see, e.g.*, Sentencing Reform Act of 1976 (codified at 18 U.S.C. §§ 3771 et seq.; Rules Enabling Act of 1934 (codified at 28 U.S.C. §§ 2072 et seq.). Chief Justice Warren chaired the Warren Commission and Justice Jackson

The Delaware State Constitution does so in Article IV, which provides that the General Assembly shall have "power to confer upon . . . the Court of Chancery jurisdiction and powers in addition to those [judicial powers] hereinbefore mentioned," Del. Const. art. IV, § 17, and further empowers members of the Court of Chancery to "exercise all the powers which any law of this State vests in the Chancellor, besides the general powers of the Court of Chancery," *id.* § 18.[32]

If Delaware had created a separate "Delaware Department of Arbitration" to hire State employees to conduct arbitrations, there would be no basis for declaring the arbitrations "judicial proceedings" under the district court's standard. Because Delaware may assign non-judicial functions to State judges, the fact that a judge presides over the arbitration does not make it "judicial" any more than a State's decision

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served as a prosecutor at Nuremberg. *Mistretta,* 488 U.S. at 400. Justice Roberts served on a commission investigating American preparedness for Pearl Harbor. *Id.* Other justices have reviewed ships for seaworthiness, *see* Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132, attended the salvaging of French ships stranded or shipwrecked on American shores, *see* Act of Apr. 14, 1792, ch. 24, § 1, 1 Stat. 254, interviewed witnesses for Congress in contested congressional elections, *see* Act of Jan. 23, 1798, ch. 8, § 1, 1 Stat. 537, and naturalized aliens, *see* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

[32] The Delaware Constitution also provides that the Chancellor serves on the Board of Pardons. Del. Const. art. VII, § 2.

to assign ratemaking, permitting or appointment responsibilities to judges makes those functions "judicial" and for that reason subject to a First Amendment access right.

II. APPLICATION OF THE EXPERIENCE AND LOGIC TEST DEMONSTRATES THAT THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO DELAWARE'S COMMERCIAL ARBITRATION PROCEEDINGS.

If the district court had applied the experience and logic test, it could have reached only one conclusion—there is no First Amendment access right to the arbitration proceedings themselves. Delaware's arbitration statute provides a right of access at the first point that the First Amendment right could attach, when a judicial proceeding is commenced to review the arbitrator's award.

A. Delaware Has Provided For Public Access To Judicial Proceedings Reviewing The Arbitration Award.

This Court has held that "[a]ll rights of access are not co-extensive, . . . some may be granted at different stages than others. . . . . A temporally based right is no stranger to the law." *First Amend. Coal.*, 784 F.2d at 472-73. The Delaware statute provides for public access when a party invokes the judicial process, by seeking review of the arbitrator's award in the Delaware Supreme Court. Del. Code Ann. tit.

10, § 349(a). Thus, the issue here is whether Delaware must provide public access to the entirety of the arbitration process.

This Court faced a similar question in *First Amendment Coalition*. There, the Pennsylvania Judicial Inquiry and Review Board closed early-stage judicial misconduct proceedings and provided for disclosure only after discipline of a judge had been recommended. The Court held that the issue was "not whether the First Amendment prohibits the state from barring public observation of judicial disciplinary proceedings at all stages," but rather it was in determining the stage of the proceeding to which a constitutional right of access attached. 784 F.2d at 472. It found that the "span" of the right of access should "be guided by the unique history and function of the Judicial Review Board," and that it need not be as "extensive as that in civil and criminal trials as such." *Id.*

Even in the context of judicial adjudication, not every aspect of the proceeding is open to the public. The Supreme Court has recognized that "pretrial depositions and interrogatories are not public components of a civil trial" and therefore, "restraints placed on discovered, but not yet admitted information are not a restriction on a traditionally public

source of information." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

Similarly, courts have recognized that the right of access may not apply to settlement negotiations and agreements. *See Leap Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 222-23 (3d Cir. 2011) (affirming that a presumption of public access had been rebutted where "[t]he parties are private entities, their dispute has no impact on the safety and health of the public, and their settlement agreements demonstrate a clear intent to maintain confidentiality"); *see also United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998) (holding that the interest in public access to settlement negotiations is low); *United States v. Amodeo*, 71 F.3d 1044, 1048-49 (2d Cir. 1995) (same).

Here, Delaware has provided for a right of access at the appropriate stage: when a judicial proceeding is instituted to review the arbitrator's award. If there were a public interest in securing a right of access at an earlier stage, before formal judicial involvement, that interest may be vindicated through legislation (existing federal securities laws, for example, may compel disclosure of the pendency of

an arbitration proceeding regardless of the lack of a constitutional right of access).

B. There Is No First Amendment Right Of Access To The Arbitration Proceeding Itself.

Application of the experience and logic test in accordance with the principles recognized by the Supreme Court and this Court makes clear that there is no First Amendment right of public access to the arbitration proceedings conducted under the Delaware statute.

1. Arbitration Has A Historical Tradition Of Confidentiality.

Arbitration proceedings, unlike criminal and civil judicial trials, have no history of openness. Rather, parties to arbitration proceedings have traditionally, and consistently, been entitled to keep the proceedings confidential.

Arbitration in the United States is the product of the tradition of private arbitration in England. The first written records of English arbitration appear in the twelfth century, and the practice had become well-established by the early seventeenth century. 1 L.E. Edmonson, *Domke on Commercial Arbitration* § 2:3 (3d ed. 2011). From the seventeenth century onward, merchants relied on arbitration to resolve

trade and business disputes. Katherine V.W. Stone, *Arbitration – National*, *in* 1 *Encyclopedia of Law & Society: American and Global Perspective*s 89 (2007).

English law concerning arbitration has long recognized that arbitrations are not open to the public. *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." (citing Sir Michael Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 432-34 (2d ed. 1989))).

The tradition of confidential arbitration proceedings conducted by merchant associations carried over into the American colonies. One of the first official acts of the New York Chamber of Commerce upon its establishment in 1768 "was to make provision for arbitration by means of establishing arbitration committees." William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 Wash. U.L.Q. 193, 207. "[A]rbitration's ***privacy*** and independence [fostered] efficient resolution of disputes among the American and British merchants during and after the American Revolutionary War."

Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1223 (2006) (emphasis added).

When the predecessor of the AAA was founded in the 1920s to develop rules and regulations for arbitration proceedings, one of those rules provided for confidential proceedings: "It is the responsibility of the arbitrator to maintain the privacy of the proceedings, for it is he who decides who shall be admitted to a hearing . . . . Only with the mutual consent of the parties, or where the rules provide for public hearings, may this rule [of privacy] be changed." Frances Kellor, *Arbitration in Action* 32 (1941).

Confidentiality has remained the norm in arbitration proceedings. Thomas E. Carbonneau, *The Law and Practice of Arbitration* 1 (2d ed. 2007) ("Arbitral proceedings are not open to the public and awards generally are not published."); 3 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act* § 32.6.1, at 32:50 (Supp. 1999) ("A much-vaunted advantage of arbitration is the relative privacy of the proceedings . . . . [I]f the parties so agree, attendance at hearings may be severely restricted.").

All of the leading national and international arbitral bodies provide for confidentiality of arbitration proceedings. *See, e.g.*, AAA & ABA, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI(B) (2004) ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."); AAA, Commercial Arbitration Rules R-23 (2009) (requiring arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary"); UNCITRAL, Arbitration Rules art. 28(3) (2010) ("Hearings shall be held in camera unless the parties agree otherwise."); ICC, Rules of Arbitration art. 21(3) (2010) ("Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted."). The arbitration rules of the AAA International Centre for Dispute Resolution, International Centre for Settlement of Investment Disputes, London Court of International Arbitration, World Intellectual Property Organization and other international commercial arbitration organizations each contain similar privacy provisions. *See* Nigel Blackaby et al., *Redfern & Hunter on International Arbitration* 136 (2009).

The historical record is clear: there is no tradition of public access to arbitration proceedings. Indeed, even the district court found that "[a]s the product of private agreement between the parties, historically, arbitrations have been conducted outside the public view." JA25. Delaware's arbitration statute is consistent with this tradition of private arbitration.

2. Public Access Would Undermine The Viability Of The Delaware Arbitration Proceeding.

Without a historical tradition of public access, there can be no First Amendment access right. *N. Jersey Media Grp.*, 308 F.3d at 213 ("'[T]he role of history in the access determination' is 'crucial.'" (quoting *Capital Cities Media*, 797 F.2d at 1174)). In addition, requiring public access would violate the "logic" inquiry, because it would prevent the commercial arbitration proceeding from functioning as the Delaware legislature intended.

Confidentiality is essential to arbitration. "Publicity of commercial litigation is adverse to the interests of both parties . . . . In arbitration, such adverse publicity is avoided; attendance at the

hearings by outsiders is not possible without the parties' express permission." Martin Domke, *Commercial Arbitration* 10-11 (1965).

Indeed, the private nature of arbitration is a key reason why businesses choose to resolve disputes in arbitration rather than litigation. 1 Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* § 7:12 (2011) ("In many practice areas, the parties consider the private disposal of their case to be a substantial advantage over traditional court litigation, and for that reason alone, choose arbitration as their means of dispute resolution.").

Confidentiality enables businesses to protect patented information, trade secrets, and other closely held information. *See Concepcion*, 131 S. Ct. at 1749 ("[One] point of affording parties discretion in designing arbitration processes is . . . [so] that proceedings be kept confidential to protect trade secrets."). "The public airing of private matters, trade secrets, confidential operating costs and the like, to which may be added the loss of prestige and goodwill, attendant upon the publicity of a court trial, can be prevented by rules which insure that only the parties and the arbitrators may be present at the hearing and that all will respect the confidence of the proceeding." J. Noble

Braden, *Sound Rules and Administration in Arbitration*, 83 U. Pa. L. Rev. 189, 195 (1934). Businesses can resolve their disputes before the arbitrator on a full record without withholding proprietary or sensitive company information (or seeking expansive protective orders)—in a court proceeding, by contrast, use of such information would make it available to competitors.

Finally, the absence of public access facilitates arbitration's less hostile, more conciliatory approach to dispute resolution, *see* Alan Scott Rau et al., *Process of Dispute Resolution: The Role of Lawyers* 601 (3d ed. 2002), which helps to preserve ongoing business relations and relationships.

In view of the critical role of confidentiality in the arbitration process, an arbitration system that required public access simply would not work. Deprived of one of the key reasons for utilizing arbitration, businesses would not use the procedure.

A right of access accordingly would not "play[] a significant positive role in the functioning of" Delaware's commercial arbitration process, *Press II*, 478 U.S. at 8; rather, it would impair the arbitration process. That fact is dispositive of the "logic" inquiry.

The district court accorded little weight to the fact that openness would likely undermine Delaware's arbitration process, noting simply that "[e]ven 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." JA32. But that statement is simply a reflection of the district court's erroneous view that arbitration proceedings presided over by judges are illegitimate and therefore should be eliminated.

This Court has required that the logic inquiry focus on "whether public access to a particular proceeding would enhance *the functioning of that proceeding*." *United States v. Simone*, 14 F.3d at 838-39 (emphasis added). In *First Amendment Coalition*, the plaintiff argued that in conducting judicial misconduct proceedings, the Pennsylvania Board was "performing a governmental function" and that "[t]he public has an interest in information about the conduct of its judiciary and consequently is entitled to assurance that the Board is properly discharging its duties." 784 F.2d at 473. This Court noted that such "structural values have been a consideration in the decisions granting a right of access," but that "'structural' argument[s] alone cannot carry

the day" where they are not tethered to the circumstances of the particular case at issue. *Id.* Moreover, an inquiry accounting only for the salutary effects of open government "would lead to an unjustifiably expansive interpretation" of the right of access. *Id.*

In *First Amendment Coalition*, this Court rejected the claim for unlimited public access to judicial disciplinary proceedings where it would "would have a stifling effect" on use of those proceedings and where it was "quite uncertain whether the state would have chosen a judicial disciplinary program or have been able to implement one" at all if unlimited public access were imposed. 784 F.2d at 473.

Other courts have similarly recognized that where a right of access will lead to disuse or discontinuation of a process, it should not be applied. *See, e.g.*, *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 904-05 (6th Cir. 1988) (rejecting right of access to summary jury trial because providing acess "over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device."); *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 249 F. Supp. 2d 911, 917 (S.D. Ohio 2003) ("Allowing public access to

resumes of candidates could very reasonably cause many candidates to withhold their applications.").

Given the complete absence of a tradition of openness in the arbitration context and the effective elimination of Delaware's commercial arbitration procedure that would result from recognition of a First Amendment access right, there is no basis for holding that public access is required here.

Delaware has a substantial interest in providing an expert, government-funded arbitral forum for disputes involving businesses domiciled in the State. Delaware relies to a considerable degree on revenues from franchise taxes on domestic corporations and annual taxes on limited partnerships and limited liability companies that incorporate or register to do business in the State. Delaware's ability to maintain those revenue streams depends on its ability to continue to provide a cutting-edge, stable, and respected legal environment. Offering a government-sponsored arbitration forum, with judges of the Court of Chancery serving as arbitrators enables Delaware to provide its corporate citizens with an expert, efficient dispute resolution system competitive with those available in other parts of the country and the

world. As the Delaware General Assembly explained, the commercial arbitration system "is intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." 2009 Del. H.R. 49, syn.

"[T]he presumption of validity attaching to state legislative and constitutional provisions weighs heavy. This presumption does not relieve the courts of their obligation to make an independent inquiry when First Amendment rights are at stake, but it does require that the state's determination be upheld unless it is found to transgress a clear constitutional prohibition." *First Amend. Coal.*, 784 F.2d at 475. Quoting Chief Justice Burger, this Court has noted that courts should not "'confuse what is good, desirable, or expedient with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.'" *Id.* (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978) (Burger, C.J.)). There simply is no basis for invalidating the innovative arbitration system that Delaware has created.

C. Recognizing A Public Access Right Would Invalidate Statutes And Rules In Many Other States, Which Similarly Permit Judges To Serve As Arbitrators.

Upholding a First Amendment access right to arbitrations conducted by judges would have far reaching consequences, including placing in jeopardy the constitutionality of a federal statute, the Alternative Dispute Resolution Act of 1998.

Over half of the States and the District of Columbia have adopted an arbitration option as part of their menu of alternative dispute resolution options.[33] Some of these arbitration programs include binding outcomes—or permit the parties to the arbitration to stipulate

[33] *See, e.g.*, Ariz. Rev. Stat. § 12-133; Cal. Civ. Proc. Code § 1141.10; 4th Judicial Dist., El Paso Cnty., Colo. *available at* http://www.gofourth.org/disp-rez.htm; Conn. Gen. Stat. § 52-549u – aa; D.C. Civ. Arb. R. I-XB; Ga. Fulton Cnty. R. 30; Fla. Stat. § 44.103 – .108; Haw. Rev. Stat. § 601-20; Ill. Sup. Ct. R. 86-95; Ind. R. of Ct., Rules for ADR; Kan. Stat. § 5-509(a); UCLR Add. A, Arb. Rules; Me. R. Civ. P. 16B(d)(1); Mass. Sup. Ct. Jud. Ct. R. 1:18, Uniform R. on Dispute Resolution; Minn. Stat. § 484.73 – .76; Mo. Sup. Ct. R. 17.04; Nev. Rev. Stat. § 38.250 – .259; N.H. Super. Ct. R. 170; N.J. Stat. § 39:6A–24; N.M. R. Arb. Local Rule 2-601 – 603; N.Y. Rules of the Chief Judge art. 28; Rules Court-Ordered Arbitration in N.C.; N.D. Cent. Code § 32-29.3; Or. Rev. Stat § 36.400 – 36.425; Pa. R. Civ. P. 1301–13; R.I. Stat. § 8-6-5; S.C. ADR rules, *available at* http://www.judicial.state.sc.us/courtReg/; Tenn. Ct. R. 31, *available at* http://www.tsc.state.tn.us/rules/supreme-court/31.

to binding outcomes.[34] Others permit a trial de novo but impose disincentives for requesting a new trial to apply pressure to parties to accept the arbitrator's award. For example, in some jurisdictions, if an appellant does not receive a better outcome from the trial de novo (typically defined as a more favorable outcome or a 10-30% gain in monetary relief), the appellant must pay some or all of the arbitration panel's fees, as well as the opposing party's costs, fees, and attorneys' fees. Such incentive structures have been incorporated into arbitration programs in Arizona, California, Hawaii, Kentucky, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, and Utah.[35]

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[34] *See* D.C. Super. Ct. R. of Civ. Arb. Program I(c); Gwinnet State Judicial Circuit, Georgia, Internal Operating Procedures, Alternative Dispute Resolution Program, *available at* http://www.gwinnettcourts.com/documents/adr/IOPADR2002.pdf; Fla. Stat. § 44.104(1); Ind. Rules of Court for ADR 3.4; Kan. Stat. § 5-502(g); Mass. Uniform R. on Dispute Resolution 2; Minn. Stat. § 484.76(2); N.H. Super. Ct. R. 170-A(S); *see also* Ariz. R. Civ. P. 72-72, Section IX, *available at* http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0021.pdf.

[35] Ariz. Rev. Stat. § 12-133(H); Cal. Civ. Proc. Code § 1141.21(a); Haw. Arb. R. 25(A); Nev. R. Govern. ADR 20(B); N.J. Stat. 2A:23A-29; N.Y. Rules of Chief Judge art. 28.12(e); Rule for Court-Ordered Arbitration in N.C. 7(b); Or. Rev. Stat. § 36.425(2)(c), (4)(a); R.I. Gen. Laws § 8-6-5; Utah Rules of Court-Annexed Dispute Resolution 102(l)(5).

Many state arbitration programs also include or permit the parties to include privacy or confidentiality provisions—for example, those in Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, South Carolina, and Utah.[36]

The district court's First Amendment ruling threatens these other state programs as well as the ability of state judges—including senior, part-time, and administrative judges—to make on-the-ground decisions in cases and work with parties to achieve speedier, less-costly outcomes.

This is troubling because many of these programs were implemented or are currently being strengthened in response to extraordinary budget cuts and increasing workloads.[37] Affording

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[36] *See* Ind. Rules of Court for ADR 3.4(E), 7.3(C); Kan. Stat. § 5-512(a); Me. R. Civ. P. 16B(k); Mass. Uniform R. on Dispute Resolution 9(h); Minn. Gen. Rules of Practice for the Dist. Cts. 114.07(a), 114.08; Mo. Rev. Stat. § 435.014(2); *see also* Mo. Sup. Ct. R. 17.06(a); N.H. Super. Ct. R. 170(E)(1); S.C. ADR R. 2(g), 5(d); Utah Code § 78B-6-202(4), *see also* Utah Code §§ 78B-6-203(2)(b), 78B-6-208.

[37] State courts across the United States have endured severe funding cuts, while at the same time, they have watched their total caseloads reach record highs in the last decade. *See* Bureau of Justice Statics, State Court Caseload Statistics, Summary Findings, *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=30. A recent Conference of State Court Administrators (COSCA) survey found that in virtually every state, courts have been forced to take drastic measures to reduce their costs, including cutting hours or days out of their operating schedules, downgrading facilities, shutting down courtrooms, laying off

parties the option of quicker, informal dispute resolution helps to alleviate the huge workload burden associated with civil litigation.

The district court's decision—by preventing States from providing the confidentiality that is an essential element of these dispute resolution procedures—will undermine States' ability to use this tool.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ Andrew J. Pincus

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court staff, implementing hiring and salary freezes, delaying filling vacancies in the clerks' offices and in judicial support positions, and reducing the use of senior and retired judges. *See* COSCA, State Court Budget Survey Responses (Nov. 30, 2011), *available at* http://www.ncsc.org/~/media/files/pdf/information%20and%20resources/budget%20resource%20center/budget_survey_121811.ashx. These reductions have made it even more difficult for state courts to deal with their overwhelming caseloads.

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Dated: December 11, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), the undersigned counsel for Defendants-Appellants certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,983 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office Word 2007 and is set in 14-point sized Century Schoolbook font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on December 11, 2012 via overnight courier service; and

(iv) has been scanned with a virus detection program and no virus was detected.

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THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Rule 28.3(d), the undersigned counsel for Defendants-Appellants certifies that Andrew J. Pincus is a member of the bar of this court.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2012, I electronically filed the foregoing, which includes Volume 1 of the Joint Appendix, and Volume 2 of the Joint Appendix, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that I served the two above documents on the following non-CM/ECF participant and Plaintiff-Appellee by electronic mail and by overnight delivery through a third-party commercial carrier:

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ADDENDUM

Effective:[See Text Amendments]

West's Delaware Code Annotated Currentness
Title 10. Courts and Judicial Procedure
Part I. Organization, Powers, Jurisdiction and Operation of Courts
Chapter 3. Court of Chancery
Subchapter III. General Jurisdiction and Powers

§ 347. Mediation proceedings for business disputes

(a) Without limiting the jurisdiction of any court of this State, the Court of Chancery shall have the power to mediate business disputes when:

(1) The parties have consented to the mediation by the Court of Chancery by agreement or by stipulation;

(2) At least 1 party is a business entity as defined in § 346 of this title;

(3) At least 1 party is a business entity formed or organized under the laws of this State or having its principal place of business in this State;

(4) No party is a consumer, as that term is defined in § 2731 of Title 6, with respect to the business dispute; and

(5) In the case of disputes involving solely a claim for monetary damages, the amount in controversy is no less than $1 million dollars or such greater amount as the Court of Chancery determines by rule.

A mediation pursuant to this section shall involve a request by parties to have a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, act as a mediator to assist the parties in reaching a mutually satisfactory resolution of their dispute. Mediation proceedings shall be considered confidential and not of public record.

(b) By rule, the Court of Chancery may define those types of cases that are eligible for submission as a business dispute mediation. This section is intended to encourage the Court of Chancery to include complex corporate and commercial disputes, including technology disputes, within the ambit of the business dispute mediation rules. The Court of Chancery should interpret its rule-making authority broadly to effectuate that intention.

CREDIT(S)

74 Laws 2003, ch. 36, § 2, eff. May 27, 2003.

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Equity 15.
Westlaw Key Number Searches: 33k23.8; 150k15.
C.J.S. Arbitration § 67.
C.J.S. Equity §§ 11, 15, 35 to 37, 63, 65.

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Acquisitions and Mergers: Negotiated and Contested Transactions App. F101, Transaction and Separation Agreements.

BNA Corporate Practice Series No. 38-5 § VI, VI. Litigation Aspects of the Delaware Appraisal Proceeding.

10 Del.C. § 347, DE ST TI 10 § 347

Current through 78 Laws 2012, chs. 204 - 409. Revisions by the Delaware Code Revisors were unavailable at the time of publication.

END OF DOCUMENT

Effective: April 2, 2009

West's Delaware Code Annotated Currentness
Title 10. Courts and Judicial Procedure
Part I. Organization, Powers, Jurisdiction and Operation of Courts
Chapter 3. Court of Chancery
Subchapter III. General Jurisdiction and Powers
§ 349. Arbitration proceedings for business disputes

(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, and such general principles of law and equity as are not inconsistent with that Act.

CREDIT(S)

Added by 77 Laws 2009, ch. 8, § 1, eff. April 2, 2009.

HISTORICAL AND STATUTORY NOTES

2009 Legislation

77 Laws 2009, ch. 8, § 9, provides:

“Sections 2 - 8 of this bill shall become effective three months after enactment into law; the rest of the bill shall become effective upon enactment.”

RESEARCH REFERENCES

Other References

10/31/2011 BNA Corporate Law Daily D9, Group Mounts 1ST Amt. Challenge to Del. Law.

Treatises and Practice Aids

BNA Corporate Practice Series No. 38-5 § VI, VI. Litigation Aspects of the Delaware Appraisal Proceeding.

10 Del.C. § 349, DE ST TI 10 § 349

Current through 78 Laws 2012, chs. 204 - 409. Revisions by the Delaware Code Revisors were unavailable at the time of publication.

END OF DOCUMENT

West's Delaware Code Annotated Currentness
Delaware Rules of Court
Chancery Court Rules
XI. General Provisions
RULE 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 sub-

poenas.

(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, pursuant 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.”

CREDIT(S)

[Adopted eff. February 1, 2010.]

Chancery Court Rules, Rule 96, DE R CH CT Rule 96

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XI. General Provisions

RULE 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 information 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.

CREDIT(S)

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RULE 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 tangible 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.

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