No. 12–3859

In the United States Court of Appeals
For the Third Circuit

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,
Plaintiff-Appellee,

v.

THE HON. LEO E. STRINE, JR., *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, *Amici* state that they have no parent corporations and that no publicly traded corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. For the past century, the Chamber has played a key role in advocating on behalf of its membership. To that end, the Chamber has filed *amicus curiae* briefs in many cases raising issues of vital concern to the nation's business community, including cases concerning the validity of arbitration agreements and procedures.

The Business Roundtable ("BRT") is an association of chief executive officers ("CEOs") of leading U.S. companies with more than $7.3 trillion in annual revenues and more than 16 million employees. The BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and participate in litigation as *amicus curiae* in a variety of contexts where important business interests are at stake.

This is such a case. Arbitration offers businesses an essential alternative to litigation. The required time and expense have increasingly rendered litigation

[1] All parties have consented to the filing of this brief. No one besides *Amici*, their members, or their counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

impractical. Businesses need a venue where they can settle their disagreements fairly and efficiently. Arbitration by Court of Chancery judges is particularly promising. It bears all the virtues of traditional arbitration, including flexibility, informality, and cost effectiveness. And it has the added advantage of allowing companies to have their disputes resolved by experienced adjudicators with expertise in business law. *Amici*'s members have a strong interest in the availability of this forum and in the reversal of the judgment below.

INTRODUCTION

Delaware has offered businesses a valuable alternative to civil litigation. Arbitration by Court of Chancery judges allows companies to resolve their disputes before experts in corporate law, but without the trammels and expense of drawn-out litigation. The district court held that such arbitration must be conducted in public because it is tantamount to civil litigation—even though Delaware intended the arbitration as an *alternative* to, and *substitute* for, such litigation.

The district court's conclusion is, we respectfully submit, deeply mistaken. Arbitration in the Court of Chancery is not litigation in the Court of Chancery by any other name. Instead, as Appellants explain, the two processes differ in myriad respects, not the least of which is that arbitration is consensual and, therefore, can be tailored to the parties' needs in ways litigation cannot be.

To determine whether arbitration by Court of Chancery judges is subject to a limited public right of access, the Court applies the "experience and logic" test. *North Jersey Media Group, Inc.* v. *Ashcroft*, 308 F.3d 198, 206 (3d Cir. 2002). A key question arising under the logic prong of the test is what public benefit, if any, is served by requiring such arbitration to be conducted in the open. *Ibid.* Appellants persuasively explained below why the answer is none. Confidentiality is essential to arbitration. If arbitration by Court of Chancery judges were made public, then businesses that would otherwise avail themselves of it would turn instead to other non-public fora to resolve their disputes. Accordingly, whatever public benefit might accrue in theory from open arbitration proceedings in the Court of Chancery, *none* will be realized in practice. This consideration is central to the analysis under the logic prong, but the district court dismissed it as "speculation." *Delaware Coal. for Open Gov't* v. *Strine*, No. 1:11–1015, 2012 WL 3744718, at *10 (D. Del. Aug. 30, 2012).

The Chamber and BRT file this brief to apprise the Court that the "speculation" is entirely accurate. *Amici* are well suited to speak to the question. Their members represent the interests of millions of businesses and the CEOs of America's leading companies. They are precisely the entities Delaware expected to arbitrate in the Court of Chancery. And the Chamber and BRT can say, with confidence, that few if any businesses would participate if the arbitration were

public. The decision below thus denies businesses a promising alternative to cumbersome litigation—a cost, we explain, that equally injures the public—while not advancing any interest of openness.

Our brief proceeds in four parts. Part I reviews why businesses often prefer arbitration to litigation. Part II explains why Court of Chancery arbitration in particular offers a promising venue to settle disputes efficiently, especially complex commercial ones. Part III explains why the decision below will deprive businesses and the public of the benefits to be gained by such arbitration, while not achieving any counterbalancing benefits of openness. And Part IV explains why the district court erred in conflating the arbitration proceeding with civil litigation.

In short, everyone loses under the decision below, and does so unnecessarily. The judgment should be reversed.

SUMMARY OF ARGUMENT

I. Courts, including the Supreme Court and this Court, have repeatedly recognized the advantages of arbitration as a method of dispute resolution. Litigation is often slow, rigid, subject to gamesmanship and abuse, and very expensive. Arbitration offers businesses a procedurally flexible and cost-effective alternative. It is therefore not surprising that businesses often arbitrate their most important disagreements.

II. Arbitration by Court of Chancery judges is particularly promising. The arbitration is consensual and confidential; allows parties to tailor discovery rules to their needs, control the production of information, and waive appellate review; is cost effective; and proceeds expeditiously. Most important, the arbitrators are experts in corporate law. Indeed, Delaware specifically designed the proceeding to resolve large, complex business and technology disputes. Cases involving consumers are expressly excluded.

III. Requiring such arbitration to be conducted in the open will not advance any public interest, but it will impose substantial public cost. Confidentiality is an essential feature of arbitration, as reflected in uniform industry practice. Among other things, confidentiality prevents dissemination of trade secrets and sensitive financial information; prevents testimony from being taken out of context and used unfairly against a company; and allows parties to resolve disputes conclusively without setting precedent that will bind them or others in future cases. If arbitration before Court of Chancery judges were made public, few if any businesses would participate, and therefore no interest of openness would be advanced. But the costs to businesses and the public would be substantial. Businesses would lose the opportunity to adjudicate their disputes in an efficient forum, injuring not just businesses, but also their millions of shareholders and American financial markets generally. States will likewise lose

the ability to innovate (and generate much-needed revenue) by adopting similar programs.

IV. The district court held that confidential arbitration by Court of Chancery judges is unconstitutional because the court equated that process with civil litigation. Equating arbitration with litigation was error. Arbitration in the Court of Chancery is no different from classic arbitration except for the fact that the former is conducted by judges with extensive experience resolving business disputes. But that one distinction, which should be *lauded*, does not dispositively transform arbitration into litigation, as the district court held. This Court has made clear that the defining feature of arbitration is its consensual nature, which is true of arbitration by Court of Chancery judges and not true of litigation. Further, the district court's logic implies that *any* proceeding conducted by a judge and paid for with public funds is in effect civil litigation and therefore subject to a qualified right of public access. But that conclusion is clearly overbroad and would invalidate numerous state schemes, as well as the federal statute authorizing magistrate judges to arbitrate disputes.

ARGUMENT

I. Arbitration Offers Businesses A Cost-Effective And Efficient Alternative To Litigation

The advantages of arbitration over litigation are well known and have been repeatedly recognized by courts, including the Supreme Court and this Court.

Litigation is slow by design. Procedures must be formal to ensure that each party receives due process. The rules are many and are often subject to gamesmanship, if not abuse. Chronic judicial underfunding and understaffing only make matters worse. The result is that litigation is time consuming and expensive—often distressingly so.

The statistics do not portend a different course any time soon. All but eight States reduced their courts' budgets between 2008 and 2011. Heather Rogers, *Business-Killing Cuts to State Court Systems*, Cal. Bar J. (Nov. 2012), available at http://www.calbarjournal.com/November2012/TopHeadlines/TH1.aspx (citing statistics from the National Center for State Courts). Not surprisingly, "since 2008, 29 states have seen an increase in case backlogs, and 15 states have experienced an increase in the time it takes for cases to go from filing through resolution." *Ibid.* The picture is no brighter in the federal courts, where in 2011 the average civil case took 23.4 months just for trial *to begin*, and where 23% of all civil cases pending were pending for two or more years. Admin. Office of the U.S. Cts., *2011 Annual Report of the Director: Judicial Business of the United States Courts*, Tables C-5, C-6 (2012); see also William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 355 (1992) ("The litigation explosion which has taken place over [the past twenty-five years] has profoundly affected federal courts just

as it has state courts. The number of federal judgeships has more than doubled in that time, but that increased number of judges work much harder than their predecessors in the often vain hope of simply staying abreast of the vast increase in criminal and civil jurisdiction which Congress has conferred on them."). All told, having the judiciary resolve a dispute under traditional litigation procedures requires an investment of time and uncertainty that can easily approach a half-decade. When the dispute concerns critically important business issues that implicate millions or even billions of dollars, not to mention jobs that might be at stake, that uncertainty is a serious problem.

But time and uncertainty are just two of the costs of civil litigation today. The advance of electronic discovery, in particular, has made litigation exceedingly expensive. See, *e.g.*, Vlad Vainberg, *When Should Discovery Come with A Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. Pa. L. Rev. 1523, 1533–34 (2010) ("[L]itigants spent $2.79 billion on electronic discovery in 2007, an increase of 43% over 2006."); *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) ("With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical."). This is particularly unfortunate in today's economic climate, where scarce resources spent on attorneys, experts, and other litigation professionals could be put to more

productive uses elsewhere. See, *e.g.*, Lisa A. Rickard, Townhall.com, *Our Broken Legal System and its Impact on Competitiveness* (June 27, 2008), available at http://townhall.com/columnists/lisaarickard/2008/06/27/our_broken_legal_system_and_its_impact_on_competitiveness/page/full/ ("[C]ompanies are diverting resources from productive purposes into legal and settlement costs. Using a large company as an example, the drug maker Wyeth spent $25 billion on legal costs and reserves between 1999 and 2004, but only invested $19 billion in researching and developing new life-saving or life-improving pharmaceuticals.").

In view of these problems, arbitration is often an effective alternative to civil litigation. Litigation is slow, but arbitration can be quick. Litigation is formal, but arbitration can be flexible. Litigation is expensive, but arbitration can be cost effective. As the Supreme Court recently summarized, arbitration "allow[s] for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011); see also, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." (internal quotation marks omitted));

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."); *Hay Group, Inc.* v. *E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004) (recognizing "arbitration's goal of resolving disputes in a timely and cost efficient manner" (internal quotation marks omitted)); *Hays & Co.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1158 n.15 (3d Cir. 1989) ("Many authorities have argued that arbitration is a less costly and quicker dispute resolution process").

In light of the comparative advantages of arbitration, businesses frequently prefer it to litigation. In 2010, for example, the American Arbitration Association alone conducted more than 143,000 alternative dispute resolution proceedings, including arbitration. See Mark E. Appel, *Taking Your Case to the International Centre for Dispute Resolution*, at 14 n.2, available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002580 (last visited Dec. 3, 2012); see also, *e.g.*, AAA, *2011 President's Letter & Financial Statements*, 5 (May 2012), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_019403 (in 2011, "[t]here were record numbers of international case filings," and "[t]echnology filings increased 29% and large complex cases in particular rose 33%"); Financial Industry Regulatory Authority, FINRA Dispute

Resolution, *Dispute Resolution Statistics*, available at http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/index.htm (last visited Dec. 3, 2012) (noting thousands of securities arbitration cases filed each year between 1997 and 2012). Notably, these figures *understate* the popularity of arbitration because they do not account for the large number of commercial agreements that contain arbitration clauses but that have not given rise to an arbitrable controversy. See generally Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. on Disp. Resol. 433, 463–67 (2010) (discussing the numerous industries that benefit from arbitration agreements).

II. Arbitration By Court Of Chancery Judges Is Especially Promising In Light Of The Judges' Expertise Resolving Complex Business Disputes

Arbitration by Court of Chancery judges replicates many of arbitration's most desirable features, and then adds unique advantages. Among the proceeding's attributes are its:

- *Voluntary nature*: Before parties may arbitrate, they must submit a petition for arbitration "contain[ing] a statement that all parties have consented to arbitration by agreement or stipulation." Del. Ch. Ct. R. 97(a)(3).

- *Flexibility of procedure*: The normal rules of judicial discovery are just a default. "The parties with the consent of the Arbitrator may change any of these arbitration rules by agreement and/or adopt additional arbitration rules." *Id.* R. 96(c); see also *id.* R. 97(f) (calling for a prehearing exchange of information but permitting the parties and the arbitrator to forgo such an exchange).

- *Flexibility of remedy*: "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. In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards." *Id.* R. 98(f)(1)–(2).

- *Flexibility of review*: Appeal of an arbitration award is taken to the Delaware Supreme Court, which reviews the award under the circumscribed criteria of the Federal Arbitration Act, 9 U.S.C. § 10(a). See 10 Del. C. § 349(c). However, the parties may waive their right of appeal and agree that the arbitration award is final and binding. *Id.* § 351. The Delaware legislature explained the benefit of this alternative: "In many matters, parties desire an answer and their dispute is narrow enough that even if they cannot settle, they are willing to agree in advance to live with the outcome rendered by the trial court. This section would give parties that voluntary option." H.B. 49, 145th Gen. Assem. (Del. 2009).

- *Confidentiality*: The filing of the initial petition requesting arbitration, as well as the ensuing proceedings, are conducted in confidence. Del. Ch. Ct. R. 97(a)(4), 98(b). "Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. . . . 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." *Id.* § 98(b). The record is not made public unless and until an appeal is taken to the Delaware Supreme Court. See 10 Del. C. § 349(b); Del. Ch. Ct. R. 97(a)(4).

- *Efficiency*: The arbitration is conducted with characteristic alacrity. A preliminary conference "shall occur" within 10 days of the commencement of arbitration (unless the parties and Arbitrator agree otherwise). *Id.* § 97(c). Then, a "preliminary hearing shall take place as soon as practicable" thereafter. *Id.* § 97(d). In all events, the "arbitration hearing generally will occur no later than 90 days following receipt of the petition." *Id.* § 97(e). Further, "[a]t 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." *Id.* § 98(a).

- *Reasonable cost*: The fee to initiate an arbitration proceeding is $12,000. There is an additional per-day fee of $6,000 for each day of arbitration after the first day. Those fees are equally divided among the parties.

- *Integration of other alternative dispute mechanisms*: The arbitration proceeding is designed to encourage settlement and to move seamlessly into mediation, should the parties desire it. See *id.* § 98(e) ("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."); *id.* § 98(d) ("The parties may agree at any stage of the arbitration process to submit the dispute to the Court for mediation.").

The features just discussed are advantageous in their own right. But what makes Delaware's innovation particularly promising is the identity of the arbitrators: judges who are expert in business law. See *id.* § 96(d)(2). As a leading scholar recently explained:

> Delaware judges and its courts are already renowned for their expertise in these matters. And with these provisions, the courts arbitrate not only commercial and corporate matters but also intellectual property disputes, adding some technology expertise. . . .
>
> In some ways the arbitration provisions may be a victim of Delaware's success. The court's five Chancery Court judges are really the best in the country at adjudicating corporate law disputes involving shareholders. The reason is not only their competence but their experience in deciding these matters.

Steven M. Davidoff, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. TIMES (Aug. 31, 2012), available at http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/. Chief Justice Rehnquist conferred similar praise on the occasion of the bicentennial of the Court

of Chancery: "The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery. Because the Court of Chancery, by design, has no jurisdiction over criminal and tort cases . . . corporate litigation can proceed quickly and effectively. The Delaware Supreme Court, similarly, is poised to act quickly in important corporate cases." Rehnquist, *supra*, 48 Bus. Law. at 354.

Delaware designed the arbitration proceeding specifically to take advantage of the Chancellor's and Vice Chancellors' corporate-law expertise. Consumer disputes are expressly excluded from the court's jurisdiction. Del. Ch. Ct. R. 97(a)(3). Instead, the proceeding is geared toward "business-to-business disputes about major contracts, joint ventures, or technology." H.B. 49, 145th Gen. Assem. (Del. 2009); see also Del. Ch. Ct. R. 96(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."); John Q. Lewis, *et al.*, Jones Day Publications, *The Delaware Court of Chancery Offers New Arbitration Procedures for Confidential, Efficient Resolution of Significant Business Disputes* (Feb. 2010), available at http://www.jonesday.com/ delaware_court_of_chancery/ ("While many court-sponsored arbitration programs have been targeted at smaller cases in an effort to reduce the strain on a court's

docket, this program is aimed specifically at the large, complex corporate and commercial cases in which the Court of Chancery has established expertise.").

In sum, Delaware has offered an important addition to the roster of alternative dispute resolution mechanisms, one marked by "[e]fficiency, confidentiality, [and] first-rate decision-makers experienced in resolving complex business disputes." Lewis H. Lazarus, *Court of Chancery Arbitration Likely to Become More Prevalent,* DEL. BUS. COURT INSIDER (Sept. 28, 2011), available at http://www.delawarebusinesslitigation.com/2011/09/articles/case-summaries/arbitration/court-of-chancery-arbitration-likely-to-become-more-prevalent/.

III. Because Confidentiality Is Essential To Arbitration, Businesses Will Not Arbitrate Publicly Before Court Of Chancery Judges, Thus Vitiating Any Benefits Of Openness, While Imposing Substantial Public Cost

In light of the promise that arbitration by Court of Chancery judges holds for resolving complex disputes quickly and competently, the district court's decision striking down the proceeding is deeply disappointing. It is also erroneous under the controlling "experience and logic" test. We limit our discussion to the logic prong of the test, because that is where *Amici* (in their respectful view) can

advance the Court's understanding by sharing the perspective of the businesses that are the intended participants in the proceeding.[2]

The logic prong asks a straightforward question: "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *North Jersey Media*, 308 F.3d at 216 (quoting *Press-Enterprise Co.* v. *Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986)). The answer here is equally straightforward: No. Requiring public access will not "pla[y] a significant positive role in the functioning" of Court of Chancery arbitration because, if such arbitration were made public, few if any businesses would participate in it. Instead, they would turn to alternative arbitral tribunals. The arbitration proceeding therefore would not "functio[n]" at all.

Analysis under the logic prong must begin by recognizing that Court of Chancery arbitration differs in a key respect from most, if not all, of the other processes the Supreme Court or this Court has considered under the "experience and logic" test. The difference is that it (like all arbitration) is *entirely consensual*. See Part II, *supra*. In other processes, such as litigation or administrative proceedings, the analysis begins from the premise that the process will inevitably

[2] Prevailing under the logic prong is necessary, but not sufficient, for Plaintiff to satisfy its burden of proving a qualified First Amendment right of access to Court of Chancery arbitration; Plaintiff must also prevail under the experience prong. See *North Jersey Media*, 308 F.3d at 216 ("Even if we could find a right of access under the . . . logic prong, absent a strong showing of openness under the experience prong . . . we would find no such [First Amendment] right here.").

occur—*i.e.*, a party, like it or not, *will be* haled into court or before an agency—and the only question is whether the process must take place openly. Not so here. In arbitration, it takes two to tango, but only one to end the dance. If *any* party does not agree to arbitrate before Court of Chancery judges, the arbitration will not occur. See Del. Ch. Ct. R. 97(a)(3) (requiring that "all parties" consent to arbitration).

The prospect that openness will deter use of Court of Chancery arbitration is critical to the logic prong analysis, because that prong asks not only whether openness would play a positive role, but also whether openness would come at a cost. As this Court explained, "whenever a court has found that openness serves community values, it has concluded that openness plays a 'significant positive role' in that proceeding. But that cannot be the story's end, for to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side—the extent to which openness impairs the public good." *North Jersey Media*, 308 F.3d at 217; see also *ibid*. ("We note in this respect that, were the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access."). Accordingly, under the logic prong, the Court must consider whether requiring openness would push Court of Chancery arbitration into disuse,

and if so, whether such disuse would "impair[] the public good." *Ibid.* The answer to both questions is yes.

As to the first question, there can be little doubt that companies would not arbitrate before Court of Chancery judges if the proceedings were made public. Confidentiality is essential to arbitration. Indeed, it is a main reason companies prefer to arbitrate rather than litigate. Among other things, confidentiality ensures that trade secrets and sensitive financial information are not divulged to competitors. See, *e.g.*, *Concepcion*, 131 S. Ct. at 1749. It avoids the hassle and uncertainty of litigating protective orders. It prevents testimony from being taken out of context and used unfairly to a company's disadvantage. It allows the parties to control what information is produced in the arbitration. It is generally less adversarial than litigation and therefore better able to preserve important business relationships. And it allows parties to resolve disputes conclusively without setting precedent that will bind or influence the resolution of future disputes among themselves or others. As the Fifth Circuit aptly stated, confidentiality goes to the "character of arbitration itself." *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004); see also, *e.g.*, Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1222–28 (2006) (discussing the benefits of confidential arbitration).

Uniform industry practice confirms the importance of confidentiality to arbitration. Arbitration clauses in commercial agreements routinely require that arbitration proceedings be kept confidential. So do the rules of national and international commercial arbitration organizations. See, *e.g.*, AAA & ABA, *Code of Ethics for Arbitrators in Commercial Disputes*, Canon VI(B) (Feb. 9, 2004), available at http://www.abanet.org/dispute/commercial_disputes.pdf ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."); AAA, *Commercial Arbitration Rules & Mediation Procedures*, R-23 (2009), available at http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased ("The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."); Int'l Inst. for Conflict Prevention and Resolution ("CPR"), *Rules for Non-Administered Arbitration*, R. 18 (2007), available at http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx ("the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential"); United Nations Comm'n on Int'l Trade Law, *Arbitration Rules*, Art. 28(3) (2010), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf ("Hearings shall be held in camera unless the parties agree otherwise."); Int'l Chamber of Commerce, *Rules of*

Arbitration, Art. 26(3) (2012), available at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ ("Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."). Other leading international arbitral fora have rules to similar effect. Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* 136 (2009).

Congress too has recognized that confidentiality is essential to arbitration. The statute authorizing federal courts to adopt alternative dispute resolution methods (including arbitration) *requires* the proceedings to be kept confidential. See 28 U.S.C. § 652(d) ("each district court shall . . . provide for the confidentiality of the alternative dispute resolution processes and . . . prohibit disclosure of confidential dispute resolution communications"). As the Federal Judicial Center stated, "Confidentiality is generally considered a bedrock principle for most ADR procedures. Thus, participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential." Robert J. Niemic *et al.*, *Guide to Judicial Management of Cases in ADR*, 93–94 (2001), available at http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf (footnote omitted). In making Court of Chancery arbitration confidential, Delaware simply followed a long line of practice. See H.B. 49, 145th

Gen. Assem. (Del. 2009) ("because arbitration is traditionally private, the bill maintains proceedings in the Court of Chancery as confidential").[3]

There is thus little doubt that companies would not arbitrate before Court of Chancery judges if the proceedings were made public. By definition, companies seeking confidential arbitration want to resolve their disputes privately. If they cannot do so in the Court of Chancery, they will just turn to other non-public fora.

Most likely businesses will go abroad. Filings in foreign arbitral tribunals have steadily increased in the last two decades and have surged in recent years. New claims filed in the London Court of International Arbitration increased by 55% between 2007 and 2008 and by another 14% in 2009; claims in the

[3] That line extends back hundreds of years and antedates the nation's Founding. "The New York Chamber of Commerce, for example, established an arbitral regime at the Chamber's inception in 1768. It even relied on arbitration's privacy and independence to foster efficient resolution of disputes among American and British merchants during and after the American Revolutionary War." Schmitz, *supra*, 54 U. Kan. L. Rev. at 1223 (footnotes omitted). Authorities throughout the 20th century likewise acknowledged the value of privacy in arbitration. See, *e.g.*, Soia Mentschikoff, *Commercial Arbitration*, 61 Colum. L. Rev. 846, 849 (1961) ("Although we do not know, we believe that the chief moving factors [for individuated arbitration] are: (1) a desire for privacy . . . ."); J. Noble Braden, *Sound Rules and Administration in Arbitration*, 83 U. Pa. L. Rev. 189, 195 (1934) ("The privacy of arbitration is one of its great advantages. 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."); Alexander P. Blanck, *Arbitration—a Substitute for Commercial Litigation*, 18 Bus. L.J. 19, 19 (1931) ("Very often settlement of a controversy by arbitration, privately, outside of the court is infinitely superior to a victory that might be achieved in court.").

International Chamber of Commerce increased 11% in 2008 and 23% in 2009; and claims in the Swiss Chambers' Court of Arbitration and Mediation increased 15% in 2008 and 53% in 2009. Mark Bezant *et al.*, *Dispute Resolution in the Global Economy*, FTI JOURNAL (Apr. 2010), available at http://www.ftijournal.com/article/Dispute-Resolution-in-the-Global-Economy.

The popularity of foreign arbitral tribunals is no surprise. America continues to labor under the perception—too often accurate—that its "highly complex and fragmented" legal system is unfriendly to businesses. Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii (Jan. 2007), available at http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (noting that this perception "diminishes our attractiveness to international companies"). Meanwhile, foreign nations have made concerted efforts to attract businesses by streamlining their own arbitration fora and increasing the quality of their arbitrators. See, *e.g.*, N.Y. State Bar Ass'n, Task Force on N.Y. Law in Int'l Matters, *Final Report* 4 (June 25, 2011). In particular, several nations have enacted procedures like Delaware's that allow businesses to arbitrate their disputes before judges with expertise in business issues. "In 2010, at least 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." *Ibid.* A main reason Delaware authorized arbitration by Court of Chancery judges was to compete against these foreign tribunals and thereby increase America's competitiveness in the global economy. See H.B. 49, 145th Gen. Assem. (Del. 2009).

That companies will not arbitrate publicly before Court of Chancery judges directly affects the cost-benefit analysis under the logic prong. On the benefit side, public access will not "pla[y] a significant positive role" (*North Jersey Media*, 308 F.3d at 216) in the functioning of the arbitration proceeding for the simple reason that in most if not all cases there will be no such arbitration. Any benefit to be had by public arbitration exists only in theory. But the costs of requiring openness in the arbitration proceeding are real. Because businesses will not participate, they will not benefit from the many advantages arbitration by Court of Chancery judges has in resolving their complex and high-dollar disputes. See Part II, *supra*. The decision below also will discourage other States from adopting similar arbitration proceedings in what could be (and should be) a race to the top.

Denying businesses access to promising domestic arbitral fora injures not just businesses, but the public. The companies that would arbitrate before Court of Chancery judges are among the largest in the nation and the world. See Del. Div.

of Corps., *2011 Annual Report*, available at http://corp.delaware.gov/2011CorpAR.pdf (last visited Dec. 9, 2012) (63% of Fortune 500 companies incorporate in Delaware, and there are more than 945,000 active business entities in the state). Their presence greatly benefits domestic capital markets. But this benefit may prove fleeting, because "as technology has virtually eliminated barriers to the flow of capital, it now freely flows to the most efficient markets, in all corners of the globe." Bloomberg & Schumer, *supra*, at i. The decision below strongly encourages businesses to arbitrate their disputes in one of the many available foreign tribunals. Indeed, a major impetus for improving the quality of those tribunals was "[foreign] governments' recognition of the importance of arbitration to their economies and to their position in today's world of global commerce." N.Y. State Bar Ass'n, *supra*, at 4. At a time when the country, its investors, and its markets would benefit greatly by likewise increasing the quality of domestic arbitral tribunals, the decision below heads in exactly the wrong direction.

For these reasons, public access will not "pla[y] a significant positive role" in the functioning of Court of Chancery arbitration, but it will very much "impair[] the public good." *North Jersey Media*, 308 F.3d at 216–17.

IV. Court Of Chancery Arbitration Differs Markedly From Civil Litigation, And The District Court Erred By Conflating The Two Processes

The district court struck down confidential Court of Chancery arbitration because the court concluded that it is "essentially a civil trial." 2012 WL 3744718, at *9. This conclusion is erroneous for many reasons, as Appellants show. We add the following brief points to their analysis.

Virtually every feature of Court of Chancery arbitration the district court identified is also a feature of arbitration in any other non-public forum, to which a qualified right of access indisputably does not attach. For example, the court noted the following characteristic features of arbitration:

- Arbitration is consensual. "The parties consent to be bound by the decision of the arbitrator, and his resolution of the dispute is constrained by the parties' agreement." *Id.* at *6. Indeed, "consent is one of arbitration's defining features." *Ibid.*

- Arbitration allows "parties [to] agree to participate in a specified forum." *Id.* at *7. "In litigation, a court can compel an unwilling party." *Ibid.*

- "Parties can craft arbitrations to their specific needs." *Ibid.* They can "specify the scope of the arbitrator's authority and design the applicable procedural rules." *Ibid.* In contrast, "[l]itigation follows the court's procedures and guidelines." *Ibid.*

- "[A]rbitration decisions are ad hoc, lacking any precedential value." *Ibid.*

- And of course, "historically, arbitrations have been conducted outside the public view." *Ibid.*

Those features, which the district court identified as hallmarks of classic arbitration, all describe arbitration before Court of Chancery judges. See Part II, *supra*. This is not surprising, given that Delaware viewed the arbitration proceeding as an *alternative* to, and *substitute* for, civil litigation. See H.B. 49, 145th Gen. Assem. (Del. 2009) ("This bill is intended to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes.").

In concluding that the arbitration proceeding is nonetheless tantamount to civil litigation, the district court relied on a single fact: That the arbitrators are Court of Chancery judges. 2012 WL 3744718, at *9. But that fact cannot bear the dispositive weight the district court assigned it. To start with, as the district court itself recognized, consent is the "'essence of arbitration.'" *Id.* at *6 (quoting *Dluhos* v. *Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003)); see also, *e.g.*, *Harrison* v. *Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997) (same). Court of Chancery arbitration is consensual. Litigation is not. That the Court of Chancery arbitrator also resolves *other* disputes between *other* parties in judicial proceedings governed by *other* rules and resulting in *precedential* decisions does not somehow transform consensual arbitration into non-consensual litigation. The two are simply different animals.

The logic of the district court's reasoning is also untenable. Because the only distinction between classic arbitration and Court of Chancery arbitration is

that the latter is conducted by a judge, the district court's reasoning amounts to a *per se* rule that *any* proceeding conducted with public funds by a state judicial officer is necessarily "civil litigation" and therefore subject to a qualified First Amendment right of access. But that conclusion is clearly overbroad and contrary to settled practice in courts throughout the country. It would invalidate the numerous state programs that authorize judges to act as arbitrators in court-annexed or similar arbitration programs. See, *e.g.*, N.Y. Adv. Comm. Jud. Eth. Op. No. 07-12 (Sept. 6, 2007) (sitting judges may serve as arbitrators in binding arbitrations in small claims court); D.C. Super. Ct. R. Proc. For Small Claims and Conciliation Branch, R. 1, Arbitration (2012) (same); Cal Civ. Proc. Code § 1141.18(a) (active judges may serve as arbitrators without compensation); N.C. Gen. Stat. § 90-21.62 (emergency superior court judges may serve as arbitrators); Or. Unif. Trial Ct. R., ch. 13, Arbitration (2005) (retired or senior judges may serve as arbitrators); Or. Rev. Stat. § 671.703 (2011) (administrative law judges may serve as arbitrators on contracts board); 37-7 Md. Reg. 547 (2010) (retired judges may serve as arbitrators); W. Va. Code § 158-13-4 (2005) (administrative law judges may serve as arbitrators); Wyo. Code of Jud. Conduct R. II(A)(2) (2012) (part-time and retired judges may serve as arbitrators). See also, *e.g.*, Arthur Garwin *et al.*, ABA, *Annotated Model Code of Judicial Conduct* 393–95 (2d ed. 2011) (authorizing judges to arbitrate disputes as part of their official duties). But

the Supreme Court has made clear that, under basic principles of federalism, the allocation of authority among state branches of government is "for the determination of the *state*," not Article III judges. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (emphasis added).

For these reasons, in addition to those explained by Appellants, arbitration by Court of Chancery judges is a far cry from civil litigation. The district court erred by equating the two processes.

CONCLUSION

For all of these reasons, the Court should reverse the judgment below.

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Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Rule 28.3(d), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit, having been admitted to that bar in November 1996.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2012, I electronically filed the foregoing Brief of *Amici Curiae* and Entry of Appearance with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I further certify that 10 hard copies of this Brief have been mailed to the Clerk's Office and hard copies of this Brief have been served upon the following via Federal Express overnight service:

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