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.; THE HON. JOHN W. NOBLE; THE HON. DONALD F. PARSONS, JR.; THE HON. J. TRAVIS LASTER; 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

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWELVE NEWS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE

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January 14, 2013

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus curiae The Reporters Committee for Freedom of the Press ("The Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The

AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Atlantic Media, Inc. is a privately held, integrated media company that publishes *The Atlantic*, *National Journal*, *Quartz*, and *Government Executive*. These award-winning titles address topics in national and international affairs, business, culture, technology and related areas, as well as cover political and public policy issues at federal, state and local levels. *The Atlantic* was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow and others.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people in more than 160 countries. Bloomberg News operates the following: cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station that syndicates reports to more than 840 radio stations

worldwide; *Bloomberg Markets* and *Bloomberg Businessweek* magazines; and Bloomberg.com, which receives 3.5 million individual user visits each month.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine and, through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires, as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information websites and licensing and syndication. The company's portfolio of locally focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington-based Scripps Media Center, home of the Scripps Howard News Service.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including *USA TODAY*, as well as hundreds of non-daily publications. In broadcasting, the company operates 23

television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

The Maryland-Delaware-District of Columbia Broadcasters Association unites public and commercial radio and television across Maryland, DC, and Delaware. The main purpose of MDCD is to represent and further the interests of broadcasters, communicate relevant information to broadcasters through meetings and publications, and provide educational services through webinars, workshops, or other appropriate means in order to better serve the public.

The New York Times Company is a leading global multimedia media news and information company, which publishes *The New York Times*, the *International Herald Tribune*, and *The Boston Globe* and operates NYTimes.com, BostonGlobe.com, Boston.com, About.com and related properties.

NPR, Inc. is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations that are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming.

NPR.org offers hourly newscasts, special features and 10 years of archived audio and information.

Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

The Washington Post publishes one of the nation's daily leading newspapers, as well as a website (washingtonpost.com) that draws an average of more than 20 million unique visitors per month.

Amici have a strong interest in ensuring the right of public access to court proceedings, which includes proceedings akin to civil trials in the Delaware Court of Chancery. The Chancery Court routinely handles cases involving large businesses that attract significant public attention. *Amici* request that this Court

recognize the strong presumption in favor of open access to judicial proceedings and the access rights of the public and the press under the First Amendment and affirm the order issued by the district court.

SUMMARY OF ARGUMENT

The Reporters Committee for Freedom of the Press, joined by listed *amici*, urges this Court to affirm the district court's order. The U.S. Supreme Court and this Court have recognized a First Amendment right of public access to judicial proceedings, including civil trials. Under the Supreme Court's "experience and logic" test, civil trials are open to the public because they historically have been open and because public scrutiny protects the integrity of the legal process and fosters fairness.

Here, Delaware law and the Delaware Chancery Court have established a scheme under which confidential arbitration proceedings between businesses may be overseen by a sitting Chancery Court judge, acting as arbitrator. Ordinary private arbitration proceedings are typically closed to the public, but just because the Chancery Court labeled its scheme as "arbitration" does not mean this Court must uncritically analyze it as such. A state may not skirt its constitutional obligations simply by renaming a proceeding. Delaware's framework is unique in that it provides for sitting Chancery Court judges to secretly and confidentially

arbitrate claims that they could otherwise hear in an open court proceeding where all constitutional presumptions of access would apply. Allowing a court that plays such an essential role in resolving disputes in corporate America to act under a veil of secrecy would run counter to important, well-established public interests. As such, the district court correctly held that proceedings under this scheme are sufficiently like civil trials to trigger First Amendment rights of public access. This Court should uphold that finding.

ARGUMENT

I. The public has a First Amendment right of access to judicial proceedings, including civil trials.

Under Supreme Court and Third Circuit precedent, there is an important First Amendment right of public access to judicial proceedings, in order for the public to provide a meaningful check on the legal process.

A. The Supreme Court has recognized a First Amendment right of access to criminal proceedings.

The United States Supreme Court held in *Richmond Newspapers* that the public has a First Amendment right of access to criminal judicial proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). In his plurality opinion, Chief Justice Burger observed that the right of public access to criminal trials stretched back hundreds of years, and "a presumption of openness inheres in

the very nature of a criminal trial under our system of justice." *Id.* at 573. This openness ensures fairness to all concerned and discourages "perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* at 569.

The Supreme Court has repeatedly reaffirmed these principles of openness. The first time was in *Globe Newspaper Co.*, where the Court declared that public scrutiny of a trial preserves the integrity of the factfinding process, fosters an environment of fairness, and allows the public to serve as a check on the judicial system. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). The Court extended the right of public access to pretrial criminal judicial proceedings, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508–10 (1984) ("*Press-Enterprise I*"), and to preliminary hearings in the criminal context. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7–10 (1986) ("*Press-Enterprise II*"). In the latter case, the Supreme Court held that the character and purpose of a preliminary hearing were so similar to that of a criminal trial that the same principles of openness apply. *See id.* at 12.

B. This Court has recognized a First Amendment right of public access to civil matters.

The Supreme Court has never directly addressed whether these same principles of openness apply to civil trials. In *Richmond Newspapers*, however, the Court did observe that the historical considerations were similar. *See Richmond*

Newspapers, 448 U.S. at 580 n.17 (plurality opinion) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

As the district court correctly observed, "Many of the same rationales supporting openness in criminal trials apply equally to civil trials." *Del. Coal. for Open Gov't v. Strine*, --- F. Supp. 2d ---, 2012 WL 3744718, at *5 (D. Del. August 30, 2012). This Court has found a First Amendment right of public access to civil trials, which it labeled as "inherent in the nature of our democratic form of government." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984).

In a searching review of historical authorities and legal precedent, this Court recognized important justifications for public access to civil trials:

> From these authorities we conclude that public access to civil trials enhances the quality and safeguards the integrity of the factfinding process. It fosters an appearance of fairness and heightens public respect for the judicial process. It permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the First Amendment embraces a right of access to civil trials to ensure that this constitutionally protected discussion of governmental affairs is an informed one.

Id. at 1070 (citations and quotation marks omitted). The Court has affirmed this First Amendment right in numerous cases since *Publicker*. *See, e.g., In re Cendant*

Corp., 260 F.3d 183, 198 n.13 (3d Cir. 2001); *United States v. A.D.*, 28 F.3d 1353, 1357 (3d Cir. 1994); *Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986); *United States v. Smith*, 776 F.2d 1104, 1109 (3d Cir. 1985).

II. The district court correctly applied the First Amendment right of access to this case.

To determine whether a public right of access to a particular proceeding exists, Supreme Court precedent mandates review of both the "experience and logic" of allowing such access. *See Press-Enterprise II*, 478 U.S. at 8. To satisfy the "experience" part of the test, this Court considers "whether the place and process have historically been open to the press and general public." *Id.* at 10–12; *see also Publicker*, 733 F.2d at 1067–69; *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 206–09 (3d Cir. 2002). To satisfy the "logic" part, this Court considers "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 12–13; *Publicker*, 733 F.2d at 1069–70; *N. Jersey Media Grp., Inc.*, 308 F.3d at 205–07. If both parts are satisfied, then a First Amendment presumption of openness applies to the proceeding.

The district court found that an arbitration proceeding was a "civil judicial proceeding" and therefore entitled to all the corresponding First Amendment rights

of public access. The court therefore did not "reiterate the thorough analysis of the experience and logic test performed by" this Court in previous cases. *Del. Coal. for Open Gov't*, 2012 WL 3744718, at *10. Instead of ignoring the experience and logic test, as appellants claim, the district court applied it — and applied it correctly — by analogizing Delaware's scheme to a civil trial and holding that First Amendment access rights apply.

A. Despite the "arbitration" label, the Delaware scheme is tantamount to a civil trial under a broader application of the experience and logic test.

The Supreme Court has said that "the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the [proceeding at issue] functions much like a full-scale trial." *Press-Enterprise II*, 478 U.S. at 7; *see also United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994) (holding that post-trial proceedings carry identical First Amendment rights of public access as the trial itself); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012) (holding that public access "focus[es] not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695–96 (6th Cir. 2002) (rejecting "categorical distinction[s]" to define rights of public access in favor of a functional approach); *United States v. El-Sayegh*, 131 F.3d 158, 160–61 (D.C. Cir.

1997) (treating a completed plea agreement as "equivalent to a trial" in terms of a First Amendment right of public access). If the Delaware scheme were truly a private arbitration, an extensive experience and logic review of private arbitration would be appropriate. Instead, the district court correctly concluded that "[t]he label Delaware gives the proceeding offers little guidance." *Del. Coal. for Open Gov't*, 2012 WL 3744718, at *6.

Mere labeling of a proceeding by a State does not obviate the importance of judicial review, and it certainly does not remove the functional nature of the proceeding from the ambit of the Constitution. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] state cannot foreclose the exercise of constitutional rights by mere labels."). A state may not use word choice and linguistic scheming to write its way around the Constitution. If a type of proceeding is "sufficiently like a trial," despite a different name, it is still subject to the same First Amendment right of access. *See El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 149 (1993); *Press-Enterprise II*, 478 U.S. at 12.

Arbitration and litigation have important differences that blur under this scheme. Ordinary private arbitration is designed to foster flexibility, efficiency, informality, and speed in a way markedly different from civil litigation. *See 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. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

One feature of ordinary private arbitration is that the parties select their own arbitrator. *See, e.g.*, *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012) (referencing that "arbitration is a matter of contract" and that parties have a "designated arbitrator"); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672–73 (5th Cir. 2002). Here, however, as in litigation, the parties have no flexibility in determining the arbitrator. *See* Del. Ch. Ct. R. 97(b) ("Upon receipt of a petition, the Chancellor will appoint an Arbitrator.").

Having tailor-made discovery rules for every dispute is an important part of ordinary private arbitration, but Chancery Court rules are the default for this framework. *See* Del. Ch. Ct. R. 96(d). Although the parties may agree to their own discovery rules under the scheme, they may also do so under Chancery Court rules in civil litigation. *See* Del. Ch. Ct. R. 29 ("Unless the Court orders otherwise, the parties may by written stipulation . . . modify the procedures provided by these Rules for other methods of discovery.")

As the district court observed, sitting Chancery Court judges would conduct proceedings under this framework in the Chancery courthouse with the assistance

of Chancery Court staff, while receiving their usual salaries for doing so.[1] *See Del. Coal. for Open Gov't*, 2012 WL 3744718, at *9.

In short, Appellants offer little reason for why the Delaware scheme differs from civil litigation in any meaningful way beyond its total secrecy.

B. The Delaware scheme allows sitting judges to decide high-profile cases of important public interest in secrecy, where similar schemes are used elsewhere only for relatively minor proceedings.

In some instances, private arbitration deviates from civil litigation in ways that do not render it functionally equivalent to a civil trial. *See, e.g., United Steelworkers of America v. Warrior & Gulf Navig. Co.*, 363 U.S. 574, 578 (1960) ("In the commercial case, arbitration is the substitute for litigation.") In this case, however, unique features of the Delaware scheme counsel in favor of finding its functional equivalence to a civil trial.

The framework here gives the Delaware Court of Chancery "the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute." Del. Code Ann. tit. 10, § 349(a) (West 2012). As the district court noted, "[e]ven with the proliferation of alternative dispute resolution in

[1]These are but a few examples of the thorough similarity between proceedings under the Delaware scheme and civil litigation. In their brief, the Appellee provides further illustrations of how the particular procedural contours of the Delaware scheme hardly vary from routine civil litigation. *See* Brief of Appellee at 19–31.

courts, judges in this country do not take on the role of arbitrators." *Del. Coal. for Open Gov't*, 2012 WL 3744718, at *8. Arbitration is for *retired* judges, not *sitting* judges.

Several states allow judges to arbitrate some types of claims, but none of those procedures comes close to the facts here. For example, in New York, the District of Columbia, California, and Connecticut, sitting judges can arbitrate small claims.[2] As for other states, Appellants acknowledge that their arbitration rules pertain only to "part-time judges, administrative law judges, and magistrates" or "senior judges." Brief of Appellant at 45.

Relying on rules for small claims courts in other states is particularly unpersuasive considering the important corporate cases that define the dockets in

[2]Appellants cite N.Y. Advisory Comm. J. Ethics, Op. No. 07-12 (Sept. 6, 2007), which states that there is no ethical prohibition against a New York State trial judge volunteering as an arbitrator in a small claims court. For the District of Columbia, Appellants cite a court rule that small claims court judges must be "ready to serve as referee or arbitrator." D.C. Super. Ct. R. P. for the Small Claims and Conciliation Branch, R. for Arbitration, R. 1 (Jan. 2012). In California, Appellants cite that state's Code of Civil Procedure, Section 1141.18, which states: "A judge may also serve as an arbitrator without compensation." However, the California Rules make clear that arbitration under that section is for "small civil cases" only. See Cal. Civ. Proc. Code § 1141.10(a) (West 2012). Furthermore, California narrows that procedure even more by limiting arbitration panels to "active or inactive members of the State Bar, retired court commissioners who were licensed to practice law before their appointment as commissioners, and retired judges." Cal. Civ. Rule 3.814(a). Connecticut law says nothing about "arbitration;" although it is unclear whether the "magistrates" referred to in those section are analogous to arbitrators, they are only empowered to handle small claims and motor vehicle violations. See Conn. Gen. Stat. §§ 51-193l–u (West 2012).

Delaware. As Appellants note, nearly 1 million business entities have their legal home in Delaware, including more than half of all publicly traded companies in the United States and 63 percent of all Fortune 500 companies. *See* Brief of Appellant at 8. Rules that apply to govern the disputes of small claimants and motor vehicle regulation violators in other states are plainly inadequate to uphold the constitutional adequacy of a scheme that would allow billion-dollar corporations to prosecute million-dollar civil claims behind closed doors. Potential claims under this framework rise to such significance: A claim for monetary damages must be at least $1 million to even be eligible. *See* Del. Code Ann. tit. 10, § 347(a)(5) (West 2012).

Additionally, when large, publicly traded companies have disputes, shareholders must not be left in the dark. As one commentator observed, "[h]aving companies litigate private disputes may have been tolerable, but the Delaware arbitration provisions had the potential to lock shareholders out of many claims as companies shifted these claims to arbitration in order to keep them confidential and stop shareholder class action lawsuits." Steven M. Davidoff, *The Life and Death of Delaware's Arbitration Experiment*, N.Y. Times DealBook Blog (August 31, 2012), http://dealbook.nytimes.com/2012/08/31/the-life-and-death-of-delawares-arbitration-experiment/. These kinds of concerns are not at all relevant to the arbitration schemes in other states that Appellants cite.

The Delaware Chancery Court has been recognized as "the most important court for corporate law in the country." Jeffrey Cane, *Wilson Sonsini Hires Delaware Chief Judge*, N.Y. Times DealBook Blog (May 19, 2011), http://dealbook.nytimes.com/2011/05/19/wilson-sonsini-hires-delaware-chief-judge/. This prestige carries with it significant public interest and responsibilities. As always, the Chancery Court continues to hear cases that have attracted media coverage. Recent illustrations include the proposed $1.6 billion sale of the family-history site Ancestry.com, *see* Jef Feeley, *Ancestry.com Must Disclose Permira Sale Details*, Bloomberg News (Dec. 17, 2012), http://www.bloomberg.com/news/2012-12-17/ancestry-com-sale-to-permira-barrred-from-proceeding-1-.html, construction company Marietta Materials' attempt to acquire competitor Vulcan Materials, *see* Steven M. Davidoff , *Lessons From the Vulcan Materials Ruling*, N.Y. Times DealBook Blog (May 7, 2012), http://dealbook.nytimes.com/2012/05/07/the-lessons-from-the-vulcan-materials-ruling/, Airgas Inc.'s "controversial defense" against a multi-billion dollar takeover bid by a rival, *see* Harold Brubaker, *Airgas Hostile-Takeover Bid Ends With Court Ruling*, Phila. Inquirer, February 7, 2011, *available at* http://articles.philly.com/2011-02-17/business/28549862_1_airgas-board-airgas-shareholders-john-l-reed, and the lawsuit between fashion designer Tory Burch and her husband, *see* Peter Lattman, *In Unusual Move, Delaware Supreme Court*

Rebukes a Judge, N.Y Times DealBook Blog (Nov. 9, 2012), http://dealbook.nytimes.com/2012/11/09/in-unusual-move-the-delaware-supreme-court-rebukes-a-judge/. Cases like these typically result in lengthy, thoroughly reasoned opinions with precedential value — all of which would be lost going forward here.

The Delaware scheme empowers sitting Chancery Court judges to hear, in complete secrecy, the same kind of cases they would ordinarily hear in full view of the public in a civil trial. While many arbitrations are disputes that might have otherwise proceeded to trial, Appellants cite no authority to indicate a sitting judge can hear the same kind of case in private as he or she would in public without being subject to First Amendment access requirements. If this scheme were to continue, the public would be kept ignorant with the complicity of the Chancery Court. "The problem with trying to follow a dispute like this from the outside is that nothing is public unless the parties want it to be. So, we end up getting bits and drabs of information here and there. It becomes very difficult for an observer, or the market, to get any idea what the issues are." Brian JM Quinn, *Skyworks fireworks*, M&A Law Prof Blog (November 4, 2011), http://lawprofessors.typepad.com/mergers/2011/11/skyworks-fireworks.html.

If Delaware's bid for secrecy passes constitutional muster, other states may rush to enact similar procedures, and high-value business arbitrations that affect

the public and the markets will proliferate behind closed doors, with the government's endorsement. This end-run around three decades of constitutional law would be in direct conflict with Chief Justice Burger's admonition that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

C. Because the Delaware scheme is tantamount to a civil trial, the experience and logic test demands a First Amendment presumption of public access.

Ordinary private arbitration has not been historically open to the public, but Delaware's law does not regulate ordinary private arbitration. Sitting judges would be hearing the same matters they would hear in open court under nearly identical rules and procedures. The district court correctly ruled that such proceedings are "sufficiently like a trial" to merit the same First Amendment right of public access.

Hundreds of years of legal history compel the conclusion that civil trials meet the "experience" half of the test. *See Publicker Indus., Inc.*, 733 F.2d at 1068–70; *Smith*, 776 F.2d at 1109 ("We have also found that these societal interests and a long history of public access mandated recognition of a First Amendment right of access to civil trials."). The values served by open judicial proceedings, both criminal and civil, also satisfy the "logic" half of the test:

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

N. Jersey Media Grp., Inc., 308 F.3d at 217.

All of these factors are implicated here. Confidential arbitration conducted by sitting judges would diminish public understanding of the Chancery Court and the major cases it processes. This would lead to fundamental unfairness by creating suspicion that a different set of rules apply to corporations pursuing multimillion dollar civil claims against each other.

CONCLUSION

This Court should affirm the judgment of the District Court.

January 14, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(A)(7)(C) and Third Circuit Rule 31.1(c), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,795 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 Word 2010 and is set in 14-point Times New Roman font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court; and

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CERTIFICATE OF BAR ADMISSION

Pursuant to L.A.R. 46.1, I hereby certify that at least one of the attorneys whose names appear on this brief is a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, 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 a hard copy each to the following:

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