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

REPLY BRIEF FOR APPELLANTS

Andre G. Bouchard
Joel Friedlander
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Ave., Suite 1400
Wilmington, DE 19801
(302) 573-3500

Lawrence A. Hamermesh
Widener University School of Law
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2132

Andrew J. Pincus
E. Brantley Webb*
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

* Admitted only in Tennessee, supervised by principals of the firm

Counsel for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

MISCELLANEOUS

INTRODUCTION

The arguments advanced by Plaintiff and its amici are wrong as a matter of law and of logic. With respect to the law, although they pay lip service to the settled requirement that a party advocating a First Amendment right of access must show a history of public access to the proceeding in question, Plaintiff and its amici ignore (but do not dispute) the long-established confidentiality of arbitration proceedings. They instead claim that Delaware's commercial arbitration proceeding is sufficiently analogous to a civil trial to justify invocation of the history of open trials.

That broad "history-by-analogy" approach has been rejected by every court to consider it and, if adopted, would transform the First Amendment test into a standardless and uncertain inquiry. Moreover, Plaintiff's argument ignores the critical difference between arbitration and a trial: both parties' consent is necessary for arbitration, but a defendant's consent is not necessary to subject it to a civil trial. The history of access to civil trials in large part rests on the importance of public access as a check on abuse of coercive government power, and that coercion is not a feature of arbitration. That fundamental

distinction—along with the numerous other ways in which arbitration differs from a civil judicial proceeding—requires rejection of Plaintiff's attempt to satisfy the experience requirement by analogy.

Plaintiff's claim also makes no sense. Although Plaintiff lauds the benefits of the increased transparency that *generally* comes from public access, it is plain that no additional transparency will result if Plaintiff prevails here. All agree that confidentiality is an essential element of arbitration—if that confidentiality is not available under Delaware's procedure, Delaware's procedure will not be used. Parties wishing to arbitrate their disputes will simply utilize alternative arbitration systems.

What Plaintiff is attempting to do, therefore, is to use the First Amendment to eliminate Delaware's program because Plaintiff opposes arbitration generally, or at least government-sponsored arbitration. But a critical component of the First Amendment standard asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *North Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 216 (3d Cir. 2002). Here, where

public access will completely prevent the proceeding from functioning properly, the Constitution does not require that access be provided.

The costs and delay associated with adjudicating disputes burdens both parties and the courts—and those burdens are greater in the United States than in other developed nations. Endorsing Plaintiff's novel First Amendment claim will prevent States and the federal government from using innovative solutions to reduce the cost to parties and to address the significant budget constraints that courts now face. Nothing in the First Amendment justifies that result.

ARGUMENT

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

A First Amendment right of access may be recognized only if it is justified by both experience—"a tradition of accessibility" to the particular type of proceeding—and logic, because "access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 10 (1986) (*Press II*). The arguments advanced by Plaintiff and its amici confirm that both factors weigh strongly against a First Amendment right of

access to the proceedings before the arbitrator under Delaware's commercial arbitration procedure.

A. The "Experience" Requirement Precludes Recognition Of A First Amendment Access Right.

This Court has emphasized that "'[t]he role of history in the access determination' is 'crucial.'" *North Jersey Media Grp.*, 308 F.3d at 213 (quoting *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (en banc)).

Neither Plaintiff nor its amici even attempt to dispute the historical evidence demonstrating the longstanding *prohibition of public access* to arbitration proceedings set forth in Defendants' opening brief. *See* Def.Br. 55-59; Chamber of Commerce/Business Roundtable Amicus Brief ("Chamber/BRT Br.") 20-21 & n.3. Their failure to establish a tradition of public access to arbitration proceedings (whether presided over by private individuals or government officials) requires rejection of the First Amendment access claim.

Recognizing that they can neither satisfy the experience requirement nor dispense with it, Plaintiff and its amici construct an unprecedented, substitute "experience" test. As long as the proceeding in question can be labeled as the "functional equivalent of a civil trial"

(Pl.Br. 15), they assert, the experience requirement is satisfied. That standardless inquiry has no grounding in this Court's decisions, or those of the Supreme Court, and therefore should be rejected. Even if such an inquiry were permissible, moreover, Delaware's commercial arbitration proceeding cannot reasonably be analogized to a civil trial without at the same time creating a First Amendment access right to every single category of government adjudicatory proceeding.

1. Plaintiff's "Functional Equivalent" Test Violates Settled Precedent and Would Launch Courts on a Vague and Uncertain Inquiry.

a. This Court and the Supreme Court require a history of public access *to the particular type of proceeding* in order to recognize a First Amendment access right.

In applying the "experience" prong of the First Amendment access right standard, the inquiry focuses on "the particular proceeding in question." *Press II*, 478 U.S. at 9; *see also Capital Cities Media*, 797 F.2d at 1175. Thus, as explained in Defendants' opening brief (at 27-29), this Court—in rejecting First Amendment access claims—determined in *First Amendment Coalition v. Judicial Inquiry & Review Board*, 784 F.2d 467, 472 (3d Cir. 1986), that judicial disciplinary boards "do not have a long history of openness," and found in *North*

Jersey Media Group that deportation hearings did not "boast a tradition of openness sufficient to satisfy *Richmond Newspapers*," 308 F.3d at 212. *See also Capital Cities Media*, 797 F.2d at 1175 (no tradition of public access to agency records).

Plaintiff's view that the historical test can be satisfied "by looking to comparable proceedings by analogy" (Pl.Br. 17) rests on a clear misreading of several decisions. Every court to have considered that broad "history-by-analogy" approach has rejected it. For example, in *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994), this Court did *not* "find[] [federal delinquency proceedings] . . . subject to First Amendment right of access" (Pl.Br. 17); the Court did not reach the First Amendment question at all.

The issue in *A.D.* was whether a federal statute required juvenile proceedings to be closed to the public and, if so, whether the statute violated the First Amendment. This Court observed that the Supreme Court's decision in *Globe Newspapers* applied to "criminal trials, which historically have been open to the press and general public," but that "[n]o centuries-old tradition of openness exists for juvenile proceedings." *A.D.*, 28 F.3d at 1358. It went on to point out that "detention and

delinquency proceedings . . . are closely analogous to criminal proceedings" and that "while *Globe* is not on all fours with the situation before us, it does suggest that [interpreting a federal statute to impose] an across-the-board ban on access to juvenile proceedings under the Act would pose a substantial constitutional issue." *Id*. The Court found that this consideration, as well as the plain language of the statute, warranted interpreting the statute to permit district courts to exercise "discretion to strike on a case-by-case basis the balance between the interests protected by the First Amendment and competing privacy interests." *Id*. at 1359. There was no First Amendment holding in *A.D.*

Moreover, this Court in its subsequent decision in *North Jersey Media Group* expressly rejected a history-by-analogy approach and limited the Court's prior decisions—including *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994), which was decided the same year as *A.D.*—in which it had applied that approach in addressing First Amendment access claims. *See* Def.Br. 28 n.16. *A.D.* therefore provides no support for Plaintiff's position.

Plaintiff also cites (at 17) *In re Boston Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003), but that ruling cuts against Plaintiff's position. The

issue there involved a claimed First Amendment right to access documents submitted by a criminal defendant to demonstrate eligibility for Criminal Justice Act funding assistance for legal expenses. It is true that the court did not reject all consideration of analogies—pointing out that the CJA was first enacted in 1964 and that the experience inquiry permits consideration of "analogous proceedings and documents of the same 'type or kind.'" *Id.* at 184. But the court emphasized the significant limitations on any use of this approach, cautioning that "[t]he analogies must be solid ones, . . . which serve as reasonable proxies for the 'favorable judgment of experience' concerning access to the actual documents in question." *Id.*

Indeed, the First Circuit rejected the plaintiffs' use of analogies in *Boston Herald*, finding that they had "stray[ed] too far from the particular nature of the CJA eligibility documents" in drawing an analogy to "access to criminal trials." *Id.* The court refused to rely on this analogy because it was "too broad. . . . As seen from examples such as grand jury materials and presentence reports, the mere connection of a document with a criminal case does not itself link the document to a tradition of public access." *Id.*

The argument advanced by Plaintiff here is precisely the same as the one rejected in *Boston Herald*—that any proceeding that can in some way be analogized to a criminal or civil trial is encompassed within the First Amendment access right. Plaintiff's argument should be rejected by this Court as well.

Finally, Plaintiff points to *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286 (2d Cir. 2012). That case involved proceedings for the enforcement of citations issued by New York City police officers for violations of the Transit Authority's rules of conduct. Prior to 1986, those citations were returnable in New York Criminal Court; subsequently, a police officer had discretion to issue a Criminal Court summons or a notice of violation to be adjudicated by the Transit Adjudication Bureau ("TAB"). The issue before the court of appeals was whether a First Amendment right of public access applied to proceedings before the TAB.

The court based its finding of sufficient "experience" of openness on "[t]he fact that an alleged violator may be subject either to a court or to a TAB proceeding at the total discretion of the police officer." 684 F.3d at 301. Because of that "jurisdictional overlap and shared

function," the resolution of "the experience and logic inquiry . . . with respect to the Criminal Court largely determines how it comes out for the TAB as well. And, since access to criminal court hearings is the core of the entire *Richmond Newspapers* line of cases, a similar result for the TAB seems almost foreordained." *Id.*; *see also id.* at 301-02 ("The *process* that goes on at TAB hearings is *a determination of whether a respondent has violated a Transit Authority Rule*. And *that* process was presumptively open from the inception of the Rules system in 1966, when such proceedings were heard only in criminal courts.").

The broad language on which Plaintiff relies (*see* Pl.Br. 19-20) occurs in the portion of the court's opinion rejecting the Transit Authority's claim that the experience and logic test is inapplicable to administrative agencies. In applying the experience standard itself, the court principally relied not on analogies but rather on the fact that *the government alone* had the power to divert to the TAB proceeding matters that formerly would have been adjudicated in a criminal court.[1]

---

[1] Plaintiff also cites *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985), but that ruling—which predates the Supreme Court's decision in *Press II* clarifying the critical nature of the experience inquiry (*see* Def.Br. 28 n.16)—was the subject of an order by the Tenth Circuit directing the district court to "vacate

There is thus no precedent supporting Plaintiff's contention that the experience standard can be satisfied by reference to broad analogies. To the contrary, courts have repeatedly rejected such arguments. A tradition of openness with respect to other, different proceedings has been found relevant only where the proceeding with a history of openness was indistinguishable from the proceedings at issue—for example, because the government could choose whether to require an individual to appear before either of the two types of tribunals with respect to the very same charge.

b. A "comparable proceedings by analogy" test provides no real guidance and inevitably will produce uncertain and inconsistent results.

Plaintiff's claim that the experience prong of the First Amendment access standard may be satisfied "by looking to comparable proceedings by analogy" (Pl.Br. 17) must be rejected for the additional reason that the broad inquiry Plaintiff proposes inevitably will produce erroneous and inconsistent results.

---

its judgment and withdraw its Memorandum Decision and Order," 832 F.2d 1180, 1186 (10th Cir. 1987). And the passage of Judge Adams' separate opinion in *First Amendment Coalition* that is quoted by Plaintiff (Pl.Br. 18) is part of the explanation of his dissent from the majority's rejection of the First Amendment access claim.

To begin with, Plaintiff does not argue that analogies are relevant only in the limited situation in which the government can direct a proceeding formerly adjudicated only in open court either to a court or to a different decisionmaker. Rather, Plaintiff contends that notwithstanding the existence of significant differences between the new proceeding and the one with the history of openness, it still should be possible to conclude that the similarities outweigh the differences and that the "experience" with respect to the older proceeding can therefore be imputed to the new one.

As the First Circuit explained in *Boston Herald*, however, that approach sweeps much too broadly. The critical question is not whether the proceeding in question bears some resemblance to a criminal or civil trial. The question is whether it is indistinguishable from them in all respects, and particularly whether the new proceeding incorporates all of the specific aspects of a civil or criminal trial that are the reasons for the tradition of public access.

After all, some parts of criminal and civil proceedings are not open to the public. Finding a tradition of access based on the presence of only some aspects of a trial "would be contrary to precedent employing

more finely honed classifications." *In re Boston Herald,* 321 F.3d at 185. "[T]he First Amendment does not grant the press or the public an automatic constitutional right of access to every document [or proceeding] connected to judicial activity. Rather, courts must apply the *Press II* standards to a particular class of documents or proceedings and determine whether the right attaches to that class." *Id*. at 184.

Once identity between the two proceedings is not required, the inquiry becomes standardless and therefore uncertain. How will a court determine how much similarity is enough to conclude that history with respect to one proceeding should be applied to another? Are some characteristics more important than others, or do all weigh equally? What if the characteristics that are similar also are shared by proceedings that lack a longstanding tradition of openness?

That is the precise problem with Plaintiff's approach in this case. As we discuss in detail below, the particular characteristics of a civil trial on which Plaintiff relies—such as government funding and decisions by a judge—are common to all judicial proceedings. But some judicial proceedings (such as many family law disputes and involuntary commitment hearings, *see* Def.Br. 30-31) while sharing those

characteristics have nevertheless traditionally been *closed* to the public. And many more of the characteristics of the Delaware arbitrations (for example, determinations regarding the parties' rights) are features of non-trial proceedings—every administrative adjudication, every arbitration, and every decision made by a judge outside the trial context—that historically have not been open to the public. Picking and choosing among characteristics therefore assures erroneous results.

Because Plaintiff's "history by analogy" approach is barred by precedent, and because it opens the door to arbitrary and unjustified decisions, that approach should be rejected by this Court.

2. The Characteristics of Delaware's Commercial Arbitration Proceedings on Which Plaintiff and its Amici Rely Do Not Make the Arbitration Proceedings the Equivalent of Civil Trials.

Even if the experience requirement could be satisfied by analogizing to a different proceeding that shares only some of the characteristics of the proceeding at issue, that approach cannot be employed here to overcome the long tradition of confidentiality associated with arbitration proceedings. The Delaware commercial arbitration proceeding is fundamentally different from a civil trial, and

the historic openness of civil trials therefore cannot be invoked by analogy.

Plaintiff appears to argue at some points in its brief that *all* arbitration proceedings satisfy the experience prong of the First Amendment standard because they are sufficiently similar to civil trials. Thus, Plaintiff responds to the numerous observations of the Supreme Court and this Court that arbitration differs from judicial litigation because it is based on consent (*see* Def.Br. 35-37) by stating that the view "that arbitration is consensual and litigation is not" is "inaccurate." Pl.Br. 21. According to Plaintiff, an arbitration agreement "is nothing more than a choice of venue provision" and both a judge and an arbitrator "have the power to enter a default judgment against the nonparticipating party." *Id*. at 22.

Similarly, Plaintiff argues that the procedural flexibility and speed of arbitration is no different than civil litigation. Pl.Br. 22-24. And it contends that parties can limit appellate review by agreement to the same extent that the Federal Arbitration Act limits judicial review of arbitral awards. *Id*. at 24.

If these contentions were correct, they could—under Plaintiff's theory—be claimed as support for the proposition that the tradition of public access to civil trials should be imputed to *all* arbitration proceedings, and that a First Amendment right of access should apply across-the-board to every arbitration proceeding. That possibility confirms the flaws in Plaintiff's history-by-analogy approach.

Of course, Plaintiff's contentions are wrong in every respect. Arbitration differs fundamentally from litigation in that the parties' consent is essential to permit the arbitrator to render a binding decision; consent is not necessary to subject a party to the judicial process. Plaintiff thus misses the point in asserting that both an arbitrator and a judge "have the power to enter a default judgment against [a] nonparticipating party" (Pl.Br. 22)—an arbitrator's order is wholly ineffective without that nonparticipating party's prior consent, but a judicial order can, and frequently does, bind a nonconsenting party.

Plaintiff and its amici fail to address the fundamental nature of this distinction. The tradition of openness relating to criminal and civil trials rests in large part on the exercise of coercive government power

that occurs through such proceedings (the prosecution and adjudication of governmental charges against a criminal defendant on the one hand, and the adjudication through the exercise of coercive government power with respect to civil litigants on the other). That unconsented exercise of authority by definition cannot take place in an arbitration proceeding because the parties' consent is essential to permit the arbitration proceeding to occur. Arbitration thus, by definition, lacks a critical attribute of civil and criminal trials—government coercion—that is one of the key reasons for the traditional openness of those proceedings. Transferring that historical tradition to a context in which that critical attribute is absent would not provide a "reasonable prox[y] for the 'favorable judgment of experience,'" *In re Boston Herald*, 321 F.3d at 184; it would constitute an entirely arbitrary invocation of that tradition.

Plaintiff's broad assertions about the effect of the parties' agreement on judicial procedures and appellate review of trial court judgments are also erroneous. Legal standards significantly limit the parties' ability to reshape trial court proceedings, and parties may not alter the legal standards governing appellate review. Def. Br. 39, 40-42.

In contrast, arbitrators have more freedom to tailor equitable relief to the needs of the parties and the dispute at issue—they may depart more readily than courts, for example, from the specific remedies prescribed by the applicable substantive law. *See, e.g.*, Uniform Arbitration Act § 21(c) (2000) ("an arbitrator may order such remedies as the arbitrator considers just and appropriate"); *id.* cmt 3 ("Section 21(c) preserves the traditional, broad right of arbitrators to fashion remedies. . . . [It] allows an arbitrator to order broad relief even that beyond the limits of courts which are circumscribed by principles of law and equity. . . . "[B]road remedial discretion is a positive aspect of arbitration.").

Finally, while the Court of Chancery is proud of its reputation for handling its entire docket more expeditiously than occurs in other courts adjudicating similar cases, the Court of Chancery is not so fast as to adjudicate the majority of its cases within 90 days—as required by Delaware Court of Chancery Rule 97(e). This speed is only possible because the arbitration features expedited procedures and because the arbitrator's role is simply to resolve a dispute between contracting parties—but not render a decision with broader precedential impact that will affect the development of the law. *See also* Def.Br. 38-42;

Chamber/BRT Br. 6-11. Moreover, Delaware's commercial arbitration procedure is not restricted to disputes falling within the Court of Chancery's jurisdiction, so it enables resolution of disputes more expeditiously than the courts that otherwise would adjudicate the matter.[2]

Plaintiff's general arguments thus provide no support for its civil trial analogy. To the contrary, they demonstrate how arbitration proceedings differ fundamentally from civil trials. The three specific characteristics of Delaware's commercial arbitration procedure cited by Plaintiff and its amici—that the arbitration is supported with government funds and resources, that it is presided over by a judge, and that the arbitrator's award takes effect in the absence of a challenge—similarly provide no basis for upholding their analogy to civil trials. If they did, every government adjudicatory proceeding would satisfy the experience prong of the access standard, the precise result that courts

---

[2] Amici worry that Delaware's arbitration program will somehow prevent development of the State's contract and corporate law through judicial decisions (Reporters Committee for Freedom of the Press Amicus Br. 18). Many disputes are ineligible for arbitration under Delaware's rules and many parties do not agree to arbitrate their disputes—there is no risk that Delaware's courts will lack sufficient cases to address important legal issues.

consistently have rejected on the ground that many aspects of criminal and civil judicial proceedings and administrative adjudicatory proceedings have historically been closed to the public.

a. Government funding and use of government resources.

Plaintiff advances an argument that is significantly broader than the rationale adopted by the district court. To the district court, it was the Delaware statute's assignment to judges of the role of arbitrator that transformed the arbitration into a civil trial, because in the district court's view "judges in this country do not take on the role of arbitrators." JA27. The district court rejected the contention that government sponsorship and funding of arbitration is sufficient to permit the analogy to civil trials. JA25-26 ("[A]rbitrations may occur in [government] courthouses, and arbitrators . . . may be paid by the government for their services.").

Perhaps recognizing the flaws in the district court's reliance on judges' service as arbitrators (*see* Def.Br. 43-55), Plaintiff focuses its attention on use of government resources and government-employed personnel in the arbitration process. Thus, Plaintiff points out that "the arbitrator conducts the proceeding in a government courthouse on

government time (and government salary)" and is assisted by "court personnel." Pl.Br. 26, 28. And it emphasizes that its First Amendment access right would apply even if Delaware had placed the arbitration responsibility "in the [State's] executive or legislative branch." *Id*. at 31 (responding to Def.Br. 43 n.22).

But Plaintiff's broader argument fares no better than the district court's more targeted approach. If government funding of an adjudication proceeding were sufficient to permit reliance on the openness of civil trials to satisfy the experience prong of the First Amendment standard, then *every* government adjudicatory proceeding would be subject to an access right, including the deportation hearings at issue in *North Jersey Media Group*. Indeed, it would invalidate the Alternative Dispute Resolution Act of 1998 ("ADRA"), Pub. L. No. 105-315, 112 Stat. 2993. *See* Def.Br. 47 (discussing ADRA). By definition, all such proceedings that receive the government resources cited by Plaintiff "determin[e] and affect[] the substantive legal rights of the parties" and resolve disputes generally similar to those adjudicated in courts. Pl.Br. 32.

Certainly every government-sponsored arbitration process would satisfy Plaintiff's definition, and all state court-annexed arbitrations would have to be open to the public under Plaintiff's view of the law. Such a ruling would sweep very broadly. *See* Def.Br. 66-69.[3] Because the effectiveness of arbitration depends in significant part upon its confidentiality (*see id.* at 55-59; Chamber/BRT Br. 18-21), the result would be to render all of those proceedings wholly ineffective.

No court has adopted such a broad approach to applying the experience prong, and those courts that have considered such an approach have rejected it. As the First Circuit observed in *Boston Herald*, such broad analogies are inconsistent with the standards applicable to criminal proceedings and civil trials, which themselves include proceedings not open to the public. This Court should reject the argument as well.

b. Judges serving as arbitrators.

Plaintiff and its amici also adopt the district court's view that the service of a sitting judge as arbitrator transforms the arbitration into a

---

[3] Plaintiff attempts (at 49-54) to distinguish other state-sponsored arbitration programs. But it ignores the fact that, because all of these programs use government resources, all would be covered under Plaintiff's approach.

civil trial: "judicial officers are engaged in government-sponsored judicial conduct—finding facts, interpreting and applying law, and deciding cases, empowered by and under the auspices of the State judicial system. Judicial arbitrators are deciding the substantive legal rights of the parties." Pl.Br. 29.

Of course, *all* arbitrators are charged with "finding facts, interpreting and applying law, and deciding cases," including "deciding the substantive legal rights of the parties." The nature of the task by itself therefore cannot be sufficient to trigger application the tradition of trial openness. What Plaintiff seems to argue here is that the nature of the task combined with the fact that it is performed by a "judicial officer" (Pl.Br. 27) transform an arbitration into a civil trial. A State could assign non-adjudicatory duties to a judge without triggering a First Amendment right of public access, but assigning adjudicatory responsibility to a judge would trigger public access even though there would be no constitutional access right if that same duty were exercised by another type of government official.

Much of Plaintiff's argument, like the district court's rationale, rests on the view that serving as an arbitrator is incompatible with a

judge's other responsibilities. *See, e.g.*, Pl.Br. 28. But the States retain plenary authority under our system of federalism to choose for themselves how to allocate responsibility among state officials. Def.Br. 48-51. Making the First Amendment right of access turn on the other duties of the state official conducting the proceeding would significantly limit the States' discretion in structuring government functions.

Moreover, nothing in the First Amendment justifies distinctions based on a state official's other duties. The purpose of the inquiry here is to determine whether the new proceeding is so closely analogous to a civil trial that the history of open civil trials should apply to the new proceeding as well. The fact that the same decisionmaker presides over different types of proceedings by itself does nothing to change the nature of those proceedings, and therefore cannot make applicable to the arbitration proceeding the history of civil trial openness.

Next, Plaintiff argues that sitting judges never, or almost never, serve as arbitrators. Virtually all of Plaintiff's "evidence," however, consists of assertions that the statutes or court rules merely permit judges to serve as arbitrators and that Defendants have failed to adduce evidence that judges in fact do take on that responsibility. Pl.Br. 49-54.

But it is Plaintiff that bears the burden of demonstrating the unconstitutionality of Delaware's duly enacted law, and it is Plaintiff that bears the burden of establishing that the tradition of open civil trials should be imputed to the factually-different context of judge-supervised arbitration. The fact that numerous state laws and court rules authorize judges to serve as arbitrators demonstrates the fallacy of Plaintiff's contention that Delaware's approach is unprecedented or unusual.[4]

---

[4] When Plaintiff is unable to distinguish a state law or court rule on this ground, it simply advances another distinction—without regard to whether the distinction is in any way relevant to its legal theory. Thus, Plaintiff several times points out that a particular court-annexed arbitration program is "non-binding and subject to de novo review." Pl.Br. 32-36. Plaintiff does not explain why the legal effect of the parties' joint decision to accept an arbitrator's suggested resolution is sufficient to remove the proceeding from Plaintiff's First Amendment rule, but the parties' joint decision to submit their dispute to the arbitrator, agreeing in advance to be bound by his or her resolution, is not even relevant to the First Amendment analysis. That is because there is no distinction between the two situations: the parties' consent is essential to render the decisionmaker's determination binding in both cases, and that critical fact fundamentally distinguishes both from a civil trial.

Plaintiff's attempt to distinguish the long history of judges serving as private arbitrators in America rests on similarly irrelevant distinctions. Thus, Plaintiff argues that judges' service as arbitrators in private or international proceedings says nothing about the First Amendment status of government-sponsored arbitration proceedings. But the history of judges serving as arbitrators demonstrates that a

At bottom, Plaintiff's objection is grounded in policy rather than First Amendment precedent: its contention that principles of fairness are undermined "when there is one class of parties having their cases being adjudicated in open court and another class having their disputes adjudicated behind closed doors." Pl.Br. 30. That policy objection is wrong on its own terms—more than eighty years ago Congress, in enacting the Federal Arbitration Act, conclusively rejected the argument that arbitration is a suspect means of resolving disputes and arbitration's use has increased significantly. Def.Br. 4-5.

Moreover, Plaintiff cannot use the First Amendment access right as a cudgel to eliminate a procedure to which it objects on policy grounds. Because the other duties assigned to a state official provide no basis for characterizing as a "civil trial" one of the proceedings over which that official presides, Plaintiff's policy contention is irrelevant here.

c. Self-executing arbitrator's awards.

Delaware's arbitration proceeding is not converted into a civil trial because the arbitrator's order is immediately enforceable. Under Court

---

judge acting as arbitrator does not render inapplicable the longstanding tradition of confidentiality associated with arbitration proceedings. *Id.*

of Chancery Rule 98(f)(3) any party dissatisfied with the arbitrator's determination has the right to appeal to the Delaware Supreme Court, which reviews the arbitrator's decision under the standards for judicial review established in the Federal Arbitration Act. *See* Def.Br. 42.

Arguing that this rule transforms the arbitration proceeding into the equivalent of a civil trial, amici cite examples of private arbitrations that do not result in self-executing orders. *See* Public Citizen Amicus Br. 7. But non-government arbitrators often issue self-enforcing awards to save parties the extra delay and cost associated with confirming uncontested arbitral awards. Indeed, that approach is favored in the international context. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 3, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

Moreover, in state and federal court connected arbitration programs, arbitrations result in automatically enforceable awards where neither party exercises its right to a trial de novo. Under the ADRA, for example, an arbitration award is filed with the clerk of the district court that referred the case to arbitration, where it "shall be entered as the judgment of the court after the time has expired for

requesting a trial de novo." 28 U.S.C. § 657(a). This judgment is "subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise." *Id.* Various state court arbitration programs also utilize self-enforcing awards. *See, e.g.*, Conn. Gen. Stat. § 52-549z(a) ("A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.").

Under the Delaware arbitration statute, as under these other provisions, a final award is entered and enforced "as any other judgment or decree." Del. Ch. R. 98(f)(3). This aspect of the arbitration process does not make it sufficiently different from an ordinary arbitration to render inapplicable the tradition of confidentiality associated with arbitration proceedings. Whether an award is self-enforcing or not is a matter of convenience that does not transform an arbitration into a civil trial to which the right of access must apply. *See* 28 U.S.C. § 652(d) (providing for confidential arbitration proceedings).

Amici also contend that the enforceability of the arbitrator's award undermines the argument that the arbitrator's power rests on the parties' consent, claiming that automatic enforceability necessarily shows that the arbitration proceeding is grounded instead in the imposition of state adjudicative power. That too is wrong.

The arbitrator's award is enforceable, subject to judicial review, *only because the parties to the arbitration have agreed to adopt Delaware's arbitration procedures, which include enforceability subject to judicial review*. The enforceability of the award thus stands on the same footing as the arbitrator's power to render a decision in the first place: neither could occur without the parties' consent.[5]

---

[5] Court of Chancery Rule 98(f)(3) interprets Del. Code Ann. tit. 10, § 349, to permit the issuance of self-enforcing arbitration awards. The Delaware Supreme Court has not yet had the opportunity to interpret the pertinent statutory language. Should this Court find that the particular interpretation embodied in Rule 98(f)(3) renders the statutory scheme constitutionally suspect under the First Amendment, it should declare the Rule invalid and interpret § 349(c) to require an application to the Delaware Supreme Court for enforcement of an award. If the Court believes that the statute's meaning is not sufficiently clear, it should certify to the Delaware Supreme Court the question whether the Rule is mandated by the statute, a permissible interpretation of the statute, or inconsistent with the statute. That would avoid a ruling on "the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the

* * *

Finally, Plaintiff cannot argue that even though each of these factors is insufficient to characterize Delaware's arbitration procedure as a civil trial, they somehow meet that standard when considered together. Such a "0+0+0=1" approach confirms the arbitrary nature of history-by-analogy, and ignores the many ways in which Delaware's procedure is different from civil trials. It also fails to provide any meaningful distinction from the arbitration systems that include these characteristics and would therefore invalidate numerous court-annexed arbitration programs.

B. The "Logic" Element Does Not Justify A Public Access Right.

Defendants' opening brief explained that the "logic" inquiry weighs strongly against recognition of a public access right because public access would prevent the proceeding from functioning at all. Def.Br. 59-65. The Chamber of Commerce and Business Roundtable also addressed this issue in detail. *See* Chamber/BRT Br. 15-24.

---

state courts." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 75 (1997).

Plaintiff argues in response that public access would vindicate the interests favoring access and that any adverse effect on the functioning of Delaware's arbitration process is irrelevant. Pl.Br. 39-46. Those contentions are inconsistent with this Court's precedents.

First, because the policy interests underlying public access are always furthered when such access is permitted, the benefits of open government proceedings cited by Plaintiff cannot, without more, satisfy the logic inquiry. Otherwise, as this Court has explained, "it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access." *North Jersey Media Grp.*, 308 F.3d at 217. A finding that "openness serves community values" necessarily "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." *Id.*

Second, Plaintiff thus is wrong that the adverse impact of public access on the proper functioning of the proceeding is irrelevant. The inquiry, after all, is "whether public access plays a significant positive role in the functioning of the particular process in question," *id.* at 216, and this Court and other courts have cited such negative effects in

rejecting First Amendment access claims. *See First Amendment Coal.*, 784 F.2d at 473; *see also In re Boston Herald*, 321 F.3d at 188-89 (recognizing that disclosure is likely to deter use of the CJA process).

Third, this analysis is even clearer here, because recognition of a First Amendment access right will prevent entirely the functioning of the Delaware proceeding and will not produce any additional transparency.

Confidentiality is one of the principal reasons that parties decide to resolve a dispute through arbitration. Def.Br. 59-62; Chamber/BRT Br. 18-21. Plaintiff repeatedly depicts this desire for confidentiality as somehow nefarious (*see, e.g.*, Pl.Br. 30, 40), but—especially in the context of the business disputes that are eligible for Delaware's procedure—there are obviously legitimate reasons for confidentiality: for example, protecting confidential business information; avoiding the antipathy between business partners that may result from repeated public sparring; presenting a comprehensive factual case without the risk that the presentation will be used against the company in business dealings, public debate, or other lawsuits.

Without confidentiality, parties will not use Delaware's procedure to resolve their disputes. Unlike the other situations in which First Amendment access claims have been considered, parties choosing to arbitrate their disputes are not limited to government proceedings; they can instead select any one of a number of private sector arbitrators. In applying the "logic" test, therefore, it is important to take account of the indisputable fact that recognition of an access right will not produce any additional public access, because parties seeking to arbitrate their disputes will simply select a different arbitration forum. Certainly there are a large number of alternatives from which to choose, including many sponsored by foreign governments in which judges serve as arbitrators. Chamber/BRT Br. 21-23.

All of the precedents cited by Plaintiff involve proceedings in which the parties had no alternative choice of forum, Pl.Br. 39-43, and the only adverse effect considered was the negative consequences for the integrity of the proceeding itself. Here, given the continued availability of a wide range of arbitration options to which a constitutional right of access could not possibly attach, it is certain that recognition of an access right in this case will not produce any

additional transparency, it will simply terminate Delaware's arbitration program.

That result would be permissible under the logic standard only if Delaware's arbitration proceeding serves no public purpose—if such proceedings do serve a legitimate purpose, imposing a condition that will eliminate their use would not "play[] a significant positive role." Plaintiff plainly believes that arbitration serves no useful purpose, but Delaware has made a different judgment, and its conclusion—which is plainly reasonable (*see* Def.Br. 64-65)—is entitled to deference.

Plaintiff is wrong in asserting (at 45-46) that Defendants are invoking economic concerns to override the First Amendment. The question here is whether a First Amendment right should be recognized in the first place, not whether an established right may be overridden because of a State's compelling interest. To resolve the question whether to recognize a constitutional right at all, the logic inquiry requires consideration of whether requiring public access would undermine the viability of the proceeding and, if so, what government interests would be adversely affected. There can be no doubt that

significant state interests would be harmed if Delaware's arbitration procedure was effectively terminated.

Delaware would be prevented from providing its domiciliaries with an arbitral forum similar to those available in other developed countries around the world.[6] And it would make Delaware, and the United States generally, significantly less attractive as a location for global businesses to incorporate—thereby reducing not only state revenues but also job creation within the State. *See* Def.Br. 64-65. That result also would prevent other States from using court-annexed arbitration to provide their citizens with flexible, expeditious dispute resolution (*see* Def.Br. 44-46).[7] The concern is not with saving "tax revenues" (Pl.Br. 45), but rather with preventing States from using

---

[6] *See, e.g.*, Deutsches Richtergesetz [DRiG] [German Law on Judges], April 19, 1972, last amended July 11, 2002, § 40 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/DRiG.pdf (providing that German judges may act as arbitrators in confidential and non-confidential proceedings subject to certain conditions); Arbitration Act, 1996, c. 23, § 93(1) (U.K.) ("A judge of the Commercial Court or an official referee may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator or as umpire by or by virtue of an arbitration agreement.").

[7] It would also invalidate a parallel arbitration program in the Delaware Superior Court, which is identical to arbitration in the Court

their limited resources innovatively to provide more expeditious means for resolving disputes.

In sum, the consequence of recognizing a public access right would be to thwart a significant number of important state interests without producing any increase in transparency. Nothing in the First Amendment requires that illogical result.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ Andrew J. Pincus

---

of Chancery in all relevant respects. *See* Del. Code Ann. tit. 10, § 546; Del. Super. Ct. R. 16, 137(d)(2).

Andre G. Bouchard
Joel Friedlander
BOUCHARD MARGULES &
FRIEDLANDER, P.A.
222 Delaware Ave., Suite 1400
Wilmington, DE 19801
(302) 573-3500

Lawrence A. Hamermesh
Widener University School of
Law
4601 Concord Pike
Wilmington, DE 19803
(302) 477-2132

Andrew J. Pincus
(D.C. Bar No. 370762)
E. Brantley Webb*
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

* Admitted only in Tennessee,
supervised by principals of the firm

Counsel for Defendants-Appellants

Dated: February 8, 2013

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 6,996 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 February 8, 2013 via overnight courier service; and

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

/s/ Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

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.

/s/ Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed the foregoing 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 overnight delivery through a third-party commercial carrier:

Lawrence A. Hamermesh
Widener University School of Law
4601 Concord Pike
P.O. Box 7474
Wilmington, DE 19803-0000
lahamermesh@widener.edu

Counsel for Defendants-Appellants

David L. Finger
Finger & Slanina, LLC
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
(302) 573-2525

Counsel for Plaintiff-Appellee

/s/ Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000