No. 13-869

IN THE

Supreme Court of the United States

LEO E. STRINE, JR., CHANCELLOR, DELAWARE COURT OF CHANCERY, ET AL.,

Petitioners,

v.

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF LAW FIRMS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* SUPPORTING PETITIONERS

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Pursuant to Rule 37.2(b), certain law firms from throughout the Nation that practice regularly in the courts of Delaware or regularly handle complex matters for businesses incorporated in Delaware move for leave to submit the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari in this case. Consent to the filing of this *amici* brief was granted by counsel for petitioners but was denied by counsel for respondent.

Amici routinely appear in Delaware courts in matters involving disputes between business entities, or regularly handle complex business matters for a broad range of clients incorporated in Delaware. *Amici*

believe that Delaware's arbitration program is a valuable alternative for business entities to resolve various types of commercial disputes, as it offers confidentiality, flexible procedures, and access to arbitrators with expertise in Delaware corporate law. *Amici* have a direct and substantial interest in whether that program is permitted to proceed as intended by the Delaware legislature, including as to its provisions ensuring confidentiality of arbitration proceedings, which *amici* believe are an important benefit of the Delaware program and are entirely permissible under the First Amendment.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law firms from throughout the Nation that routinely appear in the courts of Delaware in matters involving disputes between business entities or regularly handle complex business matters for a broad range of clients incorporated in Delaware. *Amici* believe that Delaware's arbitration program is

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, contributed money to fund its preparation or submission. Counsel of record for the parties received notice at least ten days before the due date of *amici's* intent to file this brief. Consent to the filing of this *amici* brief was granted by counsel for petitioners, but was denied by counsel for respondent.

a valuable alternative for business entities to resolve various types of commercial disputes, since it offers confidentiality, flexible procedures, and access to arbitrators with expertise in Delaware corporate law. *Amici* have a direct and substantial interest in whether that program is permitted to proceed as intended by the Delaware legislature, including as to its provisions ensuring confidentiality of arbitration proceedings, which *amici* believe are an important benefit of the Delaware program.

This brief reflects the consensus of the *amici* that this Court should grant certiorari in this case, reverse the Third Circuit's decision, and find that there is no First Amendment right of access to Delaware's civil, voluntary arbitration proceedings. Each individual *amicus*, however, may not endorse every argument made in this brief. *Amici* are the law firms listed as counsel to this brief.

SUMMARY OF ARGUMENT

"Like litigation." This mantra, or a variant, appears over a dozen times in the first four pages of respondent's brief in opposition. The phrase nicely distills the rationale of the decision below: that *anything* resembling litigation, such as Delaware's business arbitration program, falls within the lower courts' ever-expanding vision of the First Amendment right of access. To find a right of access here, the court of appeals held it enough that Delaware's arbitrations would be "conducted before active judges in a courthouse, [and] result in a binding order of [a] [c]ourt." Pet. App. 15a.

But even this capacious view of the right of access does not fix the right's elusive boundaries in the lower courts today. In the Second Circuit, for example, "[t]he

public's right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding," and so the right applies to state administrative proceedings.[2] And in many courts, the right has been found to apply even to events that do *not* resemble litigation or other adjudicatory proceedings. In its decision below, the Third Circuit noted that it had previously "found a First Amendment right of the public to attend meetings of Pennsylvania city planning commissions." *Id.* at 6a.[3] In the Ninth Circuit, "the First Amendment protects the right to witness executions in their entirety"[4]—and even guarantees "a public right of access to wild horse gathers" run by the government.[5]

All of this is a far cry from the limited right of access conceived in the decisions of this Court. The Justices who joined those decisions understood that, because "the stretch" of this right "is theoretically endless, . . . it must be invoked with discrimination and temperance." *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring in judgment; internal quotation marks, citation omitted). They recognized that a failure to exercise such discrimination and restraint would swiftly, and improperly, embroil the courts in "legislative task[s]" that "the Constitution has left to the political processes." *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978)

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[2] *N.Y. Civ. Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 290, 300 (2d Cir. 2012).

[3] Citing *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999).

[4] *Associated Press v. Otter*, 682 F.3d 821, 825 (9th Cir. 2012).

[5] *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1101 (D. Nev. 2013), *on remand from* 677 F.3d 892 (9th Cir. 2012).

(plurality opinion). And they sought to forestall the danger that "hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.'" *Id*. at 14 (plurality opinion).

The Court accordingly limited the public-access right to proceedings for which there was an "unbroken, uncontradicted history" of openness, *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion), as reflected in "accepted practice[s] . . . root[ed] in our English common law heritage," *id.* at 589 (Brennan, J., concurring in judgment; internal quotation marks omitted). The Court found such a history uniquely in the criminal realm—a practice of "public . . . trial[s] at which guilt or innocence was decided," a tradition that "remained constant" "[f]rom . . . early times," *id*. at 566 (plurality opinion), a "uniform rule of openness" in "criminal trials both here and in England" "[a]t the time when our organic laws were adopted," *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 605 (1982) (internal quotation marks omitted). And the Court emphasized that such public criminal trials served as "an *essential* component in our structure of self-government," *id*. at 606 (emphasis added). For these reasons, it concluded—and the emphasis here is this Court's—that "a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment." *Id.* at 605 (emphasis in original).

But ever since this Court last addressed this right of access to criminal proceedings just over two decades ago, *see El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993), most lower courts have steadily eroded the principles established to limit that right. The decision below typifies the trend: it acknowledged that the relevant "history of arbitration . . . reveals *a*

mixed record of openness," with some "proceedings labeled arbitrations . . . hav[ing] often been closed," and instead of finding openness to be critical to justice, merely found that "the opening of Delaware's [arbitration] proceeding[s]" would "'provide[] many benefits,'" like "giv[ing] stockholders and the public a better understanding of how Delaware resolves major business disputes." Pet. App. 14a, 16a.

As the decision below illustrates, no longer is an unbroken, uncontradicted history of public access, nor is a proceeding essential to our justice system, required in order for the right of access to attach. The result has been a broad usurpation of executive, legislative, and state power by courts that have "confuse[d] what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." *Houchins*, 438 U.S. at 13 (plurality opinion). The Court should grant certiorari in this case to restore the First Amendment right of access to its properly narrow scope.

ARGUMENT

I. THIS COURT HAS CAREFULLY LIMITED THE FIRST AMENDMENT RIGHT OF ACCESS—BUT THE LOWER COURTS HAVE NOT.

A. "This Court has repeatedly made clear that there is no constitutional right to obtain all the information" possessed by government, *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013), and that the First Amendment does not "mandat[e] a right of access to government information or sources of information within the government's control," *Houchins*, 438 U.S. at 15 (plurality opinion). For "the freedom to obtain information that the government has a legitimate

interest in not disclosing . . . is far narrower than the freedom to disseminate information." *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 20 (1986) ("*Press-Enterprise II*") (Stevens, J., dissenting; citation omitted). As a result, "'[t]he right to speak and publish does not carry with it the unrestrained right to gather information,'" *Houchins*, 438 U.S. at 12 (plurality opinion; emphasis omitted; quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)), and "'[t]he Constitution . . . is neither a Freedom of Information Act nor an Official Secrets Act,'" *id.* at 14 (plurality opinion; quoting Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975)).

Only in a limited area has this Court recognized a First Amendment right of public access. In *Richmond Newspapers*, the Court confronted the "narrow question" of "whether the right of the public and press to attend *criminal* trials is guaranteed under the United States Constitution," 448 U.S. at 558 (plurality opinion; emphasis added), and in a plurality and concurring opinions, concluded that it was, *id.* at 580 (three-Justice plurality opinion); *id.* at 598 (Brennan, J., concurring in judgment); *id.* at 599 (Stewart, J., concurring in judgment); *id.* at 604 (Blackmun, J., concurring in judgment). The Court later extended this right to the *voir dire* examination of potential jurors, *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"), as well as to preliminary hearings, *Press-Enterprise II*, 478 U.S. 1; *El Vocero*, 508 U.S. 147—again, only in *criminal* cases.

Recognizing that "'[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow,'" *Houchins*, 438 U.S. at 12 (plurality opinion; quoting *Zemel*, 381 U.S. at 16–17), however, the Court

carefully constrained the public-access right that these decisions had recognized. The principal constraint was history: the Court relied upon "unbroken, uncontradicted history," a practice of "public . . . trials[s] at which guilt or innocence was decided" that "remained constant" "[f]rom . . . early times," *Richmond Newspapers*, 448 U.S. at 566, 573 (plurality opinion), a "virtually immemorial custom" and "essentially unwavering rule in ancestral England and in our own Nation," *id.* at 593 (Brennan, J., concurring in judgment)—namely, a "uniform rule of openness" in "criminal trials both here and in England" "[a]t the time when our organic laws were adopted," *Globe Newspaper*, 457 U.S. at 605 (internal quotation marks omitted).

Indeed, so deeply ingrained are public criminal trials in our Nation's legal history that the Court found "'that a presumption of openness inheres *in the very nature* of a *criminal* trial under our system of justice.'" *Id.* at 610 (quoting *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion); emphasis added). As Justice Brennan put it, "[o]pen trials play a fundamental role in furthering the efforts of our judicial system to assure the *criminal* defendant a fair and accurate adjudication of guilt or innocence," and are "an indispensable element of the trial process itself," an element necessary to prevent "miscarriage[s] of justice that imprison[] . . . innocent accused[s] [and] also leave[] . . . guilty part[ies] at large," *Richmond Newspapers*, 448 U.S. at 593, 596, 597 (Brennan, J., concurring in judgment; emphasis added). "As the plurality opinion in *Richmond Newspapers* stresse[d], 'it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.'" *Globe Newspaper*, 457 U.S. at 611

(O'Connor, J., concurring in judgment; quoting *Richmond Newspapers*, 448 U.S. at 575).

It was precisely these "[t]wo features of the criminal justice system"—first, the history of public criminal trials, and, second, the "particularly significant" role of public access in the government's use of its criminal enforcement power—that "together serve[d] to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment." *Globe Newspaper*, 457 U.S. at 605, 606 (emphasis in original). And thus the First Amendment right that the Court recognized was uniquely "a First Amendment right of access to *criminal* proceedings." *Press-Enterprise II*, 478 U.S. at 8 (emphasis added). Given the Court's pivotal reliance "upon our long history of open criminal trials and the special value, for both public and accused, of that openness," "neither *Richmond Newspapers* nor the Court's decision[s]" applying it should have "carr[ied] any implications outside the context of criminal trials" in particular and criminal cases generally. *Globe Newspaper*, 457 U.S. at 611 (O'Connor, J., concurring in judgment).

B. Even if its decisions did not confine the right of access strictly to criminal proceedings, the Court's emphasis on these "two complementary considerations" of "experience and logic," *Press-Enterprise II*, 478 U.S. at 8, 9, should have nonetheless sharply limited the right's scope in the civil, administrative, and other non-criminal contexts. But it did not. In the nearly twenty-one years since the Court provided guidance on the right of access, the experience-and-logic test has been diluted and distorted beyond recognition by the lower courts.

To be sure, recognizing that this Court has never even "'*indicated* that it would' do so," and "that in all

areas other than criminal proceedings, the . . . Court has applied the general rule of *Houchins* [and] not the exception of *Richmond Newspapers*," some courts have refused to "appl[y] *Richmond Newspapers* outside the context of criminal proceedings." *Flynt v. Rumsfeld*, 355 F.3d 697, 704 (D.C. Cir. 2004).[6] Such courts, however, are in the distinct minority. Most of the circuits have gone well beyond *Richmond Newspapers* and extended a First Amendment right of access to civil trials and all manner of civil proceedings. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction proceedings); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984) (civil trial); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (hearings in class action).

And many courts have extended the right of access far beyond criminal and civil trials. State administrative proceedings, township planning commission meetings, search warrant affidavits, executions, deportation hearings, forms filed by counsel under the Criminal Justice Act, federal administrative fact-finding hearings, state driver's license revocation hearings—and even "wild horse gathers" on public land—have all been held subject to a First Amendment right of public access.[7]

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[6] *See also IDT Corp. v. eBay*, 709 F.3d 1220, 1224 n.1 (8th Cir. 2013) (rejecting "contention that a right of public access grounded in the First Amendment applies to" a complaint in a settled litigation); *ACLU of Miss. v. Miss.*, 911 F.2d 1066, 1071 (5th Cir. 1990) (holding that "the right of access to criminal trials established in [*Richmond Newspapers*] does not apply" to limiting access to records of state agency).

[7] *See N.Y. Civ. Liberties Union*, 684 F.3d at 300 (state administrative hearings); *Whiteland Woods, L.P.*, 193 F.3d at 180–81 (township planning commission meetings); *In re Search*

To thus marshal drivers' licenses, wild horses, and other such whatnot under the same constitutional tent has required an extraordinary elasticization and trivialization of the experience-and-logic test. In many circuits and states, no longer do the courts demand proof of an "historic practice of such clarity, generality and duration" as to properly "justify the pronouncement of a *constitutional rule*." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (Scalia, J.) (emphasis in original). As for experience, often only a little bit will do: In the Third Circuit, a thirty-year history of access sufficed to federalize access to a township's planning commission meetings. *Whiteland Woods*, 193 F.3d at 181. And in the Second Circuit, a "lack of 'tradition'" did not bar the constitutionalization of access to forms filed by counsel compensated under the Criminal Justice Act. *Suarez*, 880 F.2d at 631.[8]

Warrant for Secretarial Area, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits); *Associated Press*, 682 F.3d at 825–26 (state executions); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2002) (deportation hearings); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (Criminal Justice Act forms); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 577 (D. Utah 1985) (federal administrative fact-finding hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *Freitas v. Admin. Dir. of Courts*, 92 P.3d 993, 996–99 (Haw. 2004) (driver's license revocation hearings); *Leigh*, 954 F. Supp. 2d at 1101 (wild horse gathers).

[8] *See also Leigh*, 954 F. Supp. 2d at 1101 (finding right of access to wild horse gathers run by government based on testimony from witnesses who had attended gathers "since 2001" and "for several years"); *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994) (finding right of access to post-trial hearings regarding jury misconduct despite lack of "rich historical tradition" regarding such proceedings); *Soc'y of Prof'l Journalists*, 616 F. Supp. at 575 (finding right of access to federal admini-

Likewise, the "logic" part of the test has strayed far beyond the strict, historically-focused reasoning employed by this Court. No longer do courts ask "whether access plays an *essential* role in the proper functioning of the judicial process," *Reporters Comm.*, 773 F.2d at 1336 (emphasis added), let alone whether it is "an *essential* component in our structure of self-government," *Globe Newspaper*, 457 U.S. at 606 (emphasis added). Instead, in most lower courts, "'ingenious'" (and not so ingenious) "'argument in the garb of decreased data flow,'" *Houchins*, 438 U.S. at 12 (quoting *Zemel*, 381 U.S. at 16–17), has won the day. "With neither the constraint of text nor the constraint of historical practice, . . . the judicial task of constitutional interpretation" has morphed into the nakedly "political task" of deciding what is preferable to what is not. *Reporters Comm.*, 773 F.2d at 1332. Despite this Court's efforts to avoid it, the lower courts have "confuse[d] what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." *Houchins*, 438 U.S. at 13 (plurality opinion).

II. THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO THE DELAWARE ARBITRATION PROGRAM.

A. This case provides a perfect example of this disturbing trend. Both the experience and logic standards were only superficially applied. As for

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strative hearing despite "little historical tradition to examine" regarding such hearings); *Detroit Free Press*, 303 F.3d at 701 (noting that "a brief historical tradition might be sufficient . . . where the beneficial effects of access to that process are overwhelming and uncontradicted"); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 109 (9th Cir. 1992) (finding "likely" tradition of access to voter lists based on review of current state statutes).

experience: there is no "unbroken, uncontradicted history" of open arbitrations, no practice that "remained constant" "[f]rom . . . early times," *Richmond Newspapers*, 448 U.S. at 566, 573 (plurality opinion), no "virtually immemorial custom," and no "essentially unwavering rule in ancestral England and in our own Nation," *id.* at 593 (Brennan, J., concurring in judgment). To the contrary, the panel majority below acknowledged that "[t]he history of arbitration . . . reveals *a mixed record* of openness. Although proceedings labeled arbitrations have sometimes been accessible to the public, they have often been closed." Pet. App. 14a (emphasis added). And as the dissenting judge explained, "[t]he tradition of arbitration . . . reveals a focus on privacy." *Id.* at 30a (Roth, J., dissenting). What was at best equivocal history sufficed, rendering the scope of the right of access potentially boundless.

The "logic" prong was stretched and trivialized as well. Here, as in so many right-of-access cases today, the analysis devolved into a personal-value-laden evaluation of plusses and minuses—an unvarnished and constitutionally unmoored weighing of judicial preferences. Thus, the two judges in the majority very much liked how "[a]llowing public access . . . would give stockholders and the public a better understanding of how Delaware resolves major business disputes." Pet. App. 16a. They expressed fondness for "allay[ing] the public's concerns about a process only accessible to litigants in business disputes who are able to afford the expense of arbitration." *Ibid.* They thought it would be a good thing if "public access would expose litigants, lawyers, and the Chancery Court judge alike to scrutiny from peers and the press." *Ibid.* They speculated and hoped that "public access would discourage perjury and

ensure that companies could not misrepresent their activities to competitors and the public." *Ibid.* In the countervailing considerations, such as the need to protect the parties' confidential information, and the conciliatory benefits of arbitration, the majority saw little worth. *Id.* at 16a–19a.

Of course, none of the benefits of openness trumpeted by the panel majority here remotely compares to the historically and universally recognized worth of the public criminal trial, an institution unquestionably "essential to the proper functioning of the criminal justice system," *Press-Enterprise II*, 478 U.S. at 12. Beyond that, what the panel majority cited as beneficial here—educating the public, promoting public confidence, deterring corruption and misrepresentation—could be invoked to justify access to virtually *any* governmental activity, be it a hearing about drivers' licenses or the herding of horses. Again, what this Court crafted as a limiting principle has been construed to provide no limits at all. It is time for this Court to restore boundaries to the logic-and-experience test.

B. The unabating, decades-long erosion of limits to that test, and the confusion in the lower courts that this erosion has wrought, ought by themselves to justify review. But even if those considerations did not suffice, this case should be heard because the overconstitutionalization of public-access claims, as has occurred here and in so many other cases over the past thirty years, disturbs the proper balance of authority between judges and elected officials, and between federal power and that of the states.

In particular, "'one of the happy incidents of the federal system'" served as an important reason why this Court was so careful to craft limits to the right of

access: "'that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Globe Newspaper*, 457 U.S. at 617 (Burger, C.J., dissenting; quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Here, that single courageous state was Delaware. Delaware has long held a preeminent position in American corporate law. Not only have a majority of all U.S. publicly-traded companies "chosen Delaware as their legal home,"[9] but the state has a well-deserved reputation for "responsiveness to corporate concerns" and "judicial expertise" in corporate law. ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 38–39 (1993). In particular, as Chief Justice Rehnquist once observed, "[t]he Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery."[10]

In enacting a novel business arbitration law, Delaware's General Assembly sought to preserve the

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

[10] William H. Rehnquist, Chief Justice of the United States, The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice, Remarks at the Bicentennial Celebration of the Delaware Court of Chancery (Sept. 18, 1992), *in* 48 BUS. LAW. 351, 354 (1992); *see also Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1343 (7th Cir. 1990) (describing Delaware courts as "the Mother Court[s] of corporate law"); *In re Ivan F. Boesky Sec. Litig.*, 129 F.R.D. 89, 97 (S.D.N.Y. 1990) (noting that Delaware "has long been recognized as the fountainhead of American corporations" and that "its Courts of Chancery are known for their expert exposition of corporate law").

State's, and the Nation's, comparative advantage in this regard. It did so in the face of substantial and growing competition from elsewhere in the world. Today, many corporations have the means and sophistication to choose the forum best suited to their needs, including as between U.S. and international options. Increasingly over the last decade, potential litigants have been choosing not to proceed in civil proceedings at all—instead seeking the confidentiality and flexibility of arbitration by agreement.[11] In response, arbitration programs have flourished, including both private and government-sponsored ones, in the U.S. and abroad.[12]

Delaware's General Assembly thus sought to "preserve [the State's] pre-eminence in offering cost-effective options for resolving" commercial disputes, by enacting its voluntary arbitration program. H.B. 49, 145th Gen. Assemb. (Del. 2009) (synopsis). In doing so, it made an important policy judgment that the Constitution allows it to make: it weighed the benefits and drawbacks of public access, and chose confidentiality over access. The Third Circuit, however, substituted its own judgment for that of the legislature, and made light of the important role of confidentiality in Delaware's program. Pet. App. 17a. Nothing in the text or history of the First and Fourteenth Amendments, and, as shown above, nothing in this Court's decisions, gave the court below the authority to do that.

And even apart from the court of appeals' lack of authority to make the legislative judgment it made, the judgment it made was plainly wrong. First, as the

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[11] *See* Pet. 4–5.

[12] *See* Pet. 4–6.

petition rightly notes, confidentiality is necessary to protect the parties' trade secrets, the nature of their dispute, and their commercial dealings. Pet. 30. The Third Circuit thought such concerns were addressed by Delaware court rules that protect "trade secrets" and certain "sensitive" information. Pet. App. 17a. But a party's view of "trade secrets" and "sensitive" information may be different than the court's or its adversary's, or a party may simply be unsure whether its information would be covered by such rules. To a business entity concerned about protecting sensitive information, the difference between a proceeding where such materials *might* be protected, and one where they are *certain* to be, is no small thing.

Second, confidentiality permits the parties to avoid the negative publicity and "loss of prestige and good-will" that often accompanies a public dispute, and for that reason "[t]he privacy of arbitration is one of its great advantages." J. Noble Braden, *Sound Rules and Administration in Arbitration*, 83 U. PA. L. REV. 189, 195 (1934). If an arbitration is not confidential, then it offers no benefit in this regard versus proceeding in any public forum.

Finally, confidential arbitration allows the parties to take negotiating positions and make concessions privately, without fear of being perceived as an easy mark or that a third party might use those positions against them in another dispute. Thus, confidential arbitration helps parties reach settlements and resolve disputes in a more conciliatory manner.

For all of these reasons, it is no surprise that "the major national and international arbitral bodies" "emphasize confidentiality" with rules providing that "arbitration proceedings are not open to the public unless the parties agree they will be." Pet. App. 31a. As

a result, the Third Circuit was wrong that requiring public access would not "effectively end" Delaware's program. *Id.* at 18a. The business entities that might be attracted to the Delaware program are precisely the type of parties who have the ability and sophistication to analyze various forums and choose the one most suited to their needs. If Delaware cannot provide confidential arbitration, then those parties who want it will simply go elsewhere, to a private arbitration or government-sponsored program outside the United States. It was simply not up to a federal court of appeals, and certainly no object of the Constitution, to bar Delaware from providing them an alternative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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