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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The innovative approach for resolving business disputes adopted by Delaware and invalidated on federal constitutional grounds by the Third Circuit majority addressed a significant gap in U.S. alternative dispute resolution options—as the amicus briefs in support of certiorari filed by a broad cross-section of the business community and of the Bar demonstrate.

Review by this Court is essential to resolve the conflict among the lower courts regarding the standard for recognizing a First Amendment right-of-access, eliminate the improper limitation on Delaware's authority to maintain its status as a desirable corporate domicile by addressing the needs of its corporate domiciliaries, and eliminate the broad chill on state experimentation in alternative dispute resolution processes that inevitably will result if the Third Circuit's ruling is permitted to stand.

Respondent's brief in opposition focuses principally on defending the holding below on the merits. It is unable to disguise the clear conflict regarding the governing First Amendment standard and the importance of the decision below to Delaware, to the nation's corporate and legal community, to other States' existing ADR programs, and to all States' ability to utilize various types of ADR as alternatives to today's overcrowded judicial systems. This Court's review is urgently needed.

A. There Is A Clear Conflict Among The Lower Courts Regarding The First Amendment Right-Of-Access Test.

Respondent does not seriously dispute that the lower courts are divided over how to apply the experience component of the First Amendment right-of-access test.

First, respondent does not even attempt to reconcile the holding below that a "mixed" history of openness is sufficient to find the necessary "experience" with the requirement of a long history of openness applied by the Seventh Circuit and the Supreme Judicial Court of Massachusetts. See Pet. 19-20. Respondent's statement (Opp. 15) that these courts do not identify "the quantum of historical evidence" is false: the Massachusetts court required evidence of openness at the time of the First Amendment's adoption, and the Seventh Circuit required a long-established tradition. *United States* v. *Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989); *WBZ-TV4* v. *Exec. Office of Labor*, 610 N.E.2d 923, 925 (Mass. 1993).

Second, respondent's characterization of the decisions of the District of Columbia Circuit is simply wrong. The petition explains that the D.C. Circuit requires a lengthy, unbroken history of openness, citing *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (Scalia, J.) ("we cannot discern an historic practice of such clarity, generality, and duration as to justify" a First Amendment right).

Respondent argues (Opp. 14-15) that *United States* v. *El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) departs from this rule. But *El-Sayegh* rejected a First Amendment right-of-access claim with respect

to a plea agreement not yet filed with the court, but submitted as an exhibit to a motion to seal pursuant to local procedure. *Id.* at 161. The court stated: "[t]here can hardly be a historical tradition of access to the documents accompanying a procedure that did not exist until * * * 1991," holding that because "it is impossible to say that access to such a document has historically been available," the "claim fails to satisfy the first of the two necessary criteria for a First Amendment right of access." *Ibid.*

The court went on to observe, in dicta, that "[a] new procedure that *substituted* for an older one would presumably be evaluated by the tradition of access to the older procedure." *Ibid.* (emphasis added). But that requires the actual replacement of an old procedure by a new one, as the court made clear by citing *In re Reporters Committee for Freedom of the Press*, which explains that "[a]n historical tradition of access to civil and criminal judgments, adequate to sustain a constitutional claim, could hardly be defeated, for example, by a state statute providing that henceforth such judgments will not become part of court records," and "[c]ontrariwise, a new constitutional right of public access to litigants' personal financial data would hardly be created by a state statute requiring such data to be filed with the court, simply because all *other* court records have been (let us assume) traditionally open." 773 F.2d at 1337.

Civil trials in Delaware have not been eliminated and replaced by arbitration proceedings. Rather, the State has created a new, additional option for dispute resolution: a government-sponsored arbitration forum that is available only when the parties consent and other requirements are satisfied—just like every other arbitration forum. Because arbitration has a

long history of confidentiality and not public access, and government-sponsored arbitration—like the procedure in *El-Sayegh*—"did not exist" until recently (and, moreover, has no tradition of public access), the D.C. Circuit would reject the First Amendment claim that the Third Circuit upheld in this case.

Third, respondent inexplicably argues that "there is no indication that any claimed difference in weight lower courts have accorded the historical record has resulted in different courts reaching different conclusions regarding the same type of proceeding." Opp. 15. But that ignores the numerous cases cited in the petition demonstrating that the different legal standards do, in fact, produce just such conflicting results. See Pet. 21-22 nn.8-11 (different rules in different jurisdictions have produced divergent results for access to, *e.g.*, state administrative hearings, state legislative meetings, and search warrant affidavits).

That is the fatal flaw in the legal standard permitting the use of broad analogies invoked by the court below and advocated by respondent: it provides no concrete guidance and therefore yields results that turn more on particular judges' reactions to the access claim than on criteria that will produce similar outcomes in different courts.

This Court should grant review to eliminate the disparate right-of-access standards applied by the lower courts. Accord, Chamber/BRT Am. Br. 4 ("Given that the Court has yet to analyze a right-of-access case in the civil context, and has not decided a right-of-access case for nearly two decades, it is unsurprising that its guidance is now sorely needed.").

B. The Question Presented Is Important.

The amici's submissions confirm the very substantial importance of the question presented in the petition.

To begin with, the amici recognize the increasing use of arbitration to resolve business disputes and the particular benefits provided by Delaware's government-sponsored arbitral forum. TechNet Am. Br. 10-19 (explaining utility of the Delaware procedure for technology disputes); Chamber/BRT Am. Br. 7-8.

Moreover, Delaware's ability to provide this dispute resolution system to its domiciliaries is particularly important in encouraging corporations to establish domicile in Delaware (and therefore the United States), rather than in one of the other nations that provide government-sponsored arbitration systems. Chamber/BRT Am. Br. 8 ("When companies decide where to locate their operations, a critical factor is the quality and cost of a jurisdiction's legal infrastructure."); TechNet Am. Br. 7-9 (discussing history of Delaware's state-sponsored mediation program, companies' increasing demand for arbitration, and the government-sponsored arbitral forums established by other developed nations; "Delaware thus found that there was intense demand among international businesses for efficient and practicable arbitral fora—and that the Court of Chancery should provide Delaware businesses with such a forum or risk sending international corporations offshore"); NASDAQ/NYSE Am. Br. 17 (recognizing "the benefits of allowing States to develop their own ADR mechanisms to ensure that companies remain in the United States"); see also Pet. 6-8.

The decision below does not just invalidate Delaware's law. It "effectively precludes states * * * from creating useful (and needed) arbitration systems," because "the success or failure of Delaware's system will be viewed as a bellwether by other states." Chamber/BRT Am. Br. 12, 13.

The importance of the question presented is further demonstrated by its impact on other types of state ADR programs. See Pet. 33-34. Respondent argues that Delaware's program is unique because other state arbitration "programs do not utilize sitting judges, and/or the arbitrations are non-binding." Opp. 16-17. But the District of Columbia, Minnesota, and South Carolina all have programs indistinguishable from Delaware's.[1]

Respondent also tries (Opp. 16-18) to distinguish state arbitration programs that permit part-time judges, administrative judges, magistrates, special court officers, and others to conduct binding, confidential arbitrations. See Pet. 33. But respondent does not even attempt to explain why these judicial officers would be treated differently from "full-time" state judges under the Third Circuit's analysis.

In fact, as respondent itself explains, where "[j]udicial arbitrators are deciding the substantive legal rights of the parties * * * * [t]hat is a core basis

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[1] Respondent does not dispute the similarity of the District of Columbia program (discussed at Pet. 33); its attempt to distinguish the South Carolina program cites an ADR program (Opp. 16 n.6, citing S.C. ADR R. 4(C)) *different* from the one cited in the petition (Pet. 33, citing S.C. App. Ct. R. 223); and does the same for Minnesota (compare Opp. 16 n.6, citing Minn. Gen. R. Prac. 114.12, with Pet. 33, citing Minn. Stat. § 484.76(2)). Respondent thus cannot distinguish the state arbitration programs cited in the petition.

for the First Amendment right of access." Opp. 13-14. That is precisely what the court of appeals majority decided. Pet. App. 15a (where a state "institute[s] a binding arbitration before a judge that takes place in a courtroom," the First Amendment requires the proceeding to be open to the public). Judicial officers other than traditional "judges" exercise this authority under state law, and therefore would trigger the majority's analysis.[2] Nothing in the majority's opinion provides grounds for the limitation that respondent hypothesizes.

Respondent also makes the conclusory claim (Opp. 17-18 n.8) that the Third Circuit's reasoning would not reach non-binding arbitration where the parties subsequently agree to be bound by an arbitrator's "advisory" award or where parties participate in non-binding arbitration, but agree to be bound by the arbitrator's award *before* it is rendered. See Pet. 33-34. Respondent also ignores the actual structure of many state-sponsored arbitration pro-

[2] See, *e.g.*, Conn. Gen. Stat. § 52-549w(a) (arbitrators must be Superior Court Commissioners); N.C. Gen. Stat. § 90-21.62(b) (in health care claims context, "the arbitrator shall be selected from emergency superior court judges who agree to be on a list maintained by the Administrative Office of the Courts."); Mass. Uniform R. on Dispute Resolution 2 ("master, clerk, clerk-magistrate, register, recorder, family service officer, housing specialist, [or] probation officer" may serve as arbitrators in binding, confidential arbitration); Minn. Code of Judicial Conduct R. 3.9 (part-time judges may act as arbitrators); Wyo. Code of Judicial Conduct R. II(A)(2) (judges who serve "on a part-time basis by retention election or under a continuing appointment, including a retired judge who has been given a general or special appointment to hear cases by the Wyoming Supreme Court" may serve as arbitrators).

grams, which heavily penalize parties for appealing awards even when they have not agreed to be bound.

Finally, respondent has no response at all to the most fundamental reason that the question presented is sufficiently important to warrant this Court's attention: granting review here will enable the Court to clarify the limits on the First Amendment right-of-access doctrine—which increasingly has been invoked in a broad range of contexts in the lower courts. See Pet. 35-37; Law Firm Am. Br. 5 (lower courts' application of this Court's right-of-access precedents have produced "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'").

C. The Third Circuit's Decision Is Wrong.

The petition explains (at 22-31), why there is no First Amendment right-of-access to arbitration proceedings under the Delaware statute. See also Law Firm Am. Br. 11-17; NASDAQ/NYSE Am. Br. 5-20.

Recognizing that the holding below cannot be justified based on a history of public access to arbitration proceedings, which simply does not exist (see Pet. 24-27), respondent employs the same "history by analogy" approach as the Third Circuit majority, arguing that the history of public access to civil judicial trials can be employed to justify a First Amendment right-of-access to government-sponsored arbitration. Opp. 8-14. But respondent's argument is just as flawed as the analysis of the majority below.

First, respondent contends that this Court has endorsed "history by analogy." Opp. 8-9. Respondent is wrong.

This Court in *Press-Enterprise Co.* v. *Superior Court of California*, 478 U.S. 1 (1986) ("*Press II*"), focused on the "particular process in question." *Id.* at 8; see Pet. 3-4. Similarly, in *El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147 (1993) (per curiam), the Court explained that the experience test assesses "'the experience in that *type or kind of hearing* throughout the United States.'" *Id.* at 150 (emphasis added). Because Puerto Rico's preliminary hearing procedure was precisely the same kind of hearing as the one at issue in *Press II*, the historical test was satisfied based on the Court's analysis in that case. *Ibid.*

Respondent also cites a variety of lower court decisions supposedly employing the "analogy" approach. Opp. 9-10. But all of them—other than the D.C. Circuit decision that respondent misinterprets (see pages 2-3, *supra*)—arose in the circuits that hold ambiguous evidence of public access sufficient to satisfy the "experience" standard. Pet. 20. That is the precise conflict among the lower courts that is presented in this case.

Second, respondent argues that arbitration proceedings, in general, "are analogous to civil trials." Opp. 10-11. This Court, however, has consistently recognized the fundamental differences between arbitration and civil trials. Among the most important is "the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.,* 559 U.S. 662, 697-698 (2010) (quoting *Volt Info. Sciences, Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). While a judge presiding over a civil trial derives his or her authority from the coercive power of the State, "an arbitrator derives his or her powers

from the parties' agreement to forgo the legal process." *Id.* at 682.

Moreover, parties are "generally free to structure their arbitration agreements as they see fit." *Id.* at 683 (internal quotation marks omitted). They may agree to limit the issues they choose to arbitrate, and may agree on rules under which any arbitration will proceed." *Ibid.* They may "specif[y], for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011). Finally, arbitrators' decisions are subject to a narrow standard of judicial review. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate * * * a party * * * trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.").[3]

Respondent recites (Opp. 3-4, 11-12) a litany of supposed similarities between arbitration and judicial civil trials, but the characteristics listed apply to all forms of adjudication. Under respondent's approach, every single type of adjudication—administrative, judicial, family court, etc.—would be subject to a First Amendment right-of-access based on the history associated with civil judicial trials.

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[3] The lower court decisions on which respondent relies are inapposite. *Hyman* v. *Pottberg's Ex'rs* highlights the *differences* between arbitration and civil trials, such as arbitration's informality. 101 F.2d 262, 265 (2d Cir. 1939). *In re Home Health Corp.* simply distinguishes settlement discussions from arbitration, holding that that Fed. R. Evid. 408 does not extend to pleadings submitted in connection with arbitration. 268 B.R. 74, 78 (Bankr. D. Del. 2001).

Respondent also argues that even if arbitrations and civil trials are not analogous, Delaware's arbitration proceeding "is not an arbitration, but a trial – a judicial proceeding." Opp. 13. But, as the petition explains (at 28-29), Delaware's arbitration proceeding incorporates all of the features that *distinguish* arbitration from civil trials. See also Pet. App. 14a-15a.

The Third Circuit majority acknowledged these critical differences, but held that because Delaware's arbitration proceedings "are conducted before active judges in a courthouse," they "differ fundamentally from other arbitrations" and are "comparable" to civil trials. Pet. App 15a.[4] Respondent similarly seizes upon this distinction, arguing that where "sitting judicial officers are engaged in judicial conduct[,] * * * that is a core basis for the First Amendment right of public access." Opp. 13-14.

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[4] Judge Sloviter's opinion also stated that Delaware's arbitration proceedings "differ fundamentally from other arbitrations * * * because they result in a binding order of the Chancery Court." Pet. App. 15a. But Judge Fuentes rejected this contention in his concurring opinion, see Pet. 15-16 n.7 & Pet. App. 25a (self-executing judgments do "not alone alter the First Amendment right of access calculus one way or another"). Thus, this aspect of the majority opinion rests solely on the fact that active judges conduct arbitrations in state courthouses under the Delaware statute. Moreover, Judge Fuentes was correct: the mere fact that Delaware provides for the automatic docketing of the arbitrator's decision as a judgment, instead of utilizing the essentially automatic process of "confirmation" through filing with a court, has no substantive significance. Even if it did, that would at most call for invalidation of the court rule, which provides for automatic docketing as a judgment, rather than invalidation of the Delaware statute, which does not. See Pet. 15-16 n.7.

But that approach entirely ignores the experience and logic test's focus on "the particular *proceeding* in question," *Press II*, 478 U.S. at 9 (emphasis added). It also ignores the fact that States may confer non-judicial duties upon judges, because state governments are not subject to the separation-of-powers restrictions applicable to the federal government. Pet. 28.

In sum, the majority below fundamentally misapplied this Court's precedents in concluding that arbitration proceedings of the type authorized by the Delaware statute had a historical tradition of openness sufficient to satisfy the "experience" prong of the First Amendment right-of-access standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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