No. 13-869

In The
Supreme Court of the United States

LEO E. STRINE, JR., 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**

BRIEF FOR RESPONDENT DELAWARE COALITION FOR OPEN GOVERNMENT, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly considered the history of openness of civil trials in addition to that of private arbitration in applying the "logic and experience" test articulated by this Court[1] to determine whether there is a right under the First Amendment of public access to statutory judicial "arbitration" proceedings which are mandated to be non-public, and which are conducted by sitting judges, utilizing public resources and infrastructure, with rulings immediately filed with the court and enforceable as judgments of a court.

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[1] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982); *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986). *See also Press-Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501, 505-09 (1984).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Delaware Coalition for Open Government, Inc. states that it has no parent corporation and no stock.

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INTRODUCTION

To further its reputation at the preferred forum for incorporations and business litigation, the State of Delaware enacted a statute, 10 Del. C. §349 (the "Delaware Statute"), enabling the sitting members of its prestigious Court of Chancery to adjudicate certain commercial cases and make binding decisions immediately entered and enforceable as court judgments, with none of the proceedings open to the public. The proceedings are held in a State courthouse on State time, using State-paid infrastructure and resources. The judges take evidence, determine the facts and apply the law to the facts, but behind closed doors, completely shielded from public scrutiny. Delaware attempts to justify creating a secret court via the pretext of labeling the procedure "arbitration" instead of "litigation."

This case does not ask this Court to decide whether the public has a right of access to civil proceedings under the First Amendment. Petitioners did not raise that issue below, nor do they assert it in their petition. They have accepted that premise. Instead, Petitioners ask this Court to determine whether the Third Circuit misapplied the "logic and experience" test set forth in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982), and *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986), used to determine whether there is a right of public access to a particular proceeding.

This is not a case of public importance which requires resolution by this Court. The Third Circuit applied a properly-stated rule of law correctly, and in a manner consistent with rulings of this Court and lower courts throughout the nation. Because of the unique features of the Delaware Statute, this issue is not likely to recur in other cases. There is no real and embarrassing conflict of opinion and authority between the circuits, or with any other court.

STATEMENT OF THE CASE

In 2009, Delaware expanded the jurisdiction of its Court of Chancery by enacting the Delaware Statute, which authorized its judiciary to hear and decide certain business "arbitration" cases. According to the legislative synopsis, the statute's purpose was "to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate and technology matters." Del. H.B. 49 syn.

Although the Delaware Statute labels the procedure as "arbitration," the process mirrors civil litigation in numerous important ways. Like traditional litigation, such "arbitrations" are authorized only by

a State statute, without which the parties could not obtain the service.[2]

Like litigation, proceedings are commenced by one party filing a document with the court. Delaware Chancery Court Rules ("Ch. Ct. R.") 3, 97(a).

Like litigation, payment for the process is made to the Court, on terms set by the Court, as opposed to a private arbitrator or arbitration company. Ch. Ct. R. 3, 98(g).

Like litigation, the parties have no choice as to who will hear and decide the case. Ch. Ct. R. 97(b) ("[u]pon receipt of a petition, the Chancellor will appoint an Arbitrator"). By contrast, in private arbitration, the parties are free to contract as to how the arbitrator is selected.

Like litigation, the procedure is set forth in rules of court. *See* Ch. Ct. R. 96-98. Like litigation, there are preliminary conferences and hearings. Ch. Ct. R. 16, 97(c), (d). Like litigation, the parties can agree upon discovery procedure. Ch. Ct. R. 29, 97(f).

Like litigation, matters are heard by sitting judges, empowered to serve as arbitrators by State law. Del. Const. Art. IV, §10; 10 Del. C. ch. 3. Like litigation,

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[2] A contractual arbitration provision is merely a type of forum selection clause. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

the proceedings take place in the courthouse during court hours, processed by court personnel.

Like litigation, the parties may offer evidence, and can cross-examine witnesses. Ch. Ct. R. 43, 97(d)(6).

Like litigation, the decision of the arbitrator is binding and is entered on the docket and enforceable like any other judgment or decree without separate action. Ch. Ct. R. 58, 98(f)(3). Like litigation, the decision is appealable, 10 Del. C. §349(c), unless the parties have stipulated that it is not. 10 Del. C. §351.

Like all litigation in the Court of Chancery, the proceeding is processed expeditiously. The Court of Chancery has stated in judicial decisions that the rights of litigants before it "'will be adjudicated as efficiently, promptly and economically in Delaware courts as they would be in [ ] arbitration were [they] subject to that process.'" *Israel Discount Bank of N.Y. v. First State Depository Company, LLC*, 2012 WL 5359296 at *2 (Del. Ch. Oct. 31, 2012) (*quoting Cantor Fitzgerald v. Prebon Sec. (USA) Inc.*, 1999 WL 135241 at *2 (Del. Ch. Feb. 25, 1999)).[3]

[3] Members of the Delaware bench and bar promote the speed of the Court of Chancery in resolving litigation. *See, e.g.*, The Hon. Leo E. Strine, Jr., *The Delaware Way: How We Do Delaware Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. of Corp. Law 673, 682 (2005) ("[t]he capacity and willingness of chancery judges to act with speed fit well with the business community's needs . . . as a matter of judicial culture, Chancery developed a deep commitment to the timely resolution

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The one characteristic that differentiates the "arbitration" proceeding from a traditional civil trial is that the "arbitration" proceeding is statutorily mandated to be confidential – there is no right of public access to the petition, the proceeding, the evidence or the ruling unless there is an appeal. 10 Del. C. §349(b). *See also* Ch. Ct. R. 97(a)(4) (petition and supporting documents are confidential and not part of the public record unless and until an appeal).

PROCEEDINGS BELOW

On October 25, 2011, Respondent Delaware Coalition for Open Government ("DelCOG") filed an action in the U.S. District Court for the District of Delaware against Petitioners, the Court of Chancery and the State of Delaware, seeking relief under the Civil Rights Act of 1871, 42 U.S.C. §§1983 and 1988. DelCOG alleged a violation of rights granted under the First Amendment to the Constitution of the United States as made applicable to the states by the Fourteenth Amendment to Constitution of the United States, claiming that the Delaware Statute violated the public's right of access to judicial proceedings.

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of disputes, however big or small, and whether expedited or not"); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Law*, 106 Col. L. Rev. 1749, 1760 (2006) ("[a] sufficiently uncrowded docket permits urgent cases to be resolved expeditiously, sometimes amazingly so").

Petitioners filed answers on November 16, 2011. The parties filed cross-motions for judgment on the pleadings.

On August 30, 2012, the District Court issued a Memorandum Opinion and an Order (i) granting the motion for judgment on the pleadings as to the State of Delaware and the Court of Chancery on the grounds of sovereign immunity, (ii) denying the motion for judgment on the pleadings of the individual defendants, (iii) granting the motion of Respondent for judgment on the pleadings against Petitioners. The District Court held that proceedings under the Delaware Statute are essentially civil trials, subject to a right of public access. The District Court declared the Delaware Statute unconstitutional and enjoined further proceedings under it. *Delaware Coalition for Open Government, Inc. v. Strine*, 894 F.Supp.2d 493 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013).

Petitioners appealed. On October 2013, the U.S. Court of Appeals, in a 2-1 decision, affirmed the decision of the District Court. *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510 (3d Cir. 2013). The majority stated that "there is no need to engage in so narrow a historical inquiry as the parties suggest. In determining the bounds of our historical inquiry, we look 'not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding [has] historically been open in our free society.'" *Id*. at 515 (quoting *PG Pub. Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013)). The Third Circuit reviewed the history of

civil trials and of arbitration, and concluded that the weight of experience tilted in favor of openness. *Id.* at 518. The Third Circuit also concluded that policies supporting openness were equally applicable to proceedings under the Delaware Statute. *Id.* at 518-21.

REASONS FOR DENYING THE PETITION

I. The Third Circuit Correctly Applied a Properly-Stated Rule.

This Court has established that whether the public has a right of access to adjudicatory proceedings under the First Amendment depends on (i) whether the place and process has been historically open to the public ("experience"), and (ii) whether public access plays a significant role in the functioning of the particular process in question ("logic"). *Globe Newspaper Co.*, 457 U.S. at 605-06; *Press-Enterprise Co.*, 478 U.S. at 8.

Although that rule was developed by this Court in the context of criminal proceedings, lower courts, including the Third Circuit, have applied the "logic and experience" test to determine whether there is a right of public access to civil adjudicatory proceedings. *See, e.g., New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298-99 (2d Cir. 2012); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 694-95 (6th Cir. 2002); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1068-70 (3d Cir. 1984).

In the proceedings below, Petitioners did not challenge the reliance by the Third Circuit on the "logic and experience" test (and indeed advocated within that analytical framework). Nor did Petitioners challenge the existence of a First Amendment right of access to civil adjudicatory proceedings. Petitioners do not appear to raise such claims now. In any event, the failure to raise such claims below bars raising them for the first time here. *E.g., Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002) (argument not raised below is waived).

Petitioners, therefore, are merely claiming a misapplication of a properly stated rule of law. This is not sufficient justification for a writ of certiorari.

Petitioners' grievance is that the Third Circuit, in undertaking the "experience" analysis, considered the history of openness of civil trials by analogy, and not just the history of private arbitration. (Petition 27-29). That approach, however, is consistent with decisions from this Court and lower courts.

This Court has stated that "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of hearing. . . .'" *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting with approval *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). *See also Press-Enterprise II*, 478 U.S. at 10-11 (evaluating California pre-trial hearings by looking to practices of

other states and to other types of hearings, including probable cause hearing in Aaron Burr's 1807 trial for treason).

Lower courts have also frequently used analogy as an analytical device in deciding access cases. *E.g., In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) ("[t]radition is not meant, we think, to be construed so narrowly; we look also to analogous proceedings and documents of the same 'type or kind' "); *U.S. v. A.D.*, 28 F.3d 1353, 1358 (3d Cir. 1994) (in the absence of history of openness of federal delinquency proceedings, Third Circuit finds them analogous to criminal proceedings and so subject to First Amendment right of access); *Society of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569, 575-76 (D. Utah 1985) (in absence of history of open administrative fact-finding hearings, court analogizes to civil trials and finds a First Amendment right of access), *dismissed as moot and remanded*, 832 F.2d 1180 (10th Cir. 1987). *See also U.S. v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (the absence of a historical tradition is "not dispositive: a new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure").

As the Second Circuit has stated:

> changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If . . . government institutions that did not exist at the time of the

> Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined . . . would make avoidance of constitutional protections all too easy.

New York Civil Liberties Union, 684 F.3d at 299.

Similarly, the Third Circuit has explained:

> The First Amendment rights recognized by *Richmond Newspapers, Globe Newspaper*, and *Press-Enterprise I and II* were not defined by reference to the practices of any given state agency. In each of these cases, the Court looked not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding had historically been open in our free society.

Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1175 (3d Cir. 1986).

Petitioner has not cited a single access case where use of analogy to comparable government proceedings has been rejected as a legitimate analytical tool.

In this, case the comparable government institution is the civil trial. It is well-recognized that

arbitration proceedings are analogous to civil trials. *E.g., Hyman v. Potterberg's Ex'rs*, 101 F.2d 262, 265 (2d Cir. 1939) ("however informal, an arbitration is a kind of trial"); *In re Home Health Corp., Inc.*, 268 B.R. 74, 78 (Bankr. D. Del. 2001) (arbitration "is a trial on the merits, although before a non-judicial tribunal").

Pursuant to Chancery Court Rule 96(d), an "Arbitration hearing" is "a proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as the parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case." Each side gets to present witnesses and documentary evidence. Ch. Ct. R. 96(d)(4).

Perhaps the most important commonality between civil trials and arbitration is that the "arbitrator" interprets the law, decides the facts, applies the law to those facts, and renders a decision determining the legal rights of the parties – in other words, performs the supreme, primary judicial function. *See Olson v. National Association of Securities Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) ("an arbitrator's role is functionally equivalent to a judge's role . . . "); *Seldner Corp. v. W.R. Grace & Co.*, 22 F.Supp. 388, 392 (D.

Md. 1938) ("[t]he function of arbitrators is judicial in nature").[4] Whether labeled arbitration or litigation, a judge engages in adjudication, exercising power vested by the State to determine substantive legal rights. *See Burns v. Reed*, 500 U.S. 478, 499-500 (1991) (Scalia, J., concurring in judgment in part and dissenting in part) (noting that judicial immunity extends to arbitrators and others who are "authoritatively adjudicating private rights"[5]). "An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

Like civil litigation, and unlike private arbitration, under the Delaware Statute the decision of the "arbitrator" is binding and is automatically entered on the docket and enforceable like any other judgment or decree without separate action. Ch. Ct. R. 58, 98(f)(3).

The mere fact that a proceeding is labeled an "arbitration" does not determine the issue. *See NAACP v.*

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[4] Petitioner argues that deciding disputes is not a judicial function, but is more like rule-making or issuing permits. (Petition 28). "Judicial action" is "[a]n adjudication upon rights of parties who in general appear or are brought before tribunal by notice or process, and upon whose claims some decision or judgment is rendered." *Black's Law Dictionary* 760 (5th ed. 1979).

[5] By court rule, judges hearing and deciding proceedings under the Delaware Statute enjoy immunity from suit. Ch. Ct. R. 98(c).

Button, 371 U.S. 415, 429 (1963) ("a state cannot foreclose the exercise of constitutional rights by mere labels"). Where the arbitrator is not privately retained and paid and the fee is paid into a court, where the arbitrator conducts the proceeding in a government courthouse on government time (and government salary) pursuant to procedure set forth in court rules, and where the arbitrator is a judicial officer acting pursuant to power granted by the State (and not merely by private contract) and presiding over a proceeding that resembles a bench trial, where the arbitrator functions as a judge, deciding the facts and applicable law, and where the arbitral award is effective and enforceable without bringing a legal action to confirm it, then it is not an arbitration, but a trial – a judicial proceeding. *See Elliott v. Ten Eyck Partnership v. City of Long Beach*, 67 Cal.Rptr.2d 140, 144-45 (Cal. App. 1997). *See also Heenan v. Sobati*, 117 Cal.Rptr.2d 352, 353, 358 (Cal. App. 2002). "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (quoted in *New York Civil Liberties Union*, 684 F.3d at 300).

Minor procedural differences do not alter the fact that sitting judicial officers are engaged in 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. That is a core basis for the First Amendment right of public access. *See New York Civil Liberties Union*, 684 F.3d at 300 (where agency acts as an adjudicatory body imposing official and practical consequences on members of society, agency is subject to rules applicable to courts, including right of public access, notwithstanding different procedures).

Thus, the Third Circuit applied the law correctly and in a manner consistent with other courts.

II. There Is No Circuit Split.

Petitioner argues that there is a split among the circuits on how strictly to apply the requirement of a history of public access. This "conflict" is illusory.

Initially, as noted above, it was proper for the Third Circuit to consider the history of openness of civil trials by analogy in undertaking the "experience" analysis. Since the history of openness of civil trials passes the strictest of the "competing" approaches claimed by Petitioner, the issue of whether a less strict standard is or is not appropriate is moot.

Moreover, the courts are not as conflicted as Petitioner suggests. For example, Petitioner cites *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985), as an example of an appellate court requiring a "long and unbroken history of openness." (Petition 19). However, more recently the U.S. Court of Appeals for the D.C. Circuit has stated that

the absence of a historical tradition is "not dispositive: a new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure." *El-Sayegh*, 131 F.3d at 161.

Further, the other two cases cited by Petitioner do not state a standard for the quantum of historical evidence required. As such, the case law does not support Petitioner's claimed "conflict."

Petitioner has not cited any decision of any court recognizing the existence of the claimed conflict. Further, 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. Petitioners have not cited any cases demonstrating such a conflict.

Nor has any court addressed the constitutionality under the First Amendment of a statute comparable to the Delaware Statute (simply because there are no comparable statutes). As such, there is no direct conflict between the circuits (or with any other court, state or federal, at any level).

III. The Decision of the Third Circuit Is of Limited Effect and Does Not Need to Be Settled by This Court.

The Delaware Statute provides for binding adjudication by a sitting judge, with the judgment

automatically filed with the court and enforceable, but held in secret with no right of public access. It has been characterized as "a significant leap beyond any other venture along the borderline between public and private adjudicative forums. Research has thus far failed to uncover any other scheme remotely like it." Thomas J. Stipanowich, *In Quest of the Perfect Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 The Journal of Entrepreneurship, Business & the Law 349, 365 (April 26, 2013).

Notwithstanding its unique nature, Petitioners argue that the decision of the Third Circuit would invalidate, or at least "cast significant doubt" on, court-adjunct arbitration proceedings nationwide. (Petition 18, 33). This is hyperbole. Other court-adjunct arbitration rules differ from the Delaware Statute in either or both of two key ways: the programs do not utilize sitting judges[6], and/or the arbitrations are

[6] For example, in Minnesota, arbitrations are conducted by a "neutral," selected from a roster of neutrals. Minn. Gen. R. Prac. 114.12. That list includes lawyers in private practice and retired judges, not sitting judges. http://www.mncourts.gov/apps/adr/Adr_rpt.asp. Similarly, in South Carolina, the court maintains a list of qualified neutrals, S.C. ADR R. 4(C), which consists of lawyers, not sitting judges. http://ww2.scbar.org/member_resources/alternative_dispute_resolution/find_certified_adr_mediators_and_arbitrators/. In Indiana, the arbitrators are lawyers, not sitting judges. Ind. R. for ADR 3.3. The Kansas statutes Petitioner relies upon involves private arbitration, not court-adjunct arbitration (Kansas' court-adjunct ADR appears limited to mediation, http://www.kscourts.org/programs/

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non-binding[7] (which renders them advisory, not adjudicatory[8]). Additionally, many courts' arbitration

Alternative-Dispute-Resolution/FAQ.asp.). In Massachusetts, judges do not serve as neutrals. http://www.mass.gov/courts/admin/legal/redbook13.html. As for Missouri and New Jersey, nothing in the statute and rule cited by Petitioners refers to sitting judges serving as arbitrators. In Nevada, court-adjunct arbitrators are lawyers and non-lawyers, not sitting judges. Nev. ADR R. 7. The same is true for New Hampshire, N.H. Super. Ct. R. 170(G)(1)(d)(3), California. Cal. Civ. Proc. Code §1141.18(a) & Cal. Civil Rule 3.814(a) (lawyers and retired judges may serve as arbitrators), North Carolina, N.C. Gen. Stat. §§ 7A-45.2(a), 90-21.62 (retired judges may arbitrate medical negligence cases), and Oregon. Oregon Rev. Stat. §1.300(1) & Oregon Uniform Trial Court Rule 13.090(1) (retired judges may serve as arbitrators).

[7] Under the Federal Dispute Resolution Act, arbitration by a Magistrate Judge is non-binding, with the right to a trial de novo. 28 U.S.C. §657(a). A number of state court-adjunct arbitration programs are also limited to non-binding arbitration, including New Jersey (N.J. Cts. §4:21A-6), California (Cal. Civil Rule 3.826), Maine (Maine Court Alternative Dispute Resolution Service Operational Rule §I(2)), Georgia (Ga. Supr. Ct. ADR Rules Appx. A), Oregon (Oregon Uniform Trial Court Rule 13.250), Tennessee (Tenn. Ct. R. 31) and Utah (Utah Court-Annexed ADR Rule 102).

[8] "When the arbitration is non-binding, while adversarial in presentation, it actually performs an advisory function because it can only influence the parties' opinion of their case and how they may choose to respond to the arbitrator's non-binding assessment in deciding whether to proceed with litigation or settle through subsequent direct negotiations or other forms of ADR." B. F. Tennille, et al., *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Cases*, 11 Pepperdine Dispute Resolution Law J. 35, 51 (2010) (footnote omitted). *Accord Godfrey v. Hartford Cas. Ins. Co.*, 993 P.2d 281, 285-86 (Wash. App. 2000) (Becker, J., dissenting), *rev'd*, 16 P.3d 617 (Wash. 2001) ("[n]onbinding arbitration is the submission of a dispute to an arbitrator with the understanding at the outset that the

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rules do not mandate (or even refer to) confidentiality. Some courts expressly provide that their arbitration proceedings are *not* confidential. *E.g.*, N.Y. Commercial Division New York County Alternative Dispute Resolution Rule 6; Ga. Fulton County R. 1000.

Given the diversity of approaches in the various federal and state ADR statutes and rules, their difference from the Delaware Statute, and the fact that the Delaware Statute was created to capitalize on the unique stature of Delaware's Court of Chancery in the business community, the decision of the Third Circuit will not have any impact on existing court-adjunct ADR programs outside of Delaware.

result will be purely advisory, and the result will be treated by the parties as a recommendation for settlement . . . If the parties do settle as a result of nonbinding arbitration, the court does not confirm the arbitration award; rather, it enforces the settlement contract, the terms of which may be different from the arbitrator's award").

CONCLUSION

Respondent respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

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