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Dean J. Shauger

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SECRET'S OUT: THIRD CIRCUIT FINDS DELAWARE'S STATE-  
SPONSORED ARBITRATION PROGRAM VIOLATES FIRST  
AMENDMENT RIGHT OF PUBLIC ACCESS IN  
*DELAWARE COALITION FOR OPEN  
GOVERNMENT v. STRINE*

DEAN J. SHAUGER\*

I. INTRODUCTION

Imagine living in a country where the public and the press were barred from viewing any and all judicial proceedings; only a select few would understand the judicial process, and it would leave those in charge unaccountable for their actions.<sup>1</sup> While it is true that limiting access to judicial proceedings might be necessary to protect privacy in certain instances, a judicial system that bars the public and press from all proceedings would completely shatter the notions of fairness and public confidence that are currently an essential part of the American judicial system.<sup>2</sup> Without these notions, the basis upon which the American judicial system was built would crumble.

This inevitable result illustrates the importance of the First Amendment right of public access.<sup>3</sup> The right of public access is an implicit right contained in the First Amendment that guarantees the ability of the public to attend certain judicial proceedings. It is a key part of the judicial system

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\* J.D. Candidate, 2015, Villanova University School of Law; B.A., 2012, Christian Brothers University. I would like to thank my family and friends, especially my parents, Dean and Karen Shauger, and my sister, Caroline Shauger, for all of their unwavering love and support in this and all of my endeavors, and without which, this Casebrief would not have been possible. I would also like to thank my colleagues on the *Villanova Law Review* for all of the hard work and time that went into the publication of this Casebrief.

1. See *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994) (recognizing that “promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system” and “serving as a check on corrupt practices by exposing the judicial process to public scrutiny” are benefits of open judicial proceedings (quoting *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986))). In addition to public understanding and public scrutiny, the Third Circuit has found four other societal interests promoted by openness. See *id.* (identifying six societal interests promoted by open court proceedings). For a full discussion of the six interests promoted by openness, see *infra* note 48 and accompanying text.

2. For a further discussion of situations in which either public access or privacy is necessary, see *infra* notes 5–6 and accompanying text.

3. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556–57 (1980) (“The right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.”).

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because “without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.”<sup>4</sup> Despite its paramount importance, this right is a limited one.<sup>5</sup> One area in which the right of public access can be restricted is in proceedings that require secrecy to function properly, such as grand jury proceedings.<sup>6</sup> Determining how and when this right is applied is the subject of this Casebrief.

The Supreme Court first recognized the right of public access in *Richmond Newspapers, Inc. v. Virginia*,<sup>7</sup> when Chief Justice Burger declared that the First Amendment includes a right of public access to criminal trials.<sup>8</sup>

4. See *id.* at 557 (explaining First Amendment right of public access).

5. See *PG Publ’g Co. v. Aichele*, 705 F.3d 91, 98–99 (3d Cir. 2013) (explaining that First Amendment right of public access is limited). In finding that the right of public access is limited, the court in *PG Publishing* examined the implicit limitations on this right. See *id.* (“The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.” (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (2000)) (internal quotation marks omitted)); see also *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”).

6. See *Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cnty.* (Press II), 478 U.S. 1, 8–9, 27 (1986) (acknowledging that while most proceedings operate best when held in public, some proceedings would be “totally frustrated” if held in public; for example “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings” (quoting *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 424 (1983))). The Court explained that while some proceedings require privacy to function properly, others “plainly require public access.” See *id.* at 9. For instance, the Court had previously explained the important role that openness played in maintaining the fairness—and the appearance of fairness—in criminal trials and juror selection. See *id.* (citing *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.* (Press I), 464 U.S. 501, 501 (1984)).

7. 448 U.S. 555 (1980).

8. See *id.* at 576–77 (“The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.”). Although the right of public access was not recognized by the Supreme Court until 1980, the right dates back to English common law. See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984) (explaining that since its passage in 1267, Statute of Marlborough required that “all Causes ought to be heard, ordered, and determined before the Judges of the King’s Courts *openly* in the King’s Courts . . . .” (quoting 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 103 (6th ed. 1681))). Additionally, the fact that all judicial trials were held in public was one of the most distinct features of English justice and “appears to have been the rule in England from time immemorial.” See *Richmond Newspapers*, 448 U.S. at 556 (quoting EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73–74 (6th ed. 1967)). This tradition continued in colonial America where courthouses had a “central place in the life of communities they served” and encouraged “the active participation of community members” in developing the “local practice of justice.” Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 *YALE J.L. & HUMAN.* 311, 318–19 (2012).

Subsequently, the Supreme Court has found a right of public access to the voir dire of jurors in criminal trials and to certain preliminary criminal hearings.<sup>9</sup> In determining whether the right of public access applies to certain judicial proceedings, the Court has developed the logic and experience test.<sup>10</sup> This test considers whether there has been a history of openness to the proceeding at issue and whether “access plays a significant positive role in the functioning of the particular process in question.”<sup>11</sup>

Arbitration is one type of proceeding that requires privacy in order to function properly.<sup>12</sup> In recent years, the use of arbitration to resolve business and commercial disputes has been rapidly increasing.<sup>13</sup> Between 1994 and 2004, the caseload of the American Arbitration Association’s International Center for Dispute Resolution grew by almost 330%.<sup>14</sup> Arbi-

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9. See *Press II*, 478 U.S. at 10 (finding right of public access to preliminary criminal proceedings as conducted in California); *Press I*, 464 U.S. at 511 (finding right of public access to voir dire of jurors in criminal trials); *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013) (citing *El Vocero de P.R. (Caribbean Int’l News Corp.) v. Puerto Rico*, 508 U.S. 147, 149–50 (1993) (finding right of public access to preliminary criminal proceedings as conducted in Puerto Rico)).

10. See *Press II*, 478 U.S. at 8 (articulating bounds of logic and experience test).

11. See *id.* (explaining logic prong of logic and experience test). The logic and experience test has its origins in *Richmond Newspapers*, but it has been developed by the Supreme Court in two subsequent cases: *Press II* and *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596 (1982). See *PG Publ’g Co. v. Aichele*, 705 F.3d 91, 104 (3d Cir. 2013) (explaining development of logic and experience test by Supreme Court).

12. For a further discussion of the arbitration process, see *infra* notes 50–54 and accompanying text.

13. See *Strine*, 733 F.3d at 523 (Roth, J., dissenting) (noting that arbitration has been increasing both in United States and abroad). This increase in the use of arbitration proceedings can be attributed to the fact that arbitration “resolv[es] disputes expeditiously,” that there has been an “increase in commercial disputes between businesses located in different countries,” and that “arbitration permits the proceedings to be kept confidential, protecting trade secrets and sensitive financial information.” *Id.* Judge Roth also noted the advantages of arbitration as articulated by the Supreme Court:

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

*Id.* at 523–24 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011)) (internal quotation marks omitted). But see Brian JM Quinn, *Arbitration and the Future of Delaware’s Corporate Law Franchise*, 14 CARDOZO J. CONFLICT RESOL. 829, 837 (2013) (explaining that recent study found only 11% of contracts contain arbitration provisions). Even though the use of arbitration is rapidly rising, it only represents a fraction of adjudications. See *id.*

14. See *Strine*, 733 F.3d at 523 (Roth, J., dissenting) (discussing one factor that could account for rise in arbitration is fact that “[b]usinesses in this country and

tration rates are growing internationally as well.<sup>15</sup> For instance, London's Court of International Arbitration has seen a 300% increase in the number of arbitration requests over the last decade.<sup>16</sup> The rise in the use of arbitration can be attributed to factors such as its speed in adjudicating disputes, its ability to keep sensitive information confidential, and the increase in disputes between parties from different countries.<sup>17</sup>

With the rise in the use of arbitration, Delaware creatively attempted to enter the arbitration market by creating a state-sponsored arbitration program.<sup>18</sup> Delaware has long been viewed as the preeminent destination for incorporation in the United States.<sup>19</sup> In fact, 51% of publicly traded companies and 61% of Fortune 500 companies are incorporated in Delaware.<sup>20</sup> One of the main reasons for this preeminence is the Delaware Court of Chancery's expertise in articulating the bounds of Delaware corporate law.<sup>21</sup> Although the Court of Chancery is viewed as the foremost venue for resolving business disputes, companies are increasingly turning to arbitration to settle their disputes.<sup>22</sup> Consequently, Delaware created a state-sponsored arbitration program in an effort to "preserve Delaware's

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abroad need to get commercial conflicts resolved as quickly as possible so that commercial relations are not disrupted").

15. See *id.* (describing rise in popularity of arbitrations internationally).

16. See *id.* (detailing rise in number of arbitrations abroad). Arbitration has become a key method for adjudicating "commercial disputes between businesses located in different countries." *Id.* This is especially true with "non-U.S. companies, with no familiarity—or with too much familiarity—with the American judicial system" that "may prefer arbitration with the rules set by the parties to lengthy and expensive court proceedings." *Id.*

17. See *id.* (explaining rise in arbitration).

18. See John P. DiTomo, *The U.S. Court of Appeals for the Third Circuit Strikes Down Delaware's Confidential Arbitration Program*, INSIGHTS: THE CORP. & SEC. L. ADVISOR, Nov. 2013, at 35, available at [http://www.mnat.com/assets/htmldocuments/Insights1113\\_DiTomo.pdf](http://www.mnat.com/assets/htmldocuments/Insights1113_DiTomo.pdf) (referring to Delaware's state-sponsored arbitration program as clever attempt to enter ADR market).

19. See Jores Kharatian, Note, *Secret Arbitration or Civil Litigation?: An Analysis of the Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 411, 411 (2013) (explaining that Delaware is home to many large corporations and "Justice Steele, Chief Justice of the Delaware Supreme Court, has reiterated the prominent reason why many corporations choose Delaware as the state of their incorporation is the presence of highly knowledgeable judges within the business law realm, as well as the predictability of its judicial system").

20. See Myron T. Steele, Chief Justice, Del. Supreme Court, Keynote Address at the Journal of Business, Entrepreneurship, & the Law Symposium: Delaware's Closed Door Arbitration: What the Future Holds for Large Business Disputes and How It Will Affect M&A Deals (Oct. 30, 2012), reprinted in 6 J. BUS. ENTREPRENEURSHIP & L. 375, 376 (illustrating Delaware's preeminence as place of incorporation).

21. See Kharatian, *supra* note 19, at 411; see also LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 5 (2007), available at <http://1.usa.gov/HAgIRP>. ("Many experienced lawyers believe that the principal reason to recommend to their clients that they incorporate in Delaware is the Delaware courts and the body of case law those courts have developed. They point, in particular, to the national reputation and importance of the Court of Chancery.").

22. See Quinn, *supra* note 13, at 841 ("The specialized Chancery Court is one of the sources of Delaware's competitive advantage in corporate law."); see also

preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.”<sup>23</sup> In order to qualify for Delaware’s program, “at least one party must be a ‘business entity formed or organized’ under Delaware law and neither party can be a ‘consumer.’”<sup>24</sup> Additionally, the amount in controversy must exceed one million dollars.<sup>25</sup>

In *Delaware Coalition for Open Government, Inc. v. Strine*,<sup>26</sup> the Third Circuit declared Delaware’s state-sponsored arbitration program unconstitutional as a violation of the First Amendment right of public access.<sup>27</sup> This Casebrief identifies the Third Circuit’s application of the logic and experience test in determining the right of public access.<sup>28</sup> Part II introduces the right of public access and the logic and experience test.<sup>29</sup> Additionally, Part II examines Delaware’s arbitration program and the decisions of the United States District Court for the District of Delaware and Third Circuit regarding the constitutionality of the program.<sup>30</sup> Part III analyzes the Third Circuit’s conflicting approaches to the application of the logic

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*Strine*, 733 F.3d at 523 (Roth, J., dissenting) (noting that use of arbitration is increasing).

23. See *Strine*, 733 F.3d at 512 (internal quotation marks omitted) (declaring Delaware’s motive in creating state-sponsored arbitration program); Quinn, *supra* note 13, at 832 (“[I]n its pleadings before the court in the citizens’ challenge and its public defense, Delaware regularly points to the potential threat of losing adjudications to arbitrators in New York, London, or Singapore as a motivation for implementing its court-sponsored procedure.” (citing Brief for NASDAQ OMX Group Inc. & NYSE EuroNext as Amici Curiae Supporting Respondents at 8, Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015))). Quinn also recognized that “[t]he perceived long-term threat to Delaware’s central position in the corporate law as a result of adjudications moving overseas and elsewhere is obvious.” *Id.*

24. See *Strine*, 733 F.3d at 512 (citation omitted) (laying out qualifications to participate in Delaware’s state sponsored arbitration program).

25. See *id.* (stating minimum amount in controversy needed to participate in program).

26. 733 F.3d 510 (3d Cir. 2013).

27. See *id.* at 521 (“Because there has been a tradition of accessibility to proceedings like Delaware’s government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware’s government-sponsored arbitrations.”). For a further discussion of the facts and procedure of *Strine*, see *infra* notes 57–90 and accompanying text.

28. For a further discussion of the logic and experience test, see *infra* notes 43–49 and accompanying text.

29. For a further discussion of the right of public access, see *infra* notes 34–42 and accompanying text. For a further discussion of the logic and experience test, see *infra* notes 43–49 and accompanying text.

30. For a further discussion of Delaware’s state-sponsored arbitration program, see *infra* notes 50–56 and accompanying text. For a further discussion of the district court’s decision, see *infra* notes 57–60 and accompanying text. For a further discussion of the Third Circuit’s decision, see *infra* notes 61–97 and accompanying text.

and experience test.<sup>31</sup> Further, Part III argues that the potential negative effects on Delaware's position as a place of incorporation may not be as dire as some suggest.<sup>32</sup> Finally, Part IV addresses the overall impact of the *Strine* decision and its importance in the Third Circuit.<sup>33</sup>

## II. THE RIGHT OF PUBLIC ACCESS: DEVELOPMENT, APPLICATION, AND THE CONFLICT IN DELAWARE

The Supreme Court first recognized the right of public access in 1980, when it decided *Richmond Newspapers, Inc. v. Virginia*.<sup>34</sup> In *Richmond Newspapers*, the Court held that a Virginia trial court's decision to close a criminal trial to the public violated the First Amendment.<sup>35</sup> In that case, Chief Justice Burger emphasized the importance of public access in the American judicial system when he wrote, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily."<sup>36</sup> Since its decision in *Richmond Newspapers*, the Supreme Court has expanded the right of public access to certain additional criminal proceedings, but it has never considered the question of whether the right is

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31. For a further discussion of the conflicting applications of the logic and experience test, see *infra* notes 104–28 and accompanying text. For a further discussion of the recently filed petition for a writ of certiorari, see *infra* notes 129–42 and accompanying text.

32. For a further discussion of the potential effects of the Third Circuit's decision on Delaware as a primary place of incorporation, see *infra* notes 143–54 and accompanying text.

33. For a further discussion of the overall impact of *Strine*, see *infra* notes 155–59 and accompanying text.

34. See 448 U.S. 555, 580 (1980) (finding right of public access to criminal trials implicit in First Amendment). For a further discussion regarding the common law development of right of public access, see *supra* note 8 and accompanying text.

35. See *Richmond Newspapers*, 448 U.S. at 580 (holding that First Amendment provides right of public access to criminal proceedings). The decision in *Richmond Newspapers* was a fractured one, consisting of five different opinions; however, seven of the eight justices who participated in the decision held in favor of finding a right of public access to criminal proceedings. See *id.*; *id.* at 583 (Stevens, J., concurring); *id.* at 585 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring).

36. See *id.* at 576–77 (plurality opinion) (detailing importance of First Amendment right of public access to American judicial system). Chief Justice Burger traced the history of criminal trials being open to the public. See *id.* After reviewing several hundred years of records, Chief Justice Burger could not find "a single instance of a criminal trial conducted in camera in any federal, state, or municipal court . . ." See *id.* at 573 n.9 (quoting *In re Oliver*, 333 U.S. 257, 266 (1948)). In explaining the importance of a First Amendment right of public access, Chief Justice Burger identified some of the public benefits that stem from enforcing this right: public accountability and educating the public about the judicial system. See *id.*

warranted in civil proceedings.<sup>37</sup> Although the Supreme Court has never expressly examined the question of a right of public access to a civil proceeding, it noted in *Richmond Newspapers* that “historically both civil and criminal trials have been presumptively open.”<sup>38</sup>

#### A. *Finding the Right of Public Access in the Third Circuit*

Many circuit courts, including the Third Circuit, have considered the question of public access, and all have found a right of public access to civil trials.<sup>39</sup> The Third Circuit has held that this right also applies to meetings of a Pennsylvania city planning commission and post-trial juror examinations.<sup>40</sup> However, the Third Circuit has declined to extend the right of public access to certain proceedings, such as judicial disciplinary boards, the records of state environmental agencies, and the voting process.<sup>41</sup> In determining whether there is a First Amendment right of public access to a certain proceeding, the Third Circuit applies the logic and experience test.<sup>42</sup>

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37. See *Del. Coal. for Open Gov't v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013) (acknowledging Supreme Court has only found right of access in criminal proceedings).

38. See *Richmond Newspapers*, 448 U.S. at 580 n.17 (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”). For a further discussion regarding proceedings for which the Supreme Court has found a right of public access applies, see *supra* note 9 and accompanying text.

39. See, e.g., *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment right of public access in civil trials); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (same); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (same); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (same); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (same); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (same).

40. See *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 180–81 (3d Cir. 1999) (finding First Amendment right of public access to meetings of city planning commission in Pennsylvania); *United States v. Simone*, 14 F.3d 833, 840 (3d Cir. 1994) (finding First Amendment right of public access to post-trial juror examinations).

41. See *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 112 (3d Cir. 2013) (declining to extend First Amendment right of public access to voting process); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (declining to extend First Amendment right of public access to deportation hearings); *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477 (3d Cir. 1999) (declining to extend First Amendment right of public access to judicial disciplinary board hearings); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175–76 (3d Cir. 1986) (declining to extend First Amendment right of public access to records of state environmental agencies).

42. See, e.g., *Strine*, 733 F.3d at 514 (“In order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public” (citing *N. Jersey Media Grp.*, 308 F.3d at 213–14)).



B. *Determining a Right of Public Access: The Logic and Experience Test*

The logic and experience test is a two-pronged test that courts use to determine whether there is a right of public access.<sup>43</sup> Under the experience prong of the test, courts generally examine the history of a particular proceeding to decide whether that proceeding has traditionally been open to the public.<sup>44</sup> This is an objective standard that draws “on a plethora of historical sources . . . .”<sup>45</sup> Put simply, if a proceeding has traditionally been open to the public, that tradition of openness implies that a proceeding will pass the experience prong of the test; however, a showing of openness at common law is not always required.<sup>46</sup>

The logic prong of the test considers whether “access plays a significant positive role in the functioning of the particular process in question.”<sup>47</sup> In answering this question, courts apply an objective standard and consider two things: “the positive role of access” and “the extent to which openness impairs the public good.”<sup>48</sup> To find that a proceeding qualifies

43. See, e.g., *N. Jersey Media Grp.*, 308 F.3d at 202 (applying logic and experience test to determine if there is right of public access to deportation hearings). The Third Circuit adopted the logic and experience test from *Richmond Newspapers*, the decision where the Supreme Court first found a constitutional right of public access. See *id.* (“[W]e find that the application of the *Richmond Newspapers* experience and logic tests does not compel us to declare the Creppy Directive unconstitutional.”). In order to find a First Amendment right of public access, both the experience and logic prongs of the test must be met. See *id.* at 213–14.

44. See, e.g., *Press II*, 478 U.S. 1, 10 (1986) (examining history of preliminary proceedings in criminal trials and finding tradition of accessibility to these proceedings dating back to “the celebrated trial of Aaron Burr for treason”); see also *Strine*, 733 F.3d at 515–18 (examining history of civil trials and arbitrations); *N. Jersey Media Grp.*, 308 F.3d at 211 (stating that court considers “whether ‘the place and process have historically been open to the press and general public’” (quoting *Press II*, 478 U.S. at 8)); *Publiker Indus.*, 733 F.2d at 1068 (tracing history of openness of civil trials back to Statute of Marlborough in 1267).

45. See *PG Publ’g*, 705 F.3d at 108 (explaining how Third Circuit and Supreme Court analyze experience prong of logic and experience test under objective standard). These sources include “comments made by the Framers, practice at the English court of law, congressional procedures, relevant regulatory schemes, and court decisions.” *Id.*

46. See *id.* (“[A] tradition of accessibility implies the favorable judgment of experience.” (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980))); see also *Strine*, 733 F.3d at 515 (“In order to satisfy the experience test, the tradition of openness must be strong; however, ‘a showing of openness at common law is not required.’” (quoting *PG Publ’g*, 705 F.3d at 108)). But see *N. Jersey Media Grp.*, 308 F.3d at 213 (explaining that while “a 1000-year history is unnecessary” in establishing experience prong, experience cannot be dispensed with just because “history is ambiguous or lacking”).

47. See *Press II*, 478 U.S. at 8 (explaining that while some governmental proceedings “operate best under public scrutiny,” others, such as grand jury proceedings, “would be totally frustrated if conducted openly”).

48. See *Strine*, 733 F.3d at 518 (quoting *N. Jersey Media Grp.*, 308 F.3d at 202) (laying out elements of logic prong of logic and experience test). The logic prong is also examined under an objective standard. See *PG Publ’g*, 705 F.3d at 111. In applying the logic prong, courts will examine six traditional benefits that flow from openness. See *id.* These benefits include:

for the First Amendment right of public access, a court must determine that “both experience and logic [ ] counsel in favor of opening the proceeding to the public.”<sup>49</sup>

### C. *Preserving Delaware's Preeminence in the Realm of Corporate Law*

In 2009, the Delaware General Assembly amended the Delaware Code to grant sitting judges on the Court of Chancery the “power to arbitrate business disputes.”<sup>50</sup> The goals of Delaware’s arbitration program were two-fold: “(1) addressing businesses’ increasing demand for alternatives to civil litigation as a means of resolving commercial disputes, and (2) making the state’s expert judiciary available to satisfy that demand with well-reasoned results and savings of time and expense.”<sup>51</sup>

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

*Id.* (alterations in original) (quoting *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994)) (internal quotation marks omitted).

49. *See Strine*, 733 F.3d at 514 (citing *N. Jersey Media Grp.*, 308 F.3d at 213–14) (indicating that both prongs of logic and experience test must be met for proceeding to qualify for First Amendment right of public access). Once a presumption of public access is given to a proceeding on the basis of the experience and logic test, the right of public access can only be overturned by a compelling state interest. *See Press II*, 478 U.S. at 9–10 (explaining right of public access is not absolute but rather “[t]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” (quoting *Press I*, 464 U.S. 501, 510 (1984)) (internal quotation marks omitted)).

50. *See H.B. 49*, 145th Gen. Assemb. (Del. 2009) (resulting in Court of Chancery arbitration program outlined in DEL. CODE ANN. tit. 10, § 349 (2009)); *see also Steele*, *supra* note 20, at 376 (clarifying that Delaware’s state-sponsored arbitration program was created by statute and not court rule). Additionally, Chief Justice Steele explained that the District Court’s opinion gave the impression that the program was a court rule and not created by statute. *See id.*

51. *See DiTomo*, *supra* note 18, at 31 (citing H.B. 49, 145th Gen. Assemb. (Del. 2009)) (stating goals of Delaware’s state-sponsored arbitration program). In order to qualify for Delaware’s arbitration program, parties must meet three conditions: (1) at least one party must be a Delaware corporation; (2) neither party can be a consumer; and (3) the amount-in-controversy must be at least one million dollars. *Id.* (citing DEL. CODE ANN. tit. 10, § 349); *see also Steele*, *supra* note 20, at 376 (explaining that purpose of Delaware’s program was to provide service “to our constituents, our customers, in addition to the regular court system”). Chief Justice Steele further explained that the program is an advantage offered to corporations who are either incorporated in or have their principle place of business in Delaware. *See id.*

Under the program, the judges sitting on the Court of Chancery would hear arbitration proceedings during normal business hours.<sup>52</sup> However, unlike normal Chancery Court proceedings, these arbitrations would be closed to the public.<sup>53</sup> Court of Chancery rules governed arbitrations for the purposes of depositions and discovery, and the judge could “grant any remedy or relief that [the judge] deem[ed] just and equitable and within the scope of any applicable agreement of the parties.”<sup>54</sup> Ultimately, the confidentiality of the program caused the District Court and the Third Circuit to declare the arbitration program unconstitutional.<sup>55</sup> While it is true that privacy is an important component of the arbitration process, critics argued that this alleged need for confidentiality did not weigh heavily against the longstanding tradition of openness, which is at the heart of the First Amendment right of public access.<sup>56</sup>

#### D. *Civil Trial or Arbitration? A Dilemma in the District Court*

The Delaware Coalition for Open Government (the Coalition) brought suit in the United States District Court for the District of Delaware, alleging that the confidentiality of Delaware’s arbitration program

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52. See *Strine*, 733 F.3d at 512–13 (describing procedure of Delaware’s arbitration program). Before an arbitration proceeding is heard, the parties are required to file a petition with the Register in Chancery. See *id.* at 512. Arbitrations typically begin ninety days after the Register in Chancery has been petitioned, and they cost \$6,000 per day after an initial \$12,000 filing fee. See *id.* at 513. Additionally, arbitrations are governed by the rules of the Court of Chancery unless the parties agree otherwise. See *id.* The presiding judge “[m]ay grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties” and both parties have the right to appeal the decision to the Delaware Supreme Court. *Id.* (alterations in original) (quoting DEL. CH. R. 98(f)(1)). However, the chances of overruling decisions made by the arbitrator are limited because, on appeal, the Delaware Supreme Court applies a set of standards outlined in the Federal Arbitration Act that are highly deferential to the lower court’s arbitration decision. See *id.* One situation where the Delaware Supreme Court may disagree with the arbitrator’s decision is if the appellant shows that the “award was procured by corruption, fraud, or undue means” or there was misconduct on the part of the arbitrator. *Id.* (quoting 9 U.S.C. § 10 (2012)). Without proof of some sort of misconduct on the part of the arbitrator, there are very few circumstances in which an arbitration decision will be overturned on appeal. See *id.*

53. See *id.* at 513 (“[T]he statute and rules governing Delaware’s proceedings bar public access.”).

54. See *id.* (quoting DEL. CH. R. 98(f)(1)) (explaining procedure for arbitration program). Although depositions and discovery were to be governed by Court of Chancery rules generally, parties could amend how the rules would apply. See *id.*

55. See *id.* at 521 (declaring Delaware’s state-sponsored arbitration program unconstitutional as violation of First Amendment right of public access).

56. See *Quinn*, *supra* note 13, at 848 (“[T]he provision for the broad protections of confidentiality for the arbitration proceedings places it squarely at odds with long-held notions of openness of court proceedings and a qualified First Amendment right of public access to the courts.”).

violated the First Amendment right of public access.<sup>57</sup> The Coalition argued that these secret arbitrations were more akin to civil trials than arbitrations.<sup>58</sup> The court agreed and found that “the Delaware proceeding functions essentially as a non-jury trial before a Chancery Court judge,” and, therefore, the First Amendment right of public access applied to these proceedings.<sup>59</sup> The district court did not apply the logic and experience test because it found that Delaware’s state-sponsored arbitration program was “sufficiently like a trial,” and therefore, the right of public access automatically applied.<sup>60</sup>

#### E. *Letting the Secret Out: The Third Circuit Gets the Case*

On appeal, the Third Circuit found that the district court erred in not applying the logic and experience test.<sup>61</sup> Although the Third Circuit recognized that there were similarities between civil trials and Delaware’s arbitration program, these parallels were not enough to bypass the logic and experience test.<sup>62</sup> Therefore, the Third Circuit proceeded to examine

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57. *See* Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493, 494 (D. Del. 2012) (arguing that First Amendment right of public access bars defendants from excluding public and press from private arbitrations).

58. *See id.* at 500 (“[T]he Delaware proceeding is essentially a bench trial and *Publiker Industries* governs the state’s ability to close the proceeding to the public.”).

59. *See id.* at 494 (finding Delaware’s state-sponsored arbitration program sufficiently like trial to apply First Amendment right of public access). In finding a First Amendment right of public access, the court decided that although it was called an arbitration, Delaware’s proceeding was essentially a civil trial. *See id.* at 502.

60. *See id.* at 500–03 (determining Delaware’s state-sponsored arbitration program is essentially civil trial and therefore court did not need to apply logic and experience test). In deciding whether to apply the logic and experience test, the district court determined that it needed to address a threshold question: “Has Delaware implemented a form of commercial arbitration to which the Court must apply the logic and experience test, or has it created a procedure ‘sufficiently like a trial’, such that *Publiker Industries* governs?” *Id.* at 500 (citing *El Vocero de P.R. (Caribbean Int’l News Corp.) v. Puerto Rico*, 508 U.S. 147, 149–50 (1993)). After examining Delaware’s state-sponsored arbitration program, the court determined that “[t]he Delaware proceeding, although bearing the label arbitration, is essentially a civil trial.” *Id.* at 502. Because the court found the arbitration proceeding was, in effect, a civil trial, there was no need to apply the logic and experience test. *See id.* at 503–04.

61. *See* Del. Coal. for Open Gov’t v. Strine, 733 F.3d 510, 515 (3d Cir. 2013) (“We find the District Court’s reliance on *El Vocero* misplaced and its decision to bypass the experience and logic test inappropriate.”). The Third Circuit recognized similarities between civil trials and Delaware’s state-sponsored arbitration program, but it found that these were not enough to justify skipping the logic and experience test. *See id.*

62. *See id.* at 514–15 (finding similarities between civil trials and Delaware’s state-sponsored arbitration program, but not enough to find program “sufficiently like a trial” in order to skip logic and experience test (quoting *Strine*, 894 F. Supp. 2d at 500)).

Delaware's state-sponsored arbitration program under the logic and experience test.<sup>63</sup>

### 1. *Experience Prong: An Examination of History*

In applying the experience prong, the court needed to decide which proceeding's history to examine: civil trials or arbitrations.<sup>64</sup> The Coalition argued that only the history of civil trials should be examined, whereas the Appellants argued that only the history of arbitrations should be examined.<sup>65</sup> The Third Circuit did not agree with either party.<sup>66</sup> Rather, the court explained that it need not "engage in so narrow a historical inquiry," and instead, it would examine the history of both civil trials and arbitrations.<sup>67</sup>

#### a. Civil Trials: A Long History of Openness

The *Strine* court began its analysis by noting that, "there is a long history of [public] access to civil trials."<sup>68</sup> It then traced the history of openness in civil trials through English common law, beginning with the passage of the Statute of Marlborough in 1267.<sup>69</sup> Next, the court proceeded to explain that American colonists adopted the tradition of openness and that courthouses played a central role in colonial life.<sup>70</sup> Finally, the court concluded its analysis of the history of civil trials by noting that civil trials generally remain open to the public today.<sup>71</sup>

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63. *See id.* at 515 ("We therefore must examine Delaware's proceeding under the experience and logic test.")

64. *See id.* (noting that parties in this case disagreed about which proceedings' history Third Circuit should examine in order to decide experience prong of experience and logic test).

65. *See id.* ("The Appellants suggest that we only examine the history of arbitrations, whereas the Coalition suggests we only examine the history of civil trials.")

66. *See id.* (concluding that "[n]either suggestion is appropriate in isolation").

67. *See id.* ("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.'" (alteration in original) (quoting *PG Publ'g Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013))). In "[f]ollowing this broad historical approach," the court found "that an exploration of both civil trials and arbitration [was] appropriate . . ." *Id.* at 516.

68. *See id.* (citing *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1068–70 (3d Cir. 1984)) (noting that Third Circuit has previously explained long history of civil trials in *Publicker*).

69. *See id.* (explaining Statute of Marlborough required "all Causes . . . to be heard, ordered, and determined before the Judges of the King's Courts [were to be heard] *openly* in the King's Courts" (alterations in original) (quoting COKE, *supra* note 8)).

70. *See id.* (citing Spaulding, *supra* note 8, at 318–19) (discussing how courthouses served as central place in colonial life).

71. *See id.* ("Today, civil trials and the court filings associated with them are generally open to the public.")

## b. Arbitrations: A Mixed History

In examining the history of arbitrations, the Third Circuit once again began its analysis with the English common law, finding records of arbitrations in England dating back to the twelfth century.<sup>72</sup> These records suggest that arbitrations were held in public and involved community participation.<sup>73</sup> The court went on to explain that, beginning in colonial times and continuing throughout the eighteenth century, arbitration in the United States began to develop formal procedures and that at least some of these arbitrations were public.<sup>74</sup>

Despite this development, the court explained that it was not until the Federal Arbitration Act of 1925 that arbitrations became an important tool in resolving commercial disputes.<sup>75</sup> Today, there is an entire industry devoted to arbitrations, and these arbitrations are “distinctly private” because “[c]onfidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings.”<sup>76</sup> Thus, the court determined that the history of arbitrations contains a combination of privacy and openness.<sup>77</sup> After its analysis, the court found that Delaware’s program met the experience prong of the test.<sup>78</sup> According to the court, Delaware’s program, “a binding arbitration before a judge that takes place in a courtroom,” was similar to proceedings that have a strong tradition of openness.<sup>79</sup>

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72. *See id.* (citing 1 MARTIN DOMKE ET AL., *DOMKE ON COMMERCIAL ARBITRATION* § 2:5 (3d ed. 2011)) (detailing history of arbitration).

73. *See id.* at 517 (“Early arbitrations involved community participation, and evidence suggests that they took place in public venues.”).

74. *See id.* (recounting development of arbitration in America from colonial time to eighteenth century). The court noted that in colonial times, arbitrations served mainly as a tool for those who were suspicious of the legal system and wanted to solve disputes in a “‘less public and less adversarial’ way.” *Id.* (citing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS* 4 (1983); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 454 (1984)). In addition, the court noted that by the eighteenth century, despite the fact that arbitrations had become more formal, at least some continued to take place in public. *See id.*

75. *See id.* (recognizing that passage of Federal Arbitration Act in 1925, along with New York’s Arbitration Act in 1920, which first treated arbitration agreements as contracts, allowed arbitration to evolve into tool it is today).

76. *See id.* at 517–18 (explaining that groups such as the American Arbitration Association set up and facilitate private arbitrations).

77. *See id.* at 518 (noting that there is mixed history with regards to openness of arbitrations but “they have often been closed, especially in the twentieth century”).

78. *See id.* (finding Delaware’s state-sponsored arbitration program “differ[ed] fundamentally” from traditional arbitrations and that this type of proceeding does not qualify for protection from First Amendment right of public access).

79. *See id.* (finding proceedings similar to Delaware’s state-sponsored arbitration program have traditionally been open to public). The court found that “the history of openness is comparable to the history that this court described in *Publiker*.” *Id.* Thus, the court relied on the history in *Publiker* to find a right of public access to civil trials. *See generally id.* at 516–18 (citing *Publiker Indus., Inc. v. Co-*

## 2. *The Logic Prong: Weighing the Benefits and Disadvantages of Openness*

After finding that Delaware's proceeding met the experience prong, the Third Circuit applied the logic prong of the test.<sup>80</sup> When applying the logic prong, a court must decide whether "access plays a significant positive role in the functioning of the particular process in question."<sup>81</sup> In doing so, the Third Circuit weighed both the positive and negative roles that openness would play in Delaware's state-sponsored arbitration program.<sup>82</sup>

The Third Circuit has recognized six main benefits of public access.<sup>83</sup> These benefits include: keeping citizens informed, maintaining the fairness that accompanies open proceedings, providing an outlet for community concern, allowing public scrutiny, enhancing the performance of those involved in the judicial process, and discouraging fraud or misrepresentation.<sup>84</sup> The Third Circuit concluded that opening Delaware's arbitration program to the public would serve the same benefits.<sup>85</sup> According to the court, an open proceeding would give stockholders and the public a better understanding of Delaware's dispute resolution methods, "allay the public's concerns" over the process, expose parties and the court to scrutiny, and discourage perjury and misrepresentation.<sup>86</sup>

Weighed against these benefits, the court found the detriments of open arbitrations to be "slight."<sup>87</sup> Appellants argued that privacy is necessary to protect "patented information, trade secrets, and other closely held information," to "prevent the loss of prestige and good will" that would follow an open proceeding, and to curb the hostility that often accompanies open proceedings.<sup>88</sup> Additionally, Appellants argued that openness

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hen, 733 F.2d 1059, 1070 (3d Cir. 1984) (finding First Amendment right of public access in civil trials)).

80. *See id.* at 518 (applying logic prong of logic and experience test).

81. *See id.* (quoting Press II, 478 U.S. 1, 8 (1986)) (internal quotation marks omitted) (explaining logic prong of logic and experience test).

82. *See id.* at 518–19 (quoting *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002)) (defining considerations at play in logic prong).

83. *See id.* at 519 (listing six benefits of openness considered by Third Circuit). For a list of the six factors weighed by the Third Circuit in determining the logic prong of the logic and experience test, see *supra* note 48.

84. *See id.* (asserting that all six benefits of public access would be furthered if First Amendment right of public access applied to Delaware's state-sponsored arbitration program).

85. *See id.* (discussing benefits of applying right of public access to Delaware's state-sponsored arbitration program).

86. *See id.* (determining that benefits of opening Delaware's proceeding to public "weigh strongly in favor of granting access to Delaware's arbitration proceedings").

87. *See id.* ("The benefits of openness weigh strongly in favor of granting access to Delaware's arbitration proceedings. In comparison, the drawbacks of openness that Appellants cite are relatively slight.").

88. *See id.* at 519–20 (quoting Brief for Appellants at 60, *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) (No. 12-3859)) (internal quotation marks omitted) (listing Appellant's arguments in favor of privacy and explain-

would effectively end the arbitration program.<sup>89</sup> Despite Appellants' arguments, the court did not find these interests compelling and held that the logic prong weighed in favor of a right of public access.<sup>90</sup>

#### F. *Disagreement Among the Judges: The Dissenting Opinion*

Judge Roth issued a strong dissenting opinion in *Strine*.<sup>91</sup> She took exception to the majority's application of the logic and experience test because it examined the history of both civil trials and arbitrations.<sup>92</sup> Instead, Judge Roth examined only the history of arbitrations.<sup>93</sup> She ex-

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ing why those benefits would be slight). The court rebuffed each argument put forth by Appellants in favor of privacy. *See id.* at 519. The court disagreed that privacy was necessary to protect "patented information, trade secrets, and other closely held information" because that information is "already protected under Delaware Chancery Court Rule 5.1 . . ." *Id.* (internal quotation marks omitted). With regard to the potential loss of goodwill and prestige that parties would suffer, the court responded that it "would not hinder the functioning of the proceeding." *Id.* Appellants further argued that privacy encourages a "less hostile, more conciliatory approach," however, the court noted that private arbitrations can become "contentious" as well. *Id.* (internal quotation marks omitted). Lastly, Appellants argued that openness would end Delaware's arbitration program. *See id.* at 520. The court found that, if true, Delaware's arbitrations were akin to civil trials and created to "contravene the First Amendment right of access." *See id.*

89. *See id.* ("This argument assumes that confidentiality is the sole advantage of Delaware's proceeding over regular Chancery Court proceedings. But if that were true—if Delaware's arbitration were just a secret civil trial—it would clearly contravene the First Amendment right of access.")

90. *See id.* at 521 ("Like history, logic weighs in favor of granting access to Delaware's government-sponsored arbitration proceedings. The benefits of access are significant. It would ensure accountability and allow the public to maintain faith in the Delaware judicial system. A possible decrease in the appeal of the proceeding and a reduction in its conciliatory potential are comparatively less weighty, and they fall far short of the 'profound' security concerns we found compelling in *North Jersey Media Group*.").

91. *See id.* at 523 (Roth, J., dissenting) (focusing solely on issue of confidentiality).

92. *See id.* at 524–26 (disagreeing with majority's decision to examine history of both civil trials and arbitrations). Judge Roth argued that the majority erred in looking "not to the practice of the specific public institution involved, but rather to whether the particular *type* of government proceeding [has] historically been open . . ." *Id.* at 524 (first alteration in original) (quoting *Strine*, 733 F.3d at 515 (majority opinion)) (internal quotation marks omitted). Further, she opined that the majority's analysis, which classifies Delaware's program as a "particular type of government proceeding" that has traditionally been open to the public, "begs the question." *Id.* at 525 (quoting *Strine*, 733 F.3d at 515 (majority opinion)) (internal quotation marks omitted).

93. *See id.* at 523–26 (examining history of arbitrations only). In examining the history of arbitrations, Judge Roth found that there was a strong tradition of privacy and confidentiality in arbitrations that began in England, continued through the founding of the United States, and remained to today. *See id.* at 525. Thus, she did not find a tradition of openness for arbitrations. *See id.* at 525–26. Additionally, under the logic prong, she found that "the resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential so that the parties do not suffer the ill effects of this information being set out for the public . . ." *Id.* at 526.



plained that arbitrations in England and the American colonies were private and that confidentiality in arbitration proceedings continues today.<sup>94</sup> Additionally, she noted that “the major national and international arbitral bodies continue to emphasize confidentiality.”<sup>95</sup> Consequently, Judge Roth concluded that arbitrations have historically been held in private and therefore lacked the tradition of openness needed to satisfy the experience prong.<sup>96</sup>

Finally, in examining the logic prong, she found that the “resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential . . . .”<sup>97</sup> Therefore, under Judge Roth’s application of the logic and experience test, Delaware’s state-sponsored arbitration program does not violate the right of public access and should be upheld.

### III. ANALYSIS

The Third Circuit’s decision in *Strine* forced two issues to the forefront: the application of the logic and experience test and the decision’s impact on Delaware’s position as a destination for incorporation.<sup>98</sup> First, *Strine* evidences the contrasting applications of the logic and experience test—that mirror a division among the circuit courts—and provides an intriguing forum in which to examine these two approaches.<sup>99</sup> Second,

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Therefore, Judge Roth concluded that the arbitration program should remain private. *See id.*

94. *See id.* at 525–26 (citing Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT’L L.J. 121, 122 (1995)) (explaining that arbitrations in England and American colonies focused on privacy). Judge Roth also noted that during the twentieth century “arbitration bodies began to develop rules for arbitration proceedings that emphasize privacy and confidentiality.” *Id.* (citing Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1271–72 (2006)).

95. *See id.* (citing AAA & ABA, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, CANON VI(B) (2004); AAA, COMMERCIAL ARBITRATION RULES R-23 (2009); UNCITRAL, ARBITRATION RULES art. 21(3) (2010)) (emphasizing that confidentiality is key to arbitration today and that arbitrations are not held in public unless parties agree).

96. *See id.* at 526 (concluding that arbitrations have not traditionally been open to public and press).

97. *See id.* (determining that confidentiality is essential to prevent third parties from obtaining and misappropriating confidential information needed to arbitrate disputes).

98. For a further discussion of the application of the logic and experience test, see *infra* notes 101–42 and accompanying text. For a further discussion of the decision’s impact on Delaware’s position as a destination for incorporation, see *infra* notes 143–54 and accompanying text.

99. *See* Petition for a Writ of Certiorari at 19–21, *Strine v. Del. Coal. for Open Gov’t*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 262086 (explaining differing applications of logic and experience test and division among circuits). The Petition notes two main applications of the logic and experience test. *See id.* The main applications are demonstrated in *Strine*, with the majority adopting a more lenient approach and the dissent adopting a more stringent approach. *Compare Strine*, 733

Delaware's position as a destination of incorporation has been at the forefront of Delaware's arguments throughout litigation; however, some commentators have stated strong disagreements with this position.<sup>100</sup>

### A. *Conflicting Applications of the Logic and Experience Test*

The correct application of the experience prong of the logic and experience test is a point of contention among the circuits and some state supreme courts.<sup>101</sup> The issue arises over the degree of strictness, or leniency, courts use in applying a historical analysis.<sup>102</sup> These different applications can produce opposite results, as was displayed in *Strine*, where the majority adopted the more lenient approach and the dissent the stricter approach.<sup>103</sup>

#### 1. *Contrasting Approaches Create Headaches for Practitioners in the Third Circuit*

There are two main applications of the experience prong of the test.<sup>104</sup> First, some courts require "a long and unbroken history of openness," whereas other courts allow for a much more lenient historical showing.<sup>105</sup> The stricter version of the test, which requires a "long and unbroken history of openness," seems to more closely resemble the test promulgated in *Richmond Newspapers*, in which the Supreme Court first

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F.3d at 515–18 (applying lenient approach), *with id.* at 523–26 (Roth, J., dissenting) (applying strict approach). Because these two applications are used in *Strine*, it provides a unique chance to examine the relative advantages and disadvantages of both approaches by comparing their application to the same issue.

100. For a further discussion of Delaware's insistence that its arbitration program is necessary to preserve its preeminence as the destination for incorporation, and the disagreement of certain commentators, see *infra* notes 143–54 and accompanying text.

101. See Petition for Writ of Certiorari, *supra* note 99, at 19 ("Beyond the traditional criminal or civil trial—and the 'unbroken, uncontradicted history' of public access to those proceedings—the lower courts disagree sharply on the historical showing needed to satisfy the experience standard." (citation omitted) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980))). *But see* Brief for Respondent Delaware Coalition for Open Government, Inc. in Opposition at 14, *Strine v. Del. Coal. for Open Gov't*, 134 S. Ct. 1551 (2014) (No. 13-869), 2014 WL 547054 (arguing there is no circuit split regarding application of logic and experience test).

102. For a further discussion of the divergent applications of the logic and experience test, see *infra* notes 104–28 and accompanying text.

103. See *Strine*, 733 F.3d at 515 (applying lenient standard). *But see id.* at 518 (Roth, J., dissenting) (applying strict standard).

104. See Petition for a Writ of Certiorari, *supra* note 99, at 19–20 (explaining applications of test). There is a third application in which some courts uphold First Amendment claims "notwithstanding the absence of *any* tradition of openness." See *id.* at 20–21. That approach has only been applied in the Second Circuit and will not be discussed in this Casebrief.

105. See *id.* at 19 (explaining two main applications of test that circuits are split over).

recognized the right of public access.<sup>106</sup> It is also the approach taken by Judge Roth in her dissenting opinion in *Strine*.<sup>107</sup> Additionally, the Seventh Circuit, D.C. Circuit, and the state of Massachusetts have adopted this stricter approach.<sup>108</sup>

The second approach to the experience prong is the approach applied by the majority in *Strine*.<sup>109</sup> The First, Third, and Sixth Circuits have also applied this approach.<sup>110</sup> Compared to the first approach, this approach is much more lenient because it allows for a more ambiguous showing of openness than the first approach.<sup>111</sup> Additionally, this approach allows courts to analogize the particular proceeding at issue to other proceedings with clear histories of openness in order to find a right of public access, thereby increasing the number of proceedings that qualify for the right of public access.<sup>112</sup>

The majority and dissenting opinions in *Strine* provide an intriguing forum to examine how these two different approaches treat the same issue.<sup>113</sup> The majority in *Strine* found that there was “a strong tradition of openness for proceedings like Delaware’s government-sponsored arbitra-

106. See *id.* at 17–18 (arguing that lenient approach is not consistent with test derived from *Richmond Newspapers*).

107. See *Strine*, 733 F.3d at 523–25 (Roth, J., dissenting) (analyzing history of arbitration only). Judge Roth argued that the majority’s analysis, finding that Delaware’s program is the “particular *type* of government proceeding” that has historically been held open, “begs the question.” *Id.* at 524–25.

108. See Petition for a Writ of Certiorari, *supra* note 99, at 19 (indicating which courts have applied this approach to logic and experience test). It also appears that the Third Circuit applied this approach in a previous case to hold that there was not a right of public access to deportation hearings. See *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002). For a further discussion of this case, see *infra* notes 125–27 and accompanying text.

109. See *Strine*, 733 F.3d at 515–18 (applying more lenient approach to experience prong by examining history of both civil trials and arbitrations).

110. See Petition for a Writ of Certiorari, *supra* note 99, at 20 (listing circuits that apply more lenient approach).

111. See *id.* at 19–20 (contrasting applications of test). The first application requires a “long and unbroken history,” whereas the second approach allows for a much more ambiguous showing, such as allowing courts to analogize to other proceedings. See *id.*

112. See *Strine*, 733 F.3d at 515–18 (analogizing Delaware’s state-sponsored arbitration program to histories of both civil trials and arbitrations and finding “[w]hen we properly account for the type of proceeding that Delaware has instituted—a binding arbitration before a judge that takes place in a courtroom—the history of openness is comparable to the history that this court described in *Publiker* and the Supreme Court found in *Richmond Newspapers*”); see also *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) (explaining that tradition should not be construed narrowly and that court can analogize to similar proceedings); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002) (finding right of access to deportation hearings by analogizing them to “judicial proceeding[s]”).

113. For a further analysis of the divergent applications of the test as displayed by *Strine*, see *infra* notes 114–28 and accompanying text.

tions.”<sup>114</sup> The majority’s decision not to explicitly classify the proceeding—either as a civil trial or arbitration—highlights a significant advantage of using the lenient approach.<sup>115</sup> Under the lenient approach, the classification of a specific proceeding is not of paramount importance.<sup>116</sup> Accordingly, the lenient approach allowed the majority to conclude that the Delaware program shared elements of both civil trials and arbitrations and to examine the history of both.<sup>117</sup> Like the majority in *Strine*, courts benefit from applying the lenient approach because it allows courts to analogize the matter at hand to another proceeding’s history when the proceeding at issue has no identifiable history.<sup>118</sup>

Conversely, Judge Roth, in her dissent, examined Delaware’s program against the history of arbitrations only.<sup>119</sup> The application used by Judge

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114. See *Strine*, 733 F.3d at 521 (concluding logic and experience test counsels in favor of finding First Amendment right of public access, because proceedings similar to Delaware’s state-sponsored arbitration program have historically been open to public and press). Despite this conclusion, the court did not give a clear indication regarding whether it considered Delaware’s state-sponsored program to be a civil trial or an arbitration. See *id.* Rather, it noted that the program shared features with both civil trials and arbitrations. See *id.* at 518. The court seemed to imply, however, that Delaware’s program is more like a civil trial than an arbitration in two respects. See *id.* First, the court conceded that most arbitrations are held in private. See *id.* Second, it distinguished Delaware’s state-sponsored arbitration program from traditional arbitrations by comparing the state-sponsored arbitration’s features to those of traditional civil trials. See *id.* The court did not feel the need to expressly classify the program as a civil trial or arbitration because “in prior public access cases we have defined the type of proceeding broadly, and have often found ‘wide-ranging’ historical inquiries helpful to our analysis of the First Amendment right of public access.” *Id.* at 515 (citing *PG Publ’g Co. v. Aichele*, 705 F.3d 91, 108 (3d Cir. 2013)).

115. See *id.* (choosing not to classify Delaware’s program as either arbitration or civil trial). This highlights the flexibility of this approach, allowing courts to take the proceeding at issue and analogize it to other proceedings as the court did in *Strine*.

116. See *Petition for a Writ of Certiorari*, *supra* note 99, at 19–21 (explaining that lenient approach allows courts to analogize to other proceedings). The classification is not paramount in these proceedings, because courts are not confined by the history of a single proceeding, as they are able to analogize to similar proceedings. See *id.*

117. See *Strine*, 733 F.3d at 515 (declining to examine either proceeding in isolation).

118. See, e.g., *id.* (“Following this broad historical approach, we find that an exploration of both civil trials and arbitrations is appropriate here. Exploring both histories avoids begging the question and allows us to fully consider the ‘judgment of experience.’” (quoting *Press II*, 478 U.S. 1, 11 (1986))).

119. See *id.* at 524–25 (Roth, J., dissenting) (disagreeing with majority’s analysis because Judge Roth did not examine practice of specific institution but rather whether particular type of proceeding has history of openness). The application of the test by the majority is strongly contrasted by Judge Roth’s application in her dissent. See *id.* In her dissent, Judge Roth strongly disagreed with the analysis put forth by Judge Sloviter in the majority opinion, stating that “[i]n my view, [Judge Sloviter’s] analysis begs the question.” *Id.* at 525.

Roth is stricter than that of the majority.<sup>120</sup> This approach requires courts to make a choice about a proceeding's explicit classification.<sup>121</sup> In doing so, this approach is more predictable and makes it easier for attorneys and judges to recognize which proceedings have a concrete history of openness and which ones do not.<sup>122</sup> Nevertheless, the question remains as to how to correctly classify a proceeding.<sup>123</sup>

The application of the logic and experience test in *Strine* presents a problem for practitioners in the Third Circuit.<sup>124</sup> Not only do *Strine's* majority and dissenting opinions apply different applications of the test, but the Third Circuit as a whole appears to waver on which application of the test to apply.<sup>125</sup> While the court in *Strine* applied a more lenient historical

120. See Petition for a Writ of Certiorari, *supra* note 99, at 19–20 (explaining strict approach requires “long and unbroken history of openness,” whereas lenient approach “holds a much more ambiguous historical showing sufficient”).

121. See *id.* at 19 (explaining that this approach requires “long and unbroken history of openness”). Because this approach requires the proceeding to have a “long and unbroken history,” courts cannot find a right of access by analogizing it to other proceedings. See *id.*

122. See, e.g., *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1336 (D.C. Cir. 1985) (stating that “we cannot discern an historic practice of such clarity, generality and duration as to justify” First Amendment right of public access to sealed discovery documents). But see, e.g., *Strine*, 733 F.3d at 515–18 (analogizing Delaware’s state-sponsored arbitration program to history of civil trials in order to find right of public access). This approach is easier to predict because it does not allow judges to analogize to the history of another proceeding; rather, judges are forced to examine solely the history of the proceeding in front of them. See, e.g., *In re Reporters*, 773 F.2d at 1336 (confining historical analysis to one type of proceeding only).

123. See *Strine*, 733 F.3d at 515 (questioning whether Delaware’s proceeding was actually arbitration). In her dissenting opinion, Judge Roth assumed that Delaware’s proceedings actually were arbitrations. See *id.* at 525 (Roth, J., dissenting). The majority acknowledged this issue when it noted that it could not take Delaware’s designation at face value, otherwise a government could prevent access to a proceeding simply by renaming a civil trial a “sivel trial.” See *id.* at 515 (majority opinion). The Supreme Court of the United States has held that “the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, ‘trial’ or otherwise . . . .” *Press II*, 478 U.S. at 7.

124. See *Strine*, 733 F.3d at 515–18 (applying experience prong leniently to find right of public access). But see *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 211 (3d Cir. 2002) (“[T]he tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access.”).

125. See PG Publ’g Co. v. Aichele, 705 F.3d 91, 112 (3d Cir. 2013) (applying lenient standard). But see *N. Jersey Media Grp.*, 308 F.3d at 211 (applying strict standard). For in-depth treatment of the strict standard applied in *N. Jersey Media Grp.* and how it compares to a more lenient application, see Donna Mackenzie, Note, *Do Democracies Die Behind Closed Doors? The Third and Sixth Circuits Split over the Closure of Removal Hearings*, 49 WAYNE L. REV. 813 (2003). Mackenzie explains that the Sixth Circuit found a right of public access to deportation hearings. See *id.* at 820. In doing so, the Sixth Circuit found that a “brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted.” *Id.* (quoting *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002)) (internal quotation marks omitted). Additionally, the court relied on “acts enacted by the Immigra-

analysis, the Third Circuit appeared to apply a much stricter analysis in *North Jersey Media Group, Inc. v. Ashcroft*,<sup>126</sup> where it found there was not a right of public access to deportation hearings.<sup>127</sup> In using both applications of the test, the Third Circuit has left practitioners to play a guessing game to determine which types of proceedings must remain open to the public and which ones can remain private.<sup>128</sup>

## 2. *Unresolved Issues: Petition for a Writ of Certiorari*

On January 21, 2014, then-Chancellor Leo E. Strine, Jr. and the other judges of the Delaware Court of Chancery petitioned the Supreme Court for a Writ of Certiorari regarding the outcome in *Strine*.<sup>129</sup> The main question presented was whether the logic and experience test rendered Delaware's state-sponsored arbitration program unconstitutional.<sup>130</sup>

The judges argued that the *Strine* majority erred in finding that Delaware's program met the experience prong because there was a *mixed tradition* of openness.<sup>131</sup> The judges asserted that in order to hold a

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tion and Naturalization Service in arriving at its decision." *See id.* Accordingly, this application is an example of the lenient standard: enabling the court to look outside the history of deportation hearings and to examine Immigration and Naturalization acts in general. *See* *Petition for a Writ of Certiorari*, *supra* note 99, at 20 (explaining lenient standard allows courts to analogize). On the other hand, the Third Circuit found that deportation hearings were "too recent and inconsistent to support a First Amendment right of access," and were not comparable to the "unbroken, uncontradicted history of the right of access to criminal trials." *See* Mackenzie, *supra*, at 822–23 (quoting *N. Jersey Media Grp.*, 308 F.3d at 212–13) (internal quotation marks omitted). This application is an example of the strict standard. *See* *Petition for a Writ of Certiorari*, *supra* note 99, at 19 (explaining strict standard does not allow courts to analogize).

126. 308 F.3d 198 (3d Cir. 2002).

127. *See id.* at 211 ("[T]he tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access."). *But see Detroit Free Press*, 303 F.3d at 702 (finding right of public access to deportation hearings by analogizing them to "judicial proceeding[s]").

128. For a further discussion of the applications of the logic and experience test used in the Third Circuit, see *supra* notes 43–49 and accompanying text.

129. *See* Matt Chiappardi, *Strine Asks High Court to Take Up 'Secret' Arbitration Case*, LAW360.COM (Jan. 22, 2014, 3:17 PM), <http://www.law360.com/articles/strine-asks-high-court-to-take-up-secret-arbitration-case>.

130. *See* *Petition for a Writ of Certiorari*, *supra* note 99, at 19–21 (arguing that Third Circuit erred in finding that First Amendment required Delaware's state-sponsored arbitration program be struck down).

131. *See id.* at 17 ("The majority below invalidated Delaware's statute by applying a legal standard that squarely conflicts with the principle employed by other courts—finding that the 'experience' test is satisfied by what the majority itself admitted was at most a 'mixed' tradition regarding public access . . ."). The judges supported their position by arguing three points. First: "There Is No Constitutional Right Of Access To State Arbitration Proceedings—Even When A Judge Serves As The Arbitrator." *Id.* at 23–29. Additionally, the judges noted that: "Arbitration Lacks The Long Tradition Of Public Access Needed To Satisfy The Experience Requirement." *Id.* Finally, they argued that: "Mandating Public Access Would Effectively Nullify Delaware's Arbitration Process." *Id.* at 30–32.

proceeding unconstitutional under the logic and experience test, a court must show a long tradition of openness.<sup>132</sup> If the majority in *Strine* had applied the strict approach instead of the more lenient approach, then the First Amendment claim would have been rejected.<sup>133</sup>

The different applications of the logic and experience test create inconsistent results, as some states have adopted the lenient approach and others have adopted the strict approach.<sup>134</sup> For example, it appears that a state like Massachusetts would have come to the opposite conclusion as the *Strine* court and would have upheld an arbitration program if it were identical to Delaware's program.<sup>135</sup>

Supreme Court jurisprudence on the right of public access is scarce.<sup>136</sup> Further, the Supreme Court has never ventured outside the scope of criminal proceedings when examining the right of public access.<sup>137</sup> This scarcity of jurisprudence is one of the main reasons for the divergent applications of the logic and experience test described above.<sup>138</sup>

The judges, in their Petition, argued that the Supreme Court should take the same conservative approach to civil proceedings as it did with criminal proceedings.<sup>139</sup> They argued that the Third Circuit's application of the logic and experience test in *Strine* is inconsistent with the test origi-

132. *See id.* at 17–18 (arguing that court should have applied standard that requires “long and unbroken history” of openness).

133. *See id.* at 20 (explaining that if strict standard had been applied, then First Amendment claim would have been rejected).

134. *See id.* at 22 (requesting Court “grant review to clarify the historical showing necessary to satisfy the ‘experience’ prong of the First Amendment right-of-access standard, so that whether a right is recognized does not depend on which State’s statute is at issue”).

135. *See id.* at 20 (noting that, due to interpretation of law in Massachusetts or Illinois, if those states had enacted identical statute to Delaware’s, then it would not have been struck down).

136. *But see, e.g.,* *El Vocero de P.R. (Caribbean Int’l News Corp.) v. Puerto Rico*, 508 U.S. 147, 149–50 (1993) (finding right of public access to preliminary criminal proceedings as conducted in Puerto Rico); *Press II*, 478 U.S. 1, 8 (1986) (finding right of public access to preliminary criminal proceedings as conducted in California); *Press I*, 464 U.S. 501, 511 (1984) (finding right of public access to voir dire of jurors in criminal trials); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556–57 (1980) (finding right of public access to criminal trials). These are the only cases in which the United States Supreme Court has addressed the issue of the right of public access to proceedings. *See* Petition for a Writ of Certiorari, *supra* note 99, at 4 (explaining that Supreme Court has not “addressed the First Amendment right of access in the twenty years since *El Vocero*—and has never addressed the application of that principle to any non-criminal proceeding”).

137. *See* Petition for a Writ of Certiorari, *supra* note 99, at 4 (explaining Court has never addressed right of public access in non-criminal proceedings).

138. *See id.* at 19 (explaining that lower courts “disagree sharply” on what is needed to satisfy right of public access outside of “traditional criminal or civil trial[s]”).

139. *See id.* at 18–19 (arguing that Third Circuit’s decision “cut this Court’s First Amendment holdings loose from their historical moorings in the centuries-old tradition of open criminal proceedings”).

nally devised by the Supreme Court.<sup>140</sup> Unfortunately, these issues seem destined to remain unresolved, because the Supreme Court denied the judges' Petition for a Writ of Certiorari.<sup>141</sup> In denying the Petition, the Supreme Court effectively refused to give practitioners—inside and outside of the Third Circuit—guidance on how to correctly apply the logic and experience test.<sup>142</sup>

B. *Not as Bad as it Seems: Delaware's Preeminence Is Not in Jeopardy*

Delaware's state-sponsored arbitration program was created in order to "preserve Delaware's preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters."<sup>143</sup> In attempting to justify its arbitration program, Delaware has continuously pointed to the threat of losing adjudications to private arbitrators.<sup>144</sup>

Despite Delaware's insistence that this program is necessary to maintain its position as the preeminent state for incorporation, at least one commentator has argued that "[t]he court's ruling in *Strine* may not be as big a blow as many may set it out to be for the state of Delaware . . ."<sup>145</sup> According to this commentator, one of the main reasons that businesses incorporate in Delaware is because of the uniformity within the judicial system, especially in the Court of Chancery.<sup>146</sup> If closed arbitration were to become the norm, then the large body of decisional law created by the Court of Chancery would no longer be as enticing.<sup>147</sup> Therefore, Dela-

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140. *See id.* (arguing that application by Third Circuit is not consistent with Supreme Court's interpretation of test).

141. *See Strine v. Del. Coal. for Open Gov't*, 134 S. Ct. 1551 (2014) (denying petition for writ of certiorari).

142. For a further discussion of the differing applications of the logic and experience test, see *supra* notes 101–28 and accompanying text.

143. *See Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013) (quoting H.B. 49, 145th Gen. Assemb. (Del. 2009)) (explaining purpose of Delaware's state-sponsored arbitration program).

144. *See Quinn, supra* note 13, at 832 (citing Brief for NASDAQ OMX Group Inc. & NYSE EuroNext as Amici Curiae Supporting Respondents at 8, *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015)) (stating that Delaware implemented its program to avoid losing potential adjudications to "arbitrators in New York, London, or Singapore"). Quinn also noted that Delaware feels that its "central position in the corporate law" is being threatened by the possibility of corporations taking their business disputes to be arbitrated outside of Delaware. *See id.*

145. *See Kharatian, supra* note 19, at 419 (arguing that having Delaware's state-sponsored arbitration program struck down will not be big blow to state's preeminent position as center of incorporation because Court of Chancery remains very attractive option even without arbitration).

146. *See id.* (explaining that Court of Chancery's body of decisional law is attractive to businesses).

147. *See id.* at 419–20 (explaining importance of Court of Chancery's body of decisional law). In addition, many large corporations prefer traditional litigation when compared to arbitration. *See id.* at 420. Further, most choice of law and forum clauses are not negotiated and are instead standard, boilerplate language.



ware's Court of Chancery would continue to attract corporations and might even be better off without closed arbitration proceedings.<sup>148</sup>

Another commentator has argued that having the provisions struck down will actually benefit Delaware.<sup>149</sup> While the arbitration program would have probably ensured that Delaware remained competitive in the short term, the program could have eventually weakened Delaware's position as the center of incorporation by decreasing its body of decisional law.<sup>150</sup> Additionally, the assumed benefits traditionally associated with arbitration, such as speed, may not be as beneficial as previously thought.<sup>151</sup> In terms of the speed of adjudication, the Court of Chancery is already one of the quickest and most efficient courts in the country.<sup>152</sup> Moreover, although arbitration is a growing alternative to traditional adjudication, it is far from being a dominant force.<sup>153</sup> Thus, despite Delaware's insistence to the contrary, it may well retain its preeminent position as a destination of incorporation despite the absence of a state-sponsored arbitration program.<sup>154</sup>

### C. *New Hope for an Arbitration Program*

Although some commentators believe Delaware will not be disadvantaged—or will even benefit—by having its arbitration program declared unconstitutional, the newly elected Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr., disagrees.<sup>155</sup> In his first State of the Judiciary

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*See id.* Thus, Delaware would still be a very attractive state to incorporate in without the arbitration program. *See id.*

148. *See id.* (explaining how Delaware's body of decisional law is one of main reasons for its preeminence as destination of incorporation).

149. *See* Quinn, *supra* note 13, at 874–75 (explaining that state-sponsored arbitration program is not in best long-term interests of Delaware).

150. *See id.* (arguing that Delaware's state-sponsored arbitration program would ensure short-term competitiveness but weaken market for adjudications in long term). Quinn argues that the supposed benefits of Delaware's state-sponsored arbitration program may not outweigh the cost of reducing the rule making power of the Court of Chancery. *See id.*

151. *See id.* at 862 (explaining that many benefits associated with arbitrations, such as speed, are already present in Court of Chancery).

152. *See id.* (explaining that arbitration program is not substantially faster than formal Chancery Court proceedings). To illustrate, a recent Delaware Chancery Court case took just over six months from the date the initial complaint was filed to the date the court issued the final order. *See id.* (citing *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012)).

153. *See id.* at 837 (highlighting that only small percentage of business disputes are actually solved through arbitration).

154. *See id.* (explaining that benefits of incorporating in Delaware still exist without state-sponsored arbitration program).

155. *See generally* Sean O'Sullivan, *Strine Expects New Arbitration Program Will Replace "Secret Court"*, THE NEWS J. (June 5, 2014, 9:57 AM), <http://www.delawareonline.com/story/news/local/2014/06/04/strine-expects-new-arbitration-program-will-replace-secret-court/9982751/> (explaining Chief Justice Strine's plan to implement new arbitration program).

address, Chief Justice Strine declared that a new proposal for a confidential arbitration program will be presented to the Delaware General Assembly in January 2015.<sup>156</sup> Chief Justice Strine is undeterred by the original program being declared unconstitutional, stating:

Regrettably, a federal court in Philadelphia issued a divided ruling striking down these statutes because they violated two judges' reading of unsettled precedent, a reading that, if good law, would invalidate long-standing dispute resolution procedures used in their own federal court system . . . . But, consistent with our history, Delaware is not wallowing in defeat . . . .<sup>157</sup>

Chief Justice Strine believes the arbitration program is the key to keeping Delaware competitive for corporate business, especially with the emerging Latin American market.<sup>158</sup> Despite his insistence on creating the program, Chief Justice Strine was not clear on how the program would avoid the issues that caused the Third Circuit to declare Delaware's state-sponsored arbitration program unconstitutional in the first place.<sup>159</sup>

#### IV. CONCLUSION

The Third Circuit's decision in *Strine* illustrates the Third Circuit's approach to the logic and experience test and the existing dispute over the test's conflicting applications.<sup>160</sup> This decision will have a tremendous effect, not just on right of public access cases, but also on the state of Delaware as it strives to keep pace with the growth in arbitration and maintain its position as the preeminent state of incorporation.<sup>161</sup> The Supreme Court's decision not to review the Third Circuit's decision comes as a blow not only to those who championed Delaware's arbitration program, but also to Third Circuit practitioners looking for guidance in applying

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156. See Jeff Mordock, *Judiciary Mulling Ways to Revive Arbitration Program*, *Strine Says*, DEL. L. WEEKLY (June 11, 2014), <http://www.delawarelawweekly.com/id=1202658780837/Judiciary-Mulling-Ways-to-Revive-Arbitration-Program-Strine-Says?slreturn=20140721111823> (noting Chief Justice Strine explained his new arbitration program would be ready to be presented to Delaware General Assembly in January 2015).

157. O'Sullivan, *supra* note 155 (quoting Chief Justice Strine).

158. See Mordock, *supra* note 156 (explaining importance of arbitration program in keeping Delaware competitive as place of incorporation).

159. See O'Sullivan, *supra* note 155 (offering few details on specifics of new program or how it would be different from program struck down in *Strine*).

160. See Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 515–18 (3d Cir. 2013) (applying lenient standard to find right of public access to Delaware's state-sponsored arbitration program). *But see id.* at 523–26 (Roth, J., dissenting) (applying strict standard and arguing there should not be right of public access).

161. See Petition for a Writ of Certiorari, *supra* note 99, at 19–21 (arguing that Delaware's program is necessary to maintain its position as central place for incorporation). *But see* Quinn, *supra* note 13, at 875 (arguing that Delaware would be "better served" by having arbitration program struck down).

the logic and experience test.<sup>162</sup> Though it appears Third Circuit practitioners will have to wait for guidance, champions of Delaware's arbitration program may not have to wait much longer to see a new program in action. However, although Chief Justice Strine plans to have a new program presented to the Delaware General Assembly in January 2015, whether the new program will withstand judicial scrutiny after the Third Circuit's decision in *Strine* remains to be seen.<sup>163</sup>

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162. For a further discussion of the diverging applications of the logic and experience test, see *supra* notes 104–28 and accompanying text.

163. For a further discussion of Chief Justice Strine's plan to introduce a new arbitration program, see *supra* notes 155–59 and accompanying text.