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## NOTE

# Let Me In: The Right of Access to Business Disputes Conducted in State Courts

*Delaware Coalition for Open Government v. Strine*, 733 F.3d 510 (3d Cir. 2013).

DAVID W. BROWN\*

### I. INTRODUCTION

Arbitrations are popular in business disputes, and Delaware is a haven for businesses.<sup>1</sup> The Delaware legislature, in an attempt to make the state even friendlier to businesses, enacted laws that allowed them to use the court system as an arbitration venue away from the prying eyes of the public and press.<sup>2</sup> In an attempt to protect First Amendment right of access to judicial proceedings, the Delaware Coalition for Open Government brought suit against the judges who were overseeing the arbitrations.<sup>3</sup> In *Delaware Coalition for Open Government v. Strine*, the Third Circuit held that the public has a right to access these proceedings and that statutes barring public access are unconstitutional.<sup>4</sup> This decision is the subject of this note.

After examining the history of the First Amendment right of access to civil proceedings, this note will analyze how the two-pronged historical test applies to arbitrations conducted in a state court.<sup>5</sup> The prongs of the test — experience and logic — provide the framework for the analysis conducted in this note.<sup>6</sup> This note argues the analysis conducted in *Strine* was the correct approach, and suggests the implementation of Sunshine Laws similar to those in other states as a constitutionally permissible alternative that would satisfy the holding in *Strine*.

### II. FACTS AND HOLDING

This case concerns a suit brought by the Delaware Coalition for Open Government (the Coalition) against the defendant judges of the Delaware Court of

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\* B.S., Truman State University, 2013; J.D. Candidate, University of Missouri School of Law, 2016; *Journal of Dispute Resolution*, Lead Articles Editor, 2015-16. I would like to thank Professor Douglas Abrams for his helpful insight while writing this Note. I would also like to thank the staff of the *Journal of Dispute Resolution*, who edited this Note, for the significant time and effort they dedicated throughout the entire process.

1. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), available at [http://corp.delaware.gov/whycorporations\\_web.pdf](http://corp.delaware.gov/whycorporations_web.pdf).

2. Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 512 (3d Cir. 2013).

3. *Id.*

4. *Id.* at 521.

5. *Id.* at 514.

6. *Id.*

Chancery.<sup>7</sup> The Coalition is a non-profit corporation “dedicated to promoting and defending the people’s right to transparency and accountability in government.”<sup>8</sup> All defendants in the action were judges of the Court of Chancery whom the Coalition claimed violated the First Amendment of the United States Constitution when they served as arbitrators in confidential arbitrations conducted in the court.<sup>9</sup>

In 2009, Delaware added a provision to the state code that expanded the power of the Court of Chancery to arbitrate business disputes.<sup>10</sup> To qualify for this arbitration, at least one party must be a business formed or organized under Delaware law,<sup>11</sup> and neither party can be a consumer.<sup>12</sup> The court’s power to arbitrate is limited to disputes in which the amount in controversy is at least one million dollars.<sup>13</sup>

The Coalition argued this practice of confidential court proceedings violated a First Amendment right held by the press and the public to access civil trials.<sup>14</sup> The Coalition’s claim rested on the assertion that the First Amendment contains a presumptive right of access to judicial proceedings.<sup>15</sup> Defendants argued that the proceedings at issue are not similar to civil trials, and that the Delaware practices should therefore be upheld.<sup>16</sup> The United States District Court in Delaware granted the Coalition’s motion for judgment on the pleadings, ruling the Delaware proceedings were essentially civil trials, to which the public has a right of access.<sup>17</sup>

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court and held that when a state conducts arbitration proceedings through its court system the proceedings are similar to civil trials, and when viewed through the Supreme Court tests of “experience” and “logic” the public has a First Amendment right of access to such proceedings.<sup>18</sup>

### III. LEGAL BACKGROUND

The analysis in the instant case focuses on Title 10 Section 349 of the Delaware Code and its constitutionality under the First Amendment of the United States Constitution.<sup>19</sup> This section will present the Delaware rules at issue in *Strine* as well as the history of judicial interpretation of the First Amendment as a

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7. Complaint at 1, *Del. Coal. for Open Gov’t v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012) (No. 1:11-1015).

8. *Id.* See also *About DelCOG*, DELCOG.ORG, www.delcog.org/about (last visited May 19, 2015) (explaining that the Coalition is a state branch of the National Freedom of Information Coalition whose goal is “promoting and defending the people’s right to transparency and accountability in government”).

9. Complaint, *supra* note 7, at 1.

10. DEL. CODE ANN. tit. 10, § 349 (West 2009).

11. *Id.* at § 347(a)(3).

12. *Id.* at § 2731 (defining consumer as “an individual who purchases or leases merchandise primarily for personal, family or household purposes”).

13. DEL. CODE ANN. tit. 10, § 347(a)(5).

14. *Del. Coal. for Open Gov’t v. Strine*, 733 F.3d 510, 513 (3d Cir. 2013) (the case at issue was brought in federal court as it raises a claim under the United States Constitution).

15. Complaint, *supra* note 7, at 4.

16. *Strine*, 733 F.3d at 513.

17. *Id.*

18. *Id.* at 521.

19. *Id.* at 513.

right held by the public to access court proceedings. This section will also present a case from a California court of appeals regarding judicial arbitration in that state where a similar holding was reached.

### A. *The Delaware Rule*

The Delaware Chancery Court Rules state that after parties agree to arbitration, a Chancery Court arbitration proceeding can begin.<sup>20</sup> The Chancery Court judge has authority to order a remedy he or she deems just and equitable as long as the order is within the scope of the parties' agreement.<sup>21</sup> The judge's award automatically becomes an order of the Court of Chancery.<sup>22</sup> The arbitration proceedings are considered confidential and are made public only when an aggrieved party appeals the Court of Chancery opinion to the Supreme Court of Delaware.<sup>23</sup> Only parties and their representatives may attend the arbitration proceedings, unless the parties agree otherwise.<sup>24</sup> All materials and communications remain confidential except in two circumstances: when the parties agree to waive confidentiality, or when the confidential materials are subject to discovery and were not prepared specifically for the arbitration hearing.<sup>25</sup>

### B. *First Amendment Right of Access*

In *Publiker Industries, Inc. v. Cohen*, the Third Circuit held that the press and the public maintain a constitutional and common law right of access to civil proceedings.<sup>26</sup> The actions stemmed from defendant Cohen's attempt to buy a large amount of stock and gain a controlling share of Publiker.<sup>27</sup> Publiker filed suit alleging Cohen had failed to make required disclosures in his attempt to purchase the stock.<sup>28</sup> Publiker also moved for a temporary restraining order to stop Cohen from soliciting and using proxies at the upcoming shareholders meeting.<sup>29</sup> At the hearing on the motion, it was first mentioned that if specified information were released concerning some of Publiker's business operations at the upcoming shareholder's meeting, Publiker could suffer adverse effects.<sup>30</sup> Cohen requested the court require Publiker to disclose the information or postpone the

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20. DEL. CH. CT. R. 97(b) (West 2010).

21. *Id.* at 98(f)(1).

22. *Id.* at 98(f)(3).

23. DEL. CODE ANN. tit. 10, § 349(b) (West 2009).

24. DEL. CH. CT. R. 98(b) (West 2010).

25. *Id.*

26. *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984).

27. *Id.* at 1062 (Cohen, defendant in the action, sought to take control of Publiker Industries by agreeing to buy a large amount of stock from a member of the Neuman family, who owned 37% of the stock in the company. Cohen had also made an agreement with some members of the family to vote for them via proxy at the next shareholders meeting. A member of the Neuman family who Cohen had not agreed with filed a separate suit alleging the agreement with the other Neuman family members violated a Pennsylvania law barring a shareholder from selling his or her voting rights or proxy. A judge set aside the stock purchase agreement for being "without legal foundation").

28. *Id.*

29. *Id.*

30. *Id.*

meeting until it did so.<sup>31</sup> The court held another hearing in open court to consider the opposing motions.<sup>32</sup>

With a member of the media present in the courtroom, Publicker requested the judge close the proceedings except to necessary parties, stating the hearing's purpose was to determine whether specified information should remain confidential.<sup>33</sup> The court granted the request to close the proceedings, stating that the press's presence destroyed the entire function of the hearing.<sup>34</sup> Throughout the day, several other news sources attempted to gain access to the hearings, but were denied for the same reason as the first.<sup>35</sup> The trial court found an "over-riding interest" in maintaining the confidentiality of the proceedings and admitting the press would essentially decide the case because the issue before the judge was confidentiality of information.<sup>36</sup>

Two entities that were denied access to the proceedings — Philadelphia Newspapers, Inc. (PNI) and Dow Jones — appealed to the Third Circuit.<sup>37</sup> In deciding whether the parties had a right of access to civil trials, the court of appeals considered both a common law right and a First Amendment right.<sup>38</sup> The panel in *Publicker* cited *Gannett Co., Inc. v. DePasquale*<sup>39</sup> to determine whether the right of access was applicable in civil proceedings. In *Gannett*, the Supreme Court held a defendant's right to a public trial is "equally applicable to civil and criminal cases."<sup>40</sup> *Gannett* also recited the common law assumption that the public has a right to attend trials, civil and criminal trials alike.<sup>41</sup> Therefore, the court in *Publicker* held that PNI and Dow Jones had a common law right of access to civil trials.<sup>42</sup>

After establishing a common law right, the Third Circuit considered whether the Appellants PNI and Dow Jones had a First Amendment right of access to civil trials.<sup>43</sup> Again, the court of appeals began by analyzing criminal trials.<sup>44</sup> The panel cited *Richmond Newspapers, Inc. v. Virginia*, in which the United States Supreme Court held the First Amendment guarantees a right of access to criminal trials.<sup>45</sup> The *Richmond* majority held the function of the First Amendment ensures "freedom of communication on matters relating to the functioning of government," and court proceedings are a central function of the government.<sup>46</sup> *Richmond* also held the First Amendment includes a right of access traditionally open to the public to exercise other First Amendment rights.<sup>47</sup> The Supreme Court stated the courtroom has historically been open to the public and the media, and

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31. *Id.*

32. *Publicker*, 733 F.2d at 1062.

33. *Id.* at 1063.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1064.

38. *Publicker*, 733 F.2d at 1066.

39. 443 U.S. 368 (1979).

40. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979).

41. *Id.* at 385.

42. *Publicker*, 733 F.2d at 1067.

43. *Id.*

44. *Id.*

45. *Id.* (citing *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980)).

46. *Richmond Newspapers*, 448 U.S. at 575.

47. *Id.* at 578.

their presence assures judicial proceedings possess “integrity.”<sup>48</sup> Therefore, the court held the public had a right of access to criminal trials, but did not decide on the issue of public access to civil trials.<sup>49</sup>

In *Publicker*, the Third Circuit had to decide whether *Richmond’s* analysis and rights concerning criminal trials was applicable to civil proceedings.<sup>50</sup> To decide this, the court of appeals analyzed two principles from the Supreme Court’s decision in *Globe Newspaper Co. v. Superior Court*: whether there is a presumption of openness in civil trials and whether that openness plays a significant role in the judicial process and government.<sup>51</sup>

In considering the presumption of openness, the Third Circuit in *Publicker* found a presumption of openness in the American court system could be traced back to English law where all trials were to be held in open court for the public to access.<sup>52</sup> The court of appeals stated that access to court proceedings is “inherent in the nature of our democratic form of government.”<sup>53</sup> The court further cited Justice Oliver Wendell Holmes, who said public access to civil proceedings was central because it helped secure the “proper administration of justice,”<sup>54</sup> and that “it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”<sup>55</sup>

In deciding *Publicker* the Third Circuit held the advantages present in the openness of criminal trials as stated by the Supreme Court in *Globe Newspaper* are also present in civil trials.<sup>56</sup> In *Globe Newspaper*, the Supreme Court found the advantages of open civil proceedings included an appearance of fairness, which allows public participation to insure the proper administering of justice, and an increased public respect and education for the judicial system.<sup>57</sup>

*Globe Newspaper* stands for the proposition that while there is a First Amendment right of access, that right is not absolute.<sup>58</sup> To overcome the presumption of access it must be shown that there is an important government interest and there is no less restrictive way to protect that interest.<sup>59</sup> The presumption of openness can also be overcome where a party to a proceeding can show a “clearly defined and serious injury with specificity.”<sup>60</sup>

After finding a First Amendment right of access to civil trials and a presumption of openness, the Supreme Court in *Publicker* laid out the procedural and sub-

48. *Id.*

49. *Id.* at 580.

50. *Publicker*, 733 F.2d at 1068.

51. *Id.* (citing *Globe Newspaper Co., v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 606 (1982)).

52. *Id.* (citing EDWARD JENCKS, *THE BOOK OF ENGLISH LAW* 73–74 (6th ed. 1967); Daubney v. Cooper, (1829) 109 Eng. Rep. 438, (K.B.); 10 B. & C. 237, 240).

53. *Publicker*, 733 F.2d at 1069 (citing *United States v. Mitchell*, 551 F.2d 1252, 1256 (D.C. Cir. 1976)).

54. *Id.* (quoting *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884)).

55. *Id.*

56. *Publicker*, 733 F.2d at 1070 (citing *Globe Newspaper*, 457 U.S. at 606).

57. *Id.*

58. *Id.*

59. *Id.* (citing *Globe Newspaper*, 457 U.S. at 606, 607).

60. *Id.* at 1070-71 (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981)).

stantive requirements for denying access to civil proceedings.<sup>61</sup> Procedurally, a court denying access must identify the interest it is attempting to protect and must sufficiently articulate those findings so that a reviewing court can determine if the denial of access was proper.<sup>62</sup> To satisfy the substantive requirement, a court must find “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>63</sup>

Applying these standards in *Publicker*, the Third Circuit held the district court satisfied the procedural requirement in closing the proceedings, but failed to satisfy the substantive requirement.<sup>64</sup> The court said the district court abused its discretion in considering *Publicker*’s preliminary injunction motion at the same closed proceeding in which it considered the closing of confidential information.<sup>65</sup> The district court made no note of a confidentiality interest or alternatives to closing the portion regarding the injunction motion, therefore failing to meet the closure requirements.<sup>66</sup>

These precedents led the Supreme Court to establish a test, enunciated in *Press-Enterprise Co. v. Superior Court of California*.<sup>67</sup> In *Press*, the Court considered a case in which members of the press were denied access to the transcripts of a preliminary hearing of a criminal prosecution and sued the court overseeing the proceedings.<sup>68</sup> The Court noted this was a First Amendment right of access issue and dismissed the defense’s argument that the right applied only to trials.<sup>69</sup> The Court stated a two-part test to identify whether a person has a First Amendment right of access.<sup>70</sup> First, a court must consider whether both the place and the type of proceeding have historically been accessible by the public.<sup>71</sup> Second, it must be considered whether access by the public plays a significant and positive role in the proceeding.<sup>72</sup> The Court labeled these the tests of “experience and logic.”<sup>73</sup> In *Press*, the Court found both tests were satisfied, and held the denial of access to the preliminary hearing transcripts was a violation of the First Amendment right of access.<sup>74</sup>

Applying similar law, a California court decided against the allowance of private judge-ran arbitrations.<sup>75</sup> *Heenan* involved a superior court judge who conducted a private arbitration between two parties.<sup>76</sup> Plaintiffs in the case hired the defendant as a general contractor and later sued claiming defective work.<sup>77</sup> Defendant countersued for unpaid fees.<sup>78</sup> The parties agreed, after court encourage-

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61. *Publicker*, 733 F.2d at 1070, 1071.

62. *Id.* at 1071 (citing *Press-Enter. Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 9-10 (1986)).

63. *Publicker*, 733 F.2d at 1071 (citing *Press-Enter.*, 478 U.S. at 9-10)).

64. *Publicker*, 733 F.2d at 1072-74.

65. *Id.* at 1072.

66. *Id.*

67. 478 U.S. 1 (1986).

68. *Press-Enter. Co. v. Sup. Ct. of Cal.* 478 U.S. 1, 4 (1986).

69. *Id.* at 7.

70. *Id.* at 8.

71. *Id.*

72. *Id.* at 8.

73. *Id.* at 9.

74. *Press-Enter.*, 478 U.S. at 13-14.

75. *Heenan v. Sobati*, 96 Cal. App. 4th 995 (2002).

76. *Id.*

77. *Id.* at 998.

78. *Id.*

ment, to partake in arbitration before a sitting superior court judge.<sup>79</sup> The court labeled the action a “judicial binding arbitration” which resulted in the judge mailing an award decision in favor of Plaintiffs.<sup>80</sup> This award was not filed in the court, so Plaintiffs then had to file an order to enforce the award, which was then appealed, leading to the analysis by the Court of Appeals.<sup>81</sup>

Prior to *Heenan*, California law permitted binding judicial arbitration.<sup>82</sup> The Court of Appeals stated contractual arbitration must take place outside the courts and the only judicial involvement should be the enforcement of an award.<sup>83</sup> The court cited precedent that addressed many of the same policy concerns the Third Circuit did through precedent in *Strine*, stating that judging must be done in view of the public with appropriate appellate review to satisfy the appearance of justice.<sup>84</sup> Therefore, the appeals court ruled the orders and procedures invalid.<sup>85</sup>

This precedent, specifically the tests of experience and logic used to decide First Amendment access cases, guided the Third Circuit’s decision in *Strine*.

#### IV. INSTANT DECISION

In deciding the case at hand, the Third Circuit applied the experience and logic test, as described in *Press*, to determine if a First Amendment right of access existed.<sup>86</sup> The court of appeals for the Third Circuit further reiterated precedent by stating that in order for a proceeding to qualify for public access, the tests of experience and logic must be satisfied,<sup>87</sup> and if they were satisfied, only a compelling government interest could override them.<sup>88</sup> After acknowledging this formula as the appropriate test, the court ultimately found the district court did not apply the formula<sup>89</sup> and the decision was therefore overturned.<sup>90</sup>

##### *A. Experience: History of Arbitration*

The Third Circuit began its analysis with the “experience” prong of the *Press* test.<sup>91</sup> Noting the parties disagreed over what history was relevant,<sup>92</sup> the court of appeals decided on a broad historical approach that reaches both civil trials and arbitrations.<sup>93</sup> Citing *Publicker*, the panel explained the history of access to civil trials as well as the courthouse itself.<sup>94</sup> Further, the court found the tradition of

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79. *Id.*

80. *Id.*

81. *Heenan*, 96 Cal. App. 4th at 998.

82. *Id.* at 1000.

83. *Id.* at 1001.

84. *Id.* at 1002 (citing *TJX Cos., Inc. v. Super. Ct.*, 87 Cal. App. 4th 747, 754 (2001)).

85. *Id.* at 1004.

86. *Del. Coal. for Open Gov’t v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013).

87. *Id.* (citing *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 213-14 (3d Cir. 2002)).

88. *Strine*, 733 F.3d at 514 (citing *Press-Enter. Co. v. Sup. Ct. of Cal.*, 464 U.S. 501, 511 (1984)).

89. *Id.* at 514.

90. *Id.* at 515.

91. *Id.*

92. *Id.* (the judges argued only the history of arbitrations should be used while the Coalition argued only the history of civil trials should be used in the experience analysis).

93. *Id.* at 516.

94. *Strine*, 733 F.3d at 516 (citing *Publicker Ind., Inc. v. Cohen*, 733 F.2d 1059, 1068-70 (3d Cir. 1984)).



access stems from English law and continues in the American legal tradition; therefore, the court concluded the experience prong pointed toward openness when considering civil trials.<sup>95</sup>

The court devoted more time to the history of arbitrations for its “experience” analysis.<sup>96</sup> The court noted the prevalence of arbitration throughout history, and concluded early arbitrations in England were held in public venues and involved the community.<sup>97</sup> In America, arbitrations allowed parties skeptical of the established legal system to resolve disputes privately.<sup>98</sup> As arbitrations became more common because of the ever-increasing amount of business in America, members of the judiciary began overseeing arbitrations outside of their official roles as judges.<sup>99</sup> After the passage of the Federal Arbitration Act of 1925, courts treated arbitrations as binding contracts, allowing arbitration to become much more useful to parties.<sup>100</sup>

The court found that in modern times a member of an organization whose sole function is conducting arbitrations are often the ones who organize arbitration in the first place.<sup>101</sup> The court noted a distinction between modern arbitrations and the way they were historically conducted — finding that now arbitrations are entirely private unless the parties agree to open proceedings.<sup>102</sup>

Next, the court noted conflict in the public nature of arbitrations throughout history, but also stated they have often been closed in more modern times.<sup>103</sup> Further, the court said this closure is part of the nature of arbitrations because they serve as a private alternative to traditional court proceedings.<sup>104</sup> Considering the history of both civil trials and arbitrations together, the court recognized a contrast: civil trials have historically been open, but arbitrations not conducted by the state are often closed to the public.<sup>105</sup> With that history in mind, the court noted the Delaware proceedings at issue shared many characteristics with traditional arbitrations, including “informality, flexibility, and limited review.”<sup>106</sup> However, the court found the proceedings to differ from other arbitrations because the result of these arbitrations is a binding court order and because there is only a limited right to appeal.<sup>107</sup>

In concluding its analysis of experience, the court stated the right of access to arbitrations conducted by courts is “deeply rooted in the way the judiciary functions in a democratic society,” and stated *Publicker’s* historical analysis was simi-

95. *Id.* (citing 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)).

96. *Id.* at 516.

97. *Id.* at 517 (citing Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth-Century England*, 2 LAW & HIST. REV. 21, 29, 33-34 (1984)).

98. *Id.* at 517 (citing JEROLD S. AUERBACH, JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS 4 (1983)).

99. *Id.* at 517 (citing Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 475 (1984)).

100. *Strine*, 733 F.3d at 517 (citing IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT VOL. 1, § 4.1.2 (1999)).

101. *Id.* at 517.

102. *Id.*

103. *Id.* at 518.

104. *Id.* at 517.

105. *Id.*

106. *Strine*, 733 F.3d at 517.

107. *Id.*

lar.<sup>108</sup> The court found the experience prong favored public access to arbitral proceedings because the place and type of proceeding have traditionally been open to the public.<sup>109</sup>

### *B. Logic*

The Third Circuit also analyzed the logic prong of the *Press* test.<sup>110</sup> Under this prong, the court examined whether the public's access plays a significant positive role in these particular proceedings.<sup>111</sup> The court presented six potential benefits that have been previously ascribed as benefits to open proceedings:

- (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].<sup>112</sup>

The court found all of these goals could be reached through open proceedings.<sup>113</sup> Acknowledging the significant benefits of an open process, the court also found potential drawbacks as argued by the defendant judges was relatively minor.<sup>114</sup> The court first looked to the judges' argument that the closed proceedings protect confidential information, such as trade secrets, that may then end up being shared by businesses.<sup>115</sup> The court dismissed this argument, finding those types of sensitive information to be already protected by the Chancery Court Rules.<sup>116</sup>

Addressing the second argument made by the judges, who stated confidentiality protected companies involved in arbitration from "loss of prestige and goodwill,"<sup>117</sup> the court found that while this loss may be "unpleasant" for the parties, it does not actually interfere with the proceedings or hinder the public good.<sup>118</sup> Exposure to public scrutiny is actually a benefit, not a drawback of open proceedings.<sup>119</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Strine*, 733 F.3d at 517 (quoting *PG Publ'g. v. Aichele*, 705 F.3d 91, 110-11 (3d Cir. 2013) (internal brackets in original)).

113. *Id.* at 517.

114. *Id.*

115. *Id.*

116. *Id.* (quoting DEL. CH. CT. R. 5.1 (West 2014) (Rule 5.1 provides for confidential filing of documents that contain trade secrets, financial, business, or personal information)).

117. *Id.* at 517 (quoting Appellants' Brief at 60, *Del. Coal. for Open Gov't v. Strine*, 733 F.3d 510 (3d Cir. 2013) (No. 12-3859)).

118. *Id.*

119. *Strine*, 733 F.3d at 517.

The final argument made by the defendant judges was that opening the proceedings could actually end Delaware's arbitration program.<sup>120</sup> The court did not agree, and concluded this point of view assumed the only advantage of arbitration over regular civil proceedings is arbitration's privacy.<sup>121</sup> The court however points out that the judges themselves spent much of their brief attempting to point out the differences between the two.<sup>122</sup> The court noted several differences, including the fact arbitrations are entered into by consent, they are marked by "procedural flexibility," and their awards are subject to limited appellate review.<sup>123</sup>

The court found this logic test prong also favored open proceedings and any potential drawbacks were not compelling.<sup>124</sup> The court held because there existed a tradition of accessibility to government-sponsored arbitrations, and because public access was an integral part of the process, the First Amendment right of access applies to these arbitrations.<sup>125</sup> The Supreme Court of the United States has denied the writ of certiorari sought by the judges.<sup>126</sup>

In a concurring opinion, Judge Julio Fuentes articulated the Third Circuit's decision was not a sweeping destruction of Delaware's arbitration proceedings.<sup>127</sup> Judge Fuentes found because the decision concerned the First Amendment right of access, the court of appeals struck down only the portions of the Delaware code and Chancery Court rules invoking private proceedings.<sup>128</sup> Therefore, the majority's decision did nothing to eliminate Delaware proceedings, and instead opened them to the press and public.<sup>129</sup>

### C. Dissenting Opinion

Judge Jane Roth wrote a dissenting opinion articulating disagreement with the majority's analysis of experience and logic.<sup>130</sup> Judge Roth differed regarding what must be analyzed as part of history — concluding that arbitrations are the only relevant history.<sup>131</sup> This analysis is opposed to that of the majority, which deemed it relevant to include an analysis of the history of civil trials.<sup>132</sup> After analyzing the history of arbitrations, Judge Roth concluded arbitrations have been and continue to be held privately.<sup>133</sup> For the logic prong of the test, she concluded arbitrations involving private information must remain private so that parties are not subject to detriment from the information being available to the public and

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120. *Id.* at 520.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 521.

125. *Strine*, 733 F.3d at 521.

126. *Strine v. Del. Coal. for Open Gov't, Inc.*, 134 S.Ct. 1551 (2014).

127. *Strine* at 521 (Fuentes, J., concurring).

128. *Id.*

129. *Id.*

130. *Id.* at 525-26 (Roth, J., dissenting).

131. *Id.*

132. *Id.* at 516.

133. *Strine*, 733 F.3d at 525-26 (citing Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1271-72 (2006); THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VI(B) (2004), available at <https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/codeofethics>).

competitors.<sup>134</sup> She therefore concluded there to be no First Amendment right of access.<sup>135</sup>

The decision in *Strine* raises an interesting issue of how far states can go in overseeing the arbitrations conducted within their borders. Further, as made apparent by the dissenting opinion, there are drastically different ways to employ and interpret the precedent that is usually relied on in First Amendment access cases.

## V. COMMENT

With the holding in *Strine*, the Third Circuit established a rule that continues the historical trend of keeping court proceedings open to the public, and also more clearly defines what an arbitration can and cannot be. This decision is applicable to more than one state, but most obviously impacts Delaware where the law originated and possibly implicates that state's status as a corporate mecca. This section analyzes the court's decision in light of the policies the Third Circuit considered, the merits of the dissent, and discusses possible alternatives to the arbitration program that would not violate the First Amendment right of access.

### A. Policy Considerations

Public access to official court proceedings has enjoyed a long and prominent history in American jurisprudence. That fact held much weight in the majority decision, and ultimately led to the ruling in *Strine*.<sup>136</sup> Unfortunately for businesses who desire closed arbitrations, it appears the major draw to Delaware's arbitration process was access to a judge behind closed doors, one who also had the power to hand down binding court awards.<sup>137</sup> The benefit this arbitration system offered over other arbitration programs was private access to a judge with the power of the court behind him.<sup>138</sup> There are other entities that can provide confidentiality and still produce a binding agreement.<sup>139</sup> Therefore, this ruling does not significantly harm any potential parties to the court-sponsored arbitration.

Any harm stemming from these secret arbitrations to the parties themselves is minimal; however, the harm to the public and the court system is potentially vast. Before this decision was reached, public and press were both being denied access to the private arbitration proceedings, including filings and dockets they were entitled to by the First Amendment. The Delaware arbitration program also allowed judges to act without accountability because their decisions were private and had limited review. As discussed above, First Amendment access is not purely meant for the benefit of the people, but also ensures the accountability of the courts and government to the citizens. This latter function was not being served by these Delaware arbitrations. The Third Circuit was faced with the accountabil-

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134. THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 133, at 526.

135. *Id.*

136. See *Publiker Ind., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1954).

137. Thomas Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 369 (2013).

138. *Id.*

139. *Id.* at 371.

ity of a court that was acting out of the public eye without a compelling interest to do so.

The California case discussed previously, *Heenan* — is different from *Strine* — it involved statutory rules and was applicable in business disputes involving significant amounts of money. These cases are reconcilable, and the analysis of the roles of the judge and the court should remain the same. The judge is as an extension of the state, and as discussed through case law above, is required to conduct his or her duties in the eye of the public to maintain the rights of the people. Simply because Delaware has an interest in maintaining its allure to corporations does not release it from complying with the First Amendment.

### B. Judge Roth's Dissent

Judge Roth's dissent announced her disagreement with the majority's definition of the appropriate history to be considered under the experience prong of the test. Roth argues only the history of arbitration should have been relevant, while the majority opinion written by Judge Sloviter considers the history of both arbitration and traditional court proceedings. It seems Judge Roth's opinion of history failed to consider what was actually taking place in the courtroom. Her analysis focuses heavily on the goals of arbitration, rather than the implications of the procedure. To ignore the history of public access to civil proceedings ignores how crucial the use of the judge and courtroom were to these arbitrations. Disregarding these events led to the conclusion that the history of open arbitrations alone was applicable and that Delaware's program was constitutional.

The *Strine* decision reaches beyond the bounds of what the Supreme Court has determined in arbitration cases.<sup>140</sup> The Delaware arbitration program at issue was not subject to be barred based on the First Amendment.<sup>141</sup> The history of criminal trials that the majority based much of the "experience" analysis on is inapplicable in this case because the history access to arbitrations is not as one-sided as that of criminal trials.<sup>142</sup> The judges in the Third Circuit majority recognize a "mixed record of openness,"<sup>143</sup> but still determined the history was sufficient to require access.<sup>144</sup> Ultimately, the Third Circuit might have interpreted the constitutional right of access too broadly, and in so doing inhibited the ability of states to enact creative solutions to their specific legal issues.<sup>145</sup>

### C. A Constitutionally Permissible Alternative

As noted in the concurrence by Judge Fuentes, arbitration through the court system is not unconstitutional.<sup>146</sup> Some room for creativity was left when the Third Circuit decided this case. Delaware is not barred from having a court-operated arbitration program, but it is barred from having a confidential arbitration

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140. Myron T. Steele & Peter I. Tsoulias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1383 (2014).

141. *Id.* at 1381.

142. *Id.* at 1380, 1381.

143. *Id.* at 1383 (quoting Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 518 (3d Cir. 2013)).

144. Steele & Tsoulias, *supra* note 140 at 1382.

145. *Id.*

146. *Strine*, 733 F.3d at 521 (Fuentes, J., concurring).

system with sitting judges serving as the arbitrators in a courtroom. This distinction allows Delaware to create an alternative program still capable of achieving the possible advantages of the program that has now been struck down.

One option would be for Delaware to set up an arbitration program with former Chancery Court judges as the arbitrators. The individuals would be familiar with applicable law and have experience handling business disputes; therefore, they would be able to reach a logical conclusion supported by law. Given these are not sitting judges serving as arbitrators, the courtroom would no longer serve as the venue, and arbitrations would ultimately be confidential. Such an approach solves the court's confidentiality issue, and a court could later compel the arbitration order if one party does not cooperate in disposition. If confidentiality is the key issue, then that problem becomes solved.

California employs such a system, labeled "judicial arbitration."<sup>147</sup> Under this system, arbitrators include retired judges, members of the state bar, or even current judges as long as they are not compensated for their time.<sup>148</sup> Regardless of party consent, a court can order these arbitrations,<sup>149</sup> and if a party to the arbitration does not request a trial *de novo* or request a dismissal, the award is considered a judgment with the same effect as any other civil proceeding.<sup>150</sup>

Arizona law establishes a similar arbitration system<sup>151</sup> to the California system, and the program has led to a high amount of satisfaction from those who have participated.<sup>152</sup> Almost all of the lawyers polled (93%) who had represented clients in the arbitration program felt they were able to "fully present their case"<sup>153</sup> while 82% felt the arbitration was fair.<sup>154</sup> However, the results from the survey were not all positive. Just over half of the attorneys felt the arbitrators understood the issues involved in the case and only 50% thought the arbitrator was "very knowledgeable about arbitration procedures."<sup>155</sup> Strikingly, only one-third of the arbitrators polled were "very familiar" with the law in the cases they oversaw.<sup>156</sup> However, most of the arbitrators felt they had enough information to appropriately decide the matter.<sup>157</sup> One important note is the arbitrators who reported being more familiar with pertinent law were more likely to report having enough relevant information to make an informed decision in the case.<sup>158</sup>

This data from Arizona reveals a high level of satisfaction among arbitration participants, but also sheds light on a potential limitation to such programs. It appears from the data that arbitrator knowledge of pertinent law is vital in perception of the validity of the arbitrations. As suggested above, a similar rule as that in California where retired judges or judges not serving in their official capacity

147. CAL. CIV. PROC. CODE § 1141.10 (West 2004).

148. *Id.* at § 1141.18.

149. *Mercury Ins. Grp. v. Super. Ct. of San Bernadino Cnty.*, 965 P.2d 1178 (Cal. 1998).

150. CAL. CIV. PROC. CODE § 1141.23 (West 2004).

151. ARIZ. REV. STAT. ANN. § 12-133 (West 2012).

152. Rosselle L. Wissler & Bob Dauber, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes*, 2007 J. DISP. RESOL. 65, 86-93 (authors conducted a survey in 2004 where all members of the Arizona state bar were invited to answer questions regarding their experiences with the arbitration program in place).

153. *Id.* at 85.

154. *Id.* at 85, 86.

155. *Id.* at 86.

156. *Id.* at 87.

157. *Id.*

158. Wissler & Dauber, *supra* note 152, at 87.

could serve as arbitrators could help alleviate some of the issues presented in the Arizona research.

A program such as those employed in California and Arizona could work well as an alternative to the unconstitutional Delaware program. The arbitration would be conducted confidentially and would result in an order from the Court, binding the parties. This outcome was a main advantage of the Delaware arbitrations. A case could come before the Court of Chancery, and while the California and Arizona programs differ in that they do not require consent, if both parties request arbitration, one could be ordered and then handled outside of the courtroom for the remainder of the proceedings. Many of the surrounding rules designated for the Court of Chancery arbitrations could stand, including amount in controversy and commercial party requirements.

## VI. CONCLUSION

For many years, Delaware has been a state creating pro-business legislation that welcomes corporations, and as a result, a Chancery Court system knowledgeable in business law emerged. Recently, with the creation of an arbitration program with sitting judges as the arbitrators, Delaware maintained that reputation. In so doing, a system was created that violated a provision of the First Amendment that serves both the public and the courts.

Arbitrations are inherently confidential. Court proceedings are inherently open. The experiment conducted by Delaware attempting to combine those two conflicting interests failed, when the Third Circuit added to precedent favoring open court proceedings in *Strine*. This decision does not in any way negate the advantages of arbitration, and does not seriously harm Delaware as a hub for business. Delaware was a desirable state for businesses before 2009 when the legislation was passed<sup>159</sup> and will likely continue to be. Courts and parties prefer arbitration over litigation for a variety of reasons, but the arguments put forward were insufficient to overcome the First Amendment right of access.

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159. BLACK, *supra* note 1.