IN THE SUPREME COURT
OF VIRGINIA

NO. 030508

IN RE: PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.

Petitioner.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND STUDENT PRESS LAW CENTER IN SUPPORT OF PETITIONER

S. Mark Goodman, Esq.
Counsel of Record for Amici Curiae
Student Press Law Center
1815 N. Fort Myer Drive, Suite 900
Arlington, Virginia 22209
(703) 807-1904
(VSB No. 38369)

Of Counsel:
Lucy Dalglish
Gregg Leslie
Sara Thacker
The Reporters Committee for Freedom of the Press
1815 N. Fort Myer Drive, Suite 900
Arlington, Virginia 22209
(703) 807-2100

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 1

I. The trial court’s order violates the press and public’s established right of access to judicial records in civil proceedings 3

A. Access to civil judicial records is protected by the First Amendment 4

1. The long history of openness to civil proceedings and records supports the First Amendment right of access guaranteed to the press and public 4

2. Open access to court records in civil trials plays a significant positive role in the functioning of the judicial process 6

B. Virginia’s open records statute and common law establish a presumptive right of access to civil court records 8

II. The trial court failed to overcome the First Amendment and common law presumption of access by establishing that a compelling interest required sealing of the entire case file and that closure was narrowly tailored to serve that interest 10

CONCLUSION 14

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Cases:

Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) 5, 10, 13

Charlottesville Newspapers, Inc v. Berry, 215 Va. 116 (1974) 9

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 5

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 7, 10, 11

Grove Fresh Distribs. Inc v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994) 5

In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986) . 12

Joy v. North, 692 F.2d 880 (2d Cir. 1982) 13

Matter of Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) 13

Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) 9

Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984) 11

Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1 (1986) 4, 12

Publicker Indus., Inc. v. Cohen, 733 F.2d, 1059 (3d Cir. 1984) 5, 7, 8, 10, 14

Republic of Phillipines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir. 1991) 9-10

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 4, 14

Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) 5, 10

Shenandoah Publ'g House, Inc. v. Fanning, 235 Va. 253 (1988) 6, 8-9, 11, 13

State v. Cottman Transmission, 542 A.2d 859 (Md. App. 1988) 13

Statutes:

Va. Code §17.1-208 . . . . 6, 8

Other Authorities:

Scott Farwell, *Priest, 72, Faces Move*, PRESS-ENTERPRISE [RIVERSIDE], Sept. 30, 2002 3

James R. Healey, *26 More Deaths Involving Firestones Reported*, USA TODAY, Feb. 8, 2001 3

Bill W. Hornaday, *Ruling Broadens Asbestos Lawsuits*, INDIANAPOLIS STAR, May 18, 2002 3

Cam Simpson and Flynn McRoberts, *Architects of Enron's Rise Bred Its Demise*, CHICAGO TRIBUNE, Jan. 20, 2002 3

INTEREST OF *AMICI CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Student Press Law Center is a national, not-for-profit corporation based in Arlington, Va., that serves as an advocate for and defender of the First Amendment and freedom of information rights of student journalists. Since its founding in 1974, the SPLC has filed *amicus curiae* briefs before courts across the country in cases affecting the rights of the college press to cover important issues of interest to their readers and viewers.

The *amici curiae* have an enduring interest in ensuring that the right of access to judicial records is not compromised and that these records continued to be available to the press and public.

ARGUMENT

The trial court's *sua sponte* order sealing all court records in the civil case *People for the Ethical Treatment*

of Animals v. Kenneth Feld, et al., No. 204452 (Fairfax County Circuit Court) violates the First Amendment right of access to judicial records and proceedings, as well as Virginia statutory and common law. Journalists rely upon access to judicial documents to inform the public about the operation of the judicial system. Access to judicial records is necessary so that the press and public can make an independent assessment of the parties' allegations and defenses, and the administration of justice.

Decisions to prohibit access to judicial records must not be made lightly, and should only be affirmed by this Court when compelling interests necessitate closure. In describing his order, Judge Robert W. Wooldridge stated: "All I've done is seal the file."[1] While the judge may believe his actions were benign, the court could not have taken a more restrictive approach. Clearly, less restrictive alternatives exist and the judge should have considered them before entering his order violating the constitutional and common law rights of the press and public.

[1] *See* Memorandum of Law in Support of Petition for Writ of Mandamus ("Memorandum") at 5 (citing App. 257-258). Because the entire case file has been sealed by the circuit court, Petitioner filed all judicial records and transcripts under seal with this Court. As a result, *Amici* can only rely on information contained in Petitioner's Memorandum to describe the trial court's order and statements made on the record.

I. The Trial Court's Order Violates the Press and Public's Established Right of Access to Judicial Records in Civil Proceedings.

Journalists across the country use pleadings filed in civil proceedings to alert the public to issues requiring public debate and discussion. For example, civil court filings and judicial records have been used by reporters to explain the Enron securities fraud scandal, asbestos litigation, defective automobile tires, and sexual abuse by Catholic priests. *See, e.g.*, Cam Simpson and Flynn McRoberts, *Architects of Enron's Rise Bred Its Demise*, CHICAGO TRIBUNE, Jan. 20, 2002, at 1; Bill W. Hornaday, *Ruling Broadens Asbestos Lawsuits*, INDIANAPOLIS STAR, May 18, 2002, at C1; James R. Healey, *26 More Deaths Involving Firestones Reported*, USA TODAY, Feb. 8, 2001; Scott Farwell, *Priest, 72, Faces Move*, PRESS-ENTERPRISE [RIVERSIDE], Sept. 30, 2002, at B1. Even if the allegations contained in these complaints cannot be supported, the press and public have a right to know of their existence. By sealing the entire case file, the trial court's order prevents the press and the public from understanding the legal issues and circumstances surrounding this case and prevents publication of the very allegations brought in this action. If indiscriminate orders sealing all judicial records are condoned, our legal system will operate behind a veil of secrecy unprecedented in American

jurisprudence.

A. Access to civil judicial records is protected by the First Amendment.

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, the U.S. Supreme Court established a two-part test to determine whether the press and public have a First Amendment right of access to criminal proceedings. First, the Court must consider "whether the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986). Second, the Court must consider "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* Since *Richmond Newspapers*, courts have extended this "history and logic" test to establish a First Amendment right of access to civil proceedings and records.

1. The long history of openness to civil proceedings and records supports the First Amendment right of access guaranteed to the press and public.

The open nature of civil trials has been established for over 300 years, pre-dating our Nation’s birth. As the Supreme Court noted, "For many centuries, both civil and

criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that the truth may be discovered in civil as well as criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386, n. 15 (1979) (citing Remarks upon Mr. Cornish's Trial, 11 How.St.Tr. 455, 460).

While the First Amendment presumptive right of access originally was recognized in the context of criminal proceedings, courts have extended the scope of the First Amendment to civil proceedings and records. *See, e.g., Grove Fresh Distribs. Inc v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right of access to civil proceedings and records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed in connection with a summary judgment motion in a civil case); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (finding a First Amendment right of access extends to records of civil proceedings); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1181 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (vacating the district court's sealing of all documents filed in a civil action based on common law and First Amendment right of access).

This historic access to civil court records is also codified in Va. Code § 17.1-208, which requires that "records and papers in every circuit court shall be open to inspection by any person. . . ."[2] According to legislative history, this statute providing for public access to judicial records finds its roots in Virginia's Code of 1849. *Shenandoah Publ'g House, Inc. v. Fanning*, 235 Va. 253, 258 (1988). Indeed, Respondent cannot ignore the long history of openness set forth in established precedent and codified for more than 150 years in the Virginia Code that ensures that the public has access to judicial records.

2. Open access to court records in civil trials plays a significant positive role in the functioning of the judicial process.

Open access to civil court records encourages discussion of public affairs, and provides greater assurance that the public will discover when defendants may be exposing others to harm or when plaintiffs make frivolous or exaggerated claims that can be a drain on the resources of

---

[2]In fact, this statute alone provides the press and public with a presumptive right of access. *See Shenandoah Publ'g*, 235 Va. at 258 ("find[ing] it unnecessary to conduct a constitutional analysis" of the right of access to civil judicial records in light of the open records statute). Part I.B of this brief discusses Virginia's open records statute and common law, which provides a separate and independent basis for establishing a presumptive right of access to judicial records.

the courts.

While *Amici* take no position with regard to the underlying merits of Petitioner’s lawsuit, the press and public have a great interest in knowing the contents of the claims asserted against Kenneth Feld and Richard Froemming and should not be denied information leading to a free and open discussion about this lawsuit. Even if the claims are not sustained against these two defendants, the public has an interest in judging the merits of these claims for itself.

Because public access to civil judicial records enhances scrutiny of the judicial process, it "contributes to a fairer administration of justice." *Publicker*, 733 F.2d at 1070. When officers of the court are subject to scrutiny, "it enhances the quality of the justice dispensed by officers of the court." *Id.* Without access to the pleadings in this case, the public will be unable to assess whether the rulings made by the trial court are fair or evaluate how justice was administered by the court.

Public access to civil proceedings also "enhances the quality and safeguards the integrity of the factfinding process." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Providing access to judicial records places the pleadings filed under public scrutiny and may enhance

the trustworthiness of the information provided. *Publicker*, 733 F.2d at 1070.

Journalists rely on access to judicial records to inform the public about the administration of justice. Such access provides "a better understanding of the operation of government as well as confidence in and respect for our judicial system." *Id.* It is for these reasons that the public right of access to civil trials is "inherent in the nature of our democratic form of government." *Id.* at 1069.

B. Virginia's open record statute and common law establish a presumptive right of access to civil court records.

This Court has previously rejected broad sealing orders that deny the public access to judicial records filed in civil cases. In *Shenandoah Publishing*, this Court refused to uphold a trial court order sealing all judicial documents, including pleadings, exhibits, motions, and orders, entered in a wrongful death action. As in *Shenandoah Publishing*, the trial court's order sealing all judicial records cannot be sustained. The trial court's order is in direct conflict with the common law right of access to judicial records and Virginia's open records law, which provides open access to "the records and papers of every court." Va. Code §17.1-208. As this Court recognized: "The broad sweep of this language

is significant. It makes no distinction between criminal and civil proceedings." *Shenandoah Publ'g*, 235 Va. at 258.

In *Charlottesville Newspapers, Inc v. Berry*, 215 Va. 116, 117 (1974), this Court also refused to uphold a circuit judge's directive that "the public be denied access to the pleadings, motions, and suit papers in all new civil actions filed in that court until 21 days have elapsed from the date of such filing." The court's order in the instant case is equally restrictive. The court sealed the entire case file. This order applies not only to judicial records already filed by the parties, but to any future pleadings. In fact, the trial court sealed all judicial records without even knowing their contents. Such action is in direct conflict with Virginia's open records statute and this Court's prior decisions in *Shenandoah Publishing* and *Charlottesville Newspapers* establishing a presumptive right of access to court records in civil cases.

Not only does the trial court order conflict with the prior decisions of this Court, it is contrary to case law across the country recognizing a presumptive right of access to court documents of all types. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing a common law right of access to judicial records and documents); *Republic of Philippines v. Westinghouse Elec.*

Corp., 949 F.2d 653, 662 (3d Cir. 1991) (finding common law right of access to documents submitted with summary judgment motion); *Rushford*, 846 F.2d at 253 (same); *Publicker,* 733 F.2d at 1066-67(finding common law right of access extends to civil court records); *Brown & Williamson Tobacco*, 710 F.2d at 1179 (recognizing "strong common law presumption in favor of public access to court proceedings and records"). In light of this established precedent, a presumptive right of access cannot be denied to the judicial records filed in Petitioner's civil court action.

II. The trial court failed to overcome the First Amendment and common law presumption of access by establishing that a compelling interest required sealing of the entire case file and that closure was narrowly tailored to serve that interest.

Under the First Amendment, the trial court must show that its order denying access to is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 607. Similarly, under common law, this Court requires that "to overcome the presumption [of public access], the moving party must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order . . . and that any such order must be drafted in the manner least restrictive

of the public's interest." *Shenandoah Publ'g*, 235 Va. at 258-59. The trial court's *sua sponte* order cannot survive this strict scrutiny.

Not only did the trial court fail to give any notice that it was closing the entire case file -- action that was not requested by either party -- it offered no explanation for its broad December 20, 2002, sealing order. *See* Memorandum at 2-3. Notice is required so that the press and general public are given a meaningful opportunity to object to the closure order. *See Globe Newspaper*, 457 U.S. at 609, n. 25. Even when asked to reconsider its order, the court did not provide specific findings on the record that justified the denial of access to judicial records in this case. Memorandum at 3-4. Such on-the-record findings are required so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984).

Although the trial court did not follow these procedural requirements before it issued the closure order, it provided a limited explanation for its decision at the January 24, 2003, hearing on reconsideration. The trial court rested its broad sealing order on the fact that PETA's motion for judgment contains allegations against nonparties,

Ringling Brothers and Barnum & Bailey Circus, Inc., who "have no standing to protect themselves in the context of this litigation." Memorandum at 4-5 (citing App. 257-258). The court never identified the specific harm that the nonparties needed protection from. In fact, the court found that "[a]ll of these allegations regarding nonparties may ultimately prove to be relevant and admissible in relation to the claims against defendants in this case" and that statements made in PETA's motion for judgment were not made to embarrass or harass. Memorandum at 4 (citing App. 257-258). Such findings go to support rather than deny the public interest in access.

Simply providing a conclusory assertion that the court has a "compelling interest" to protect nonparties who lack standing from "receiv[ing] that kind of attention from the court" is insufficient to overcome the First Amendment and common law right to judicial records. Memorandum at 5 (citing App. 257-258); *see Press-Enterprise II*, 478 U.S. at 15 (finding conclusory assertion cannot overcome First Amendment right of access); *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) (finding that "the court may not base its decision on conclusory assertions alone").

Even assuming nonparties are harmed by the allegations made in plaintiff's motion for judgment, protection of

corporate interests cannot justify abridgment of the First Amendment or common law right of access. As this Court has found, "risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract [do not] constitute sufficient reasons to seal judicial records." *Shenandoah Publ'g*, 235 Va at 259; *see also Continental Illinois Securities Litigation*, 732 F.2d 1302, 1316 (7th Cir. 1984) (finding records submitted with summary judgment motion should be open despite alleged corporate interests); *Brown & Williamson Tobacco*, 710 F.2d at 1179 (finding harm to company's reputation insufficient to overcome the strong common law right of access to court proceedings and records); *Joy v. North*, 692 F.2d 880, 894 (2d Cir.1982) (finding conclusory statement that access will cause bank and community harm is insufficient to deny access to a court records); *State v. Cottman Transmission Sys., Inc.*, 542 A.2d 859, 658 (Md. App. 1988) (finding closure not justified merely to minimize damage to corporate reputation). Thus, the trial court's order sealing the entire case file cannot be sustained by the asserted interest of protecting corporate interests of nonparties.

While the court summarily stated "that sealing the court's file is the least burdensome and most narrowly tailored way" to protect nonparties who don't have standing

from some unidentified harm, the court did not even consider alternatives to its broad sealing order. Closure orders that fail to account for less restrictive alternatives cannot be sustained. *See, e.g., Richmond Newspapers*, 448 U.S. at 580-81; *Publicker*, 733 F.2d at 1074. The court's order not only prevents access to allegations made against nonparties, but prevents access to all allegations contained in the entire case file. Such an order is more restrictive than necessary to achieve the stated interest of protecting nonparties and should not be affirmed.

CONCLUSION

Without access to judicial records in civil proceedings, the press is denied a fundamental First Amendment right to publish information of public interest and concern. Regardless of whether the allegations made in civil pleadings are sustained, the press has a right to access these records to inform the public of the basis of civil matters pending before the judiciary. Such openness is fundamental the administration of justice in a democratic society.

Based on the foregoing, *Amici* respectfully requests this Court grant Petitioner's Writ of Mandamus and direct the Fairfax County Circuit Court to vacate its December 20,

2002, sealing and restraining order.

Respectfully submitted,

____
S. Mark Goodman, Esq.
Student Press Law Center
Counsel of Record for *Amici Curiae*
(VSB No. 38369)

Of Counsel:
Lucy A. Dalglish
Gregg P. Leslie
Sara Thacker
The Reporters Committee for
Freedom of the Press
1815 N. Fort Myer Drive, Suite 900
Arlington, Virginia 22209
(703) 807-2100

CERTIFICATE OF SERVICE

Counsel for *amici curiae* hereby certifies that three copies of the Brief of *Amici Curiae* The Reporters Committee for Freedom of the Press and Student Press Law Center In Support of Petitioner, were served via first class mail on this 21st day of March, 2003, upon:

Counsel for Petitioner
Philip J. Hirschkop
Hirschkip & Associates, P.C.
108 North Columbus Street
Alexandria, VA 22314
(703) 836-5555

Counsel for Respondent
Peter Messitt
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-1723

Counsel for Amicus ACLU of Virginia
Rebecca Glenberg
6 North Sixth Street, Suite 400
Richmond, VA 23219

____
S. Mark Goodman, Esq.