In the Supreme Court of Ohio

State of Ohio *ex rel.* The Vindicator Printing Co. and WFMJ Television, Inc. Relators vs. The Hon. William H. Wolff, Jr. Respondent.	: : : : : : : : : : :	Case No. 2011-0132 Original Action in Mandamus and Prohibition

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Brief *Amicus Curiae* in Support of Relators on behalf of
The Reporters Committee for Freedom of the Press

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Interest of *Amicus*[1]

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.

Amicus, on behalf of the journalists that it represents, has an interest in upholding the public's right of access to court records and right to monitor and report on court proceedings, particularly those that involve the criminal justice system. The trial court's orders and practices at issue here raise concern that ongoing criminal proceedings of high public importance are not being conducted in a manner that is consistent with the public's well-recognized right to access and monitor court proceedings. *Amicus* submits this brief in support of Relators' action to urge this Court to uphold the public's access rights in this case.

Statement of the Facts

Relators filed this original action on January 24, 2011, alleging constitutional and statutory violations based on the Respondent trial court's practice and orders restricting access to court records and proceedings in the case of *State v. Cafaro, et. al.*, Mahoning County Common Pleas Court Case No. 2010 CR 800. (*See* Verified Complaint ¶ 1). Relators seek (1) a writ of prohibition vacating the Respondent trial court's sealing and closure order and prohibiting Respondent's continued practice regarding sealing and closure, and (2) a writ of mandamus compelling the release of public records. (Complaint, at Prayer for Relief).

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[1] On May 5, 2011, counsel for The Reporters Committee for Freedom of the Press requested admission *pro hac vice* to file a brief *amicus curiae* in support of relators in this case. *Amicus* now provisionally files this brief pending the Court's decision on *pro hac vice* admission.

The underlying case is a criminal prosecution in the Mahoning County Court of Common Pleas involving corruption-related allegations. (J.R. Exs. 1-6). On September 9, 2010, the Respondent trial court issued an order that "[a]ll filings" in the case were to be filed initially under seal, except those that "are clearly procedural and cannot possibly implicate Defendants' concern about receiving a fair trial." (J.R. Ex. 11). The September 9 order came in response to a letter request by counsel for some of the defendants, (J.R. Ex. 9), and contained no findings of fact or discussion of the legal justification – beyond the implication of a fair trial concern – for issuing such an order. (J.R. Ex. 11).

The Respondent trial court issued a supplemental order on September 14, 2010. This order "further explained" the sealing process, stating that it was intended to allow the court to decide whether a document should be publicly filed after reviewing briefing by the parties. The supplemental order reasoned that "significant media attention" raised concerns about defendants' fair trial rights. (J.R. Ex. 12).

Some of the defendants subsequently sought to have documents filed under seal. As relevant here, those documents included the pre-trial sealing of bills of particulars[2] and Notices of Intent to Introduce Rule 404(b) Evidence, which the defendants anticipated to be filed with the trial court. (J.R. Ex. 20).

Relators, members of the news media, subsequently challenged the trial court's sealing orders and procedure for sealing. Relators filed public records requests for the filed court records. (J.R. Exs. 21, 23, 24, 26). Relators also moved to vacate the trial court's ordered sealing procedure and moved to gain access to the bills of particulars and other filed documents. (J.R. Ex. 25). Through briefing and oral argument, Relators raised both state and federal

[2] In Ohio, bills of particulars "set up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense." Oh. R. Crim. P. 7(E)

grounds for the release of the documents at issue. (J.R. Exs. 25, 29 and 30). The defendants opposed Relators' motion. (J.R. Exs. 28, 30).

The Respondent trial court ruled on Relators' requests in a decision and order on December 21, 2010. (J.R. Ex. 42). The trial court denied Relators' request to unseal the bills of particulars and Rule 404(B) notices. The court agreed with the defense position that these documents were "in the nature of discovery and should not be accorded [a] 'presumption of public access.'" (J.R. Ex. 42 at 2). Stating that it had "caused to be filed without seal, or unsealed," documents that "do implicate the court's decisional responsibility," the court stated that the bills of particulars and Rule 404(B) notices fell into a different category. The court reasoned that "'alleged criminal actions' of the defendants are to be adjudicated by a jury at trial, not the court at this stage of proceedings," and thus the filed documents were not presumptively public. (*Id.* at 3).

The court also concluded that, even if the documents were presumptively public, the defendants' fair trial rights justified retaining the documents under seal. (*Id*. at 4). The trial court found relevant to this conclusion its perception of the media coverage of the case as being "intense" and "tough," leading the court to conclude that disclosure of the documents would result in a "substantial probability that seating an impartial jury in Mahoning County would be impossible." (*Id.* at 4). The court rejected the notion that such concerns could be addressed by changing the trial venue, reasoning that this Court's case law and the defendants' presumptive right to be tried in the county of the alleged crimes "suggests that the court's effort to seat an impartial jury should begin in Mahoning County." (*Id*. at 5).

The Respondent trial court's order also addressed the procedure for resolving future sealing disputes. The court recognized the right of the Relator the Vindicator to be involved in

the sealing determination process, creating a system where counsel for the Vindicator would be given access to the documents proposed to be sealed and an opportunity to address the court on that issue. (*Id.*) The public, however, remained excluded from this process. The Vindicator's counsel was to not share the information with his client or the public, and all briefing on the matter was to be filed under seal. (*Id.* at 5-6). A subsequent e-mail from the Respondent trial court to counsel for the Vindicator confirmed this approach. (J.R. Ex. at 43).

Relators subsequently filed this action.

Summary of the Argument

The Respondent trial court erred in declining to recognize a presumptive right of public access to bills of particulars and 404(b) notices filed in criminal proceedings. As outlined in the Relators' briefing and argument in the trial court (and, presumably its briefing to this Court), Ohio's state laws and court rules establish a presumptive right of access to court proceedings and records that is broad enough to encompass the records at issue here. *Amicus* urges this Court to recognize this right under Ohio law.

Should this Court reach the federal constitutional issue, however, *amicus* submits this brief to emphasize the public's independent First Amendment right of access to filed bills of particulars. Both experience and reason support court recognition that bills of particulars are akin to charging documents and thus public records that should be presumptively open to public inspection. So understood, the trial court's explanation for sealing the bills of particulars is insufficient to overcome a right of access under the First Amendment, and therefore should be set aside.

Separately, this Court should correct the Respondent trial court's practice of presumptively sealing certain records in the underlying case, specifically the legal briefing that

addresses requests to seal specific documents. Although the trial court has taken some steps to allow media counsel to participate more in the court's sealing proceedings, such steps are inadequate to protect the *public's* rights of access, and turn on its head the presumption of such openness in criminal proceedings.

Argument

I. The First Amendment Protects the Public's Right of Access to Bills of Particulars Filed with the Court.

The Respondent trial court's sealing order relies on the mistaken premise that bills of particulars "should not be accorded [a] 'presumption of public access.'" (J.R. Ex. 42 at 2). Respondent's opinion is inconsistent with the standards of open access that Ohio's state laws and court rules require. Because this state legal authority provides an independent basis for overturning the Respondent's trial court order, this Court need not address the federal constitutional right of access. *See, e.g.*, *State ex rel. BSW Dev. Group v. Dayton*, 83 Ohio St.3d 338, 345, 699 N.E.2d 1271 (1998).

Should this Court reach that constitutional issue, however, *amicus* submits the argument below to emphasize that the First Amendment of the U.S. Constitution provides an independent protection for the public's presumptive right of access to bills of particulars.

A. The public has a First Amendment right of access to criminal proceedings, including court records.

It is beyond dispute that the First Amendment creates a presumptive right of public access to criminal court proceedings. As the U.S. Supreme Court stated in *Richmond Newspapers, Inc. v. Virginia*, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." 448 U.S. 555, 573 (1980) (plurality op.). The purpose of the

right of access embedded within the First Amendment is to "ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982). Openness in criminal trials "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*").

The U.S. Supreme Court has repeatedly recognized that the First Amendment right of access encompasses not only criminal trials themselves, but also the related court proceedings, including jury selection, *see Press-Enterprise I*, 464 U.S at 505, and preliminary hearings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). The logic for recognizing such a right in these proceedings is the same as with open access to the trial itself: public access ensures accountability and validates the institution to the public. *See*, *e.g.*, *Press-Enterprise II*, 478 U.S. at 12-13. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572, *as quoted in Press-Enterprise II*, 478 U.S. at 13.

This Court has similarly recognized that the public right of access to criminal proceedings "serves several lofty goals":

> First, a crime is a public wrong, and the interest of the community to observe the administration of justice in such an instance is compelling. Also, the general right of public access promotes respect for and an understanding of the legal system and thus enables the public to engage in an informed discussion of the governmental process.

State ex rel. Cincinnati Enquirer v. Winkler, 101 Ohio St.3d 382, 384, 805 N.E.2d 1094 (2004) (citations omitted).

This Court, like many others, recognizes that the First Amendment right of access extends to judicial records in criminal cases. *See Winkler*, 101 Ohio St. 3d at 384 ("This right of access found in both the federal and state Constitutions includes records and transcripts that document the proceedings.").[3] Adopting the same analytic approach used by the U.S. Supreme Court in recognizing the First Amendment right of access, many of these courts have explained that both history and logic compels the conclusion that judicial records that form a foundation for open criminal proceedings should be afforded the same access rights. *See United States v. Smith*, 776 F.2d 1104, 1111-12 (3rd Cir. 1985); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1985) ("[P]retrial documents . . . are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning. We thus find that the public and press have a first amendment right of access to pretrial documents in general." (quoting *Globe Newspaper*, 457 U.S. at 606)).

B. Bills of Particulars filed with the court are subject to the First Amendment's right of access.

In Ohio, bills of particulars "set up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense." Oh. R. Crim. P. 7(E). The Respondent trial court erred in adopting the defense argument that these filed court records "are in the nature of discovery and should not be accorded the 'presumption of access.'" (J.R. Ex. 42 at 2).

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[3] *See also, e.g.*, *Washington Post v. Robinson,* 935 F.2d 282, 287 (D.C. Cir.1991); *United States v. Haller,* 837 F.2d 84, 87 (2d Cir. 1988); *Nat'l Broadcasting Co. v. Presser*, 828 F.2d 340, 343-45 (6th Cir. 1987); *In re Washington Post Co.,* 807 F.2d 383, 390 (4th Cir.1986); *United States v. Smith*, 776 F.2d 1104, 1110 (3d Cir. 1985); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1985) ("[T]the first amendment right of access to criminal trials also applies to pretrial proceedings such as suppression hearings. There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.").

To Respondent, whether a presumptive right of access attached to judicial records apparently depended primarily on whether the filed records were those that "implicate the decision making responsibility of the trial court." (*Id.* at 3). Reasoning that it was not "call[ed] upon" at that "stage of the proceeding" to make a decision related to those documents, the trial court concluded that no such right of access applied. Respondent's analysis, however, failed to adequately address the constitutional underpinnings of the public's access right. The public certainly has a strong right of access to documents used by courts in decision making, but the U.S. Supreme Court has made clear that the constitutional analysis turns on evaluating the history and logic of allowing access to the matter at issue. These factors support recognizing a qualified right of public access to bills of particulars.

As explained by the Third Circuit in *United States v. Smith*, bills of particulars are subject to a constitutional right of access because they are analogous to charging documents. Such documents have a long history of public access.

> This historic tradition of public access to the charging document in a criminal case reflects the importance of its role in the criminal trial process and the public's interest in knowing its contents. It sets forth the charge or charges to be tried and, as we noted, thereby establishes the general parameters of the government's case. Knowledge of the charge or charges is essential to an understanding of the trial, essential to an evaluation of the performance of counsel and the court, and, most importantly, essential to an appraisal of the fairness of the criminal process to the accused.

Smith, 776 F.2d at 1112.

The Third Circuit correctly viewed bills of particulars as "closely related" to charging documents, specifically indictments. The court noted that while indictments had historically been very detailed, the "modern trend" had been to streamline the indictments while allowing defendants to request the filing of bills of particulars. *Smith*,

776 F.2d at 111. Indeed, bills of particulars are in many respects "supplements" to indictments, carrying significant force in a criminal proceeding by defining the boundaries of the government's case. *Id.* (noting that the government cannot rely on claims that are outside of the information provided in a bill of particulars). In fact, bills of particulars can even define the limits on later prosecution for double-jeopardy purposes. *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986).

When a bill of particulars is properly viewed as a "supplement" to the indictment, the logic for affording the public a presumptive right of access to such a document is strong. Many courts recognize the First Amendment right of access to charging documents. *See, e.g., Smith*, 776 F.2d at 1112; *United States v. Kott*, 380 F. Supp.2d 1122, 1124 (C.D. Cal 2004) (adopting *Smith's* analysis); *see also United States v. Gen. Motors Corp.*, 352 F. Supp. 1071, 1074 (E.D. Mich. 1973) ("The indictment in this case is a matter of public record. A bill of particulars, which defines the indictment, is not a private matter between a defendant and the Government."); *cf. Anderson*, 799 F.2d at 1442 n.5 (stating that indictments are "public documents"). As the *Smith* court recounted, the open presentment of charges against a defendant is a long-standing tradition in American courts, as well as under the English common law. *See* 776 F.2d at 1112 (discussing American and English authority and commentary); *see also id.* at 1112 ("It has long been the law that 'criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court . . .'" (quoting *Post v. United States*, 161 U.S. 583, 587 (1896)).

Public access to such documents enhances the judicial process by providing the public with better information to assess the fairness and workings of the criminal justice system. *See Smith*, 776 F.2d at 1112; *see also Globe Newspaper*, 457 U.S. at 606 (explaining that open

access provides insight into the "functioning of the judicial process and the government as a whole"). A U.S. District Court in California made a similar point in *Kott*, addressing the unsealing of warrant and indictment information. Public access to such information helps to explain and evaluate the reasons asserted by the government for charging the defendants, which the public can use in evaluating the ultimate result of the prosecution. *Kott*, 380 F. Supp.2d at 1125.

Respondent's opinion did not directly address the Third Circuit's reasoning in *Smith*, instead noting (correctly) that the "federal circuits are divided" on whether to accord bills of particulars a presumptive right of access. (J.R. Ex. 42 at 3). Respondent cited *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986), as support for this proposition. The Eleventh Circuit in *Anderson* did decline to "automatically" attach a First Amendment right of access to such documents. But even the *Anderson* court acknowledged that indictments were "public document[s]," *id.* at 1442 n.5, and that a "bill of particulars, properly viewed, supplements an indictment by providing the defendant with information *necessary* for trial preparation." *Id.* at 1441 (emphasis original). The concern expressed by the *Anderson* court with creating a "mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment" was simply that the specific document at issue, while labeled a bill of particulars, was more like a "discovery bill" that the defendants had requested as a means of circumventing the discovery rules. *Id.* at 1441-42. In other words, not even the *Anderson* court foreclosed the possibility that "true" bills of particulars, like indictments, are "public documents." *See id.* at 1442 n.5.

Regardless, the presumptive First Amendment right of access carries even greater force under Ohio's criminal justice system, where bills of particulars "set up specifically the nature of

the offense charge and of the conduct of the defendant alleged to constitute the offense." Oh. R. Crim. P. 7(E). "[T]he purpose for giving a bill of particulars is 'to elucidate or particularize the conduct of the accused,' but not 'to provide the accused with specifications of evidence or to serve as a substitute for discovery.'" *State v. Lawrinson*, 49 Ohio St.3d 238, 239, 551 N.E.2d 1261 (1990) (citation omitted). Bills of particulars also play a key role in prosecutions, as the failure to properly include particulars may limit the ability to convict a defendant. *Id.* at 240 (affirming reversal of conviction where prosecution failed to provide specific information in the bill of particulars). And while it may be "elementary that averments in a bill of particulars may not be used to cure fundamental defects in an indictment," *State v. Gingell*, 7 Ohio App.3d 364, 367, 455 N.E.2d 1066 (Oh. App. 1992), this Court has stated that in some instances a bill of particulars can "remed[y a] defect in the indictment. " *State v. Skatzes*, 104 Ohio St.3d 195, 200, 819 N.E.2d 215 (2004).

In other words, a bill of particulars is in many respects akin to a charging document, and can carry similar meaning and consequences in a criminal prosecution. The same can be said for very few, if any, "discovery" documents themselves, in their own right. This understanding and practice suggests that a bill of particulars should stand on the same footing as other charging documents that are unquestionably public. *See, e.g., Smith*, 776 F.2d at 1112; *Kott*, 380 F. Supp.2d at 1124-25; *Gen. Motors*, 352 F. Supp. at 1074; *see also Anderson*, 799 F.2d at 1442 n.5.

The public has an undeniable interest in monitoring the manner in which the government prosecutes those charged with crimes and the manner in which courts dispense justice. Public confidence in the criminal justice system and its outcomes depends on the public understanding and respecting how prosecutions are conducted. *See*, *e.g.*, *Globe Newspaper*, 457 U.S. at 606.

When the government decides to prosecute an individual, the public has a right to know not only why the prosecution believes that individual was involved in a crime, but also how those allegations hold up in the criminal justice process. If, as some defendants suggest, (*see* J.R. Ex. 20), the prosecution intends to build its case on inadmissible evidence, the public has an interest in knowing that fact, too. The public also has an interest in knowing how a court evaluates such claims, if made. Access to bills of particulars helps to inform the public about such prosecutions. This Court should recognize that right as one protected by the First Amendment.

C. Defendants' fair trial concerns do not outweigh the public right of access.

When the decision to seal a bill of particulars is placed in the proper context of the presumptive right of access to such court records, the Respondent trial court's decision to seal the documents cannot withstand the high level of scrutiny required under the constitutional presumption of access. Specifically, to overcome the presumption of access, a court must make on-the-record findings "that closure is essential to preserve higher values and is narrowly tailored to serve an overriding interest." *Press Enterprise II*, 478 U.S. at 13-14; *accord State ex rel. Scripps Howard Broad. Co. v. The Cuyahoga County Court of Common Pleas,* 73 Ohio St. 3d 19, 20, 652 N.E.2d 179 (1995) (citing *Press Enterprise II*). Respondent's alternative holding, that any presumptive right of access was overcome by fair trial concerns in this case, failed to properly weigh the interests involved.

Respondent's analysis relies heavily on the assertion that allowing public access to the records at issue will impair the defendants' fair trial rights. (J.R. Ex. 42 at 4). This holding appears to be premised on an incorrect weighing of the rights involved. To begin, the trial court may have assumed that a criminal defendant's Sixth Amendment right to a fair trial outweighs

the public's First Amendment right of access.[4] As Relators argued below, (J.R. Ex. 29), this Court squarely rejected this argument last year, calling a trial court's "refusal to accord equal importance and priority to the media's First Amendment rights" and the criminal defendant's Sixth Amendment rights "plainly erroneous." *State ex rel. Toledo Blade Co. v. Henry County Court of Common Pleas*, 125 Ohio St. 3d 149, 157, 926 N.E.2d 634 (2010) (stating that the trial court's "analysis proceeded from the erroneous premise that a criminal defendant's constitutional right to a fair trial should be accorded priority over the media's constitutional rights of free speech and press.").

Second, Respondent appears to view the public's right of access and a defendant's right to a fair trial as competing interests that are in conflict with one another. The U.S. Supreme Court has expressly rejected that view as well. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II*, 478 U.S. at 7. As the Court explained,

> It is . . . important to remember that these interests are not necessarily inconsistent. Plainly, the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers.

Id. To the extent Respondent's opinion is premised on the view that these rights are necessarily hostile to each other, the opinion rests on an unsound premise.

Respondent similarly appears to assume that the "tough" pre-trial publicity impedes the fair trial right. Again, the U.S. Supreme Court has repeatedly counseled otherwise, however. As that Court recently reiterated, the fair trial right requires a jury that can be impartial, not one that

[4] Counsel for some of the defendants in the underlying case have promoted this view, asserting that "a criminal defendant's Sixth Amendment right to a fair trial outweighs the public's interest in access to a court document." (J.R. Ex. 9 at 7).

has no outside information. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2914-15 (2010) ("Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*.") (emphasis original); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."). This Court has recognized this same point. *See Toledo Blade*, 125 Ohio St. 3d at 158 ("'[P]retrial publicity-even pervasive, adverse publicity-does not inevitably lead to an unfair trial.'" (citations omitted)).

The concerns inherent in allowing public access to information in a bill of particulars are certainly no greater than access to information that is the subject of a motion to suppress. The U.S. Supreme Court has recognized that public access to motions to suppress can pose "special risks of unfairness." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979). Yet the U.S. Supreme Court has held that those risks do not justify the automatic closure of suppression hearings. *Press-Enterprise II*, 478 U.S. at 15. Rather, a court considering the closure must evaluate whether options exist to ensure a fair trial, including voir dire questioning, "cumbersome as it is in some circumstances," and narrowly tailoring any closure. *Id*. Such an analysis presupposes a right of access.

Indeed, as Relators emphasized to the trial court, this Court has rejected the notion that the potential for publicity at a suppression hearing is sufficient grounds for closing the hearing. In *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457, 468, 351 N.E.2d 127 (1976), this Court granted a writ of prohibition to invalidate a trial court's decision to close a pretrial

suppression hearing due to a concern that the "intense publicity" in a sensational murder and kidnapping case would jeopardize the defendant's right to a fair and impartial trial. Calling the issue a "simple" one, this Court laid out the proper procedure for courts in such situations:

> (1) The court should overrule the motion which requests the court to close the courtroom, exclude the public and bar the press during the hearing on the motions to suppress because the First Amendment to the Constitution of the United States and Section 11 of Article I of the Ohio Constitution prohibit any abridgment of the freedom of the press.
>
> (2) The court should hold a public hearing on the motions to suppress for the same reason.

Dayton Newspapers, 46 Ohio St. 2d at 460-61. This Court continued by explaining that the trial court could address the concern over securing a fair and impartial trial not by conducting secret proceedings, but rather by holding a public hearing on whether to change venue "to a county unaffected by the publicity." *Id.* at 461.

This Court's explanation of the policy reasons for maintaining public access to the pretrial matters bears repeating here.

> Because of corruption or malice, a secret judicial proceeding may be and has been used to railroad accused persons charged with crime. Secret proceedings may be used to cover up for incompetent and corrupt police, prosecutors and judges, and the influence of corrupt politicians on the judicial system. The public and the victims of crime are entitled to know what is going on. The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches. A free press is the only guarantee a citizen has of his right to know what is going on in his government.

46 Ohio St. 2d at 467.

Despite the Respondent's characterization of media coverage in this case as "intense" and "tough," (J.R. Ex. 42 at 4), surely the publicity surrounding the present case is no more "intense" than that surrounding the "sensational" murder and kidnapping case at issue in *Dayton*

Newspapers. Yet this Court found the constitutional issue there to be "simple." The Relator trial court's opinion here, which focused on the purported unique nature of the local media, has not explained how the present situation would make that decision any more difficult. Indeed, the Relator trial court's statement that "the court's effort to seat an impartial jury should begin in Mahoning County," (J.R. Ex. 42 at 5), while perhaps accurate in and of itself, is inadequate to the extent that it suggests that seating a local jury trumps the public's access rights. This Court has consistently stated otherwise. *Toledo Blade*, 125 Ohio St. 3d at 159; *Dayton Newspapers*, 46 Ohio St. 2d at 461.

The Respondent trial court's decision to seal the submitted judicial records violates the public's First Amendment right of access. The trial court erred in failing to recognize the presumptive public right of access here, and in failing to properly consider alternative solutions that were less restrictive than denying the public access to key material in a criminal prosecution.

II. The Respondent Trial Court's Procedural Practice of Sealing Legal Briefing Is Inconsistent with the Right of Access.

Separate from the issue of whether any particular document should be unsealed is whether the trial court's procedure for evaluating sealing requests sufficiently protects the public's right of access. In short, it does not.

The Ninth Circuit considered, and rejected, a nearly identical procedure adopted by a trial court in the high-profile drug prosecution of automaker John DeLorean and others. As recounted by the Ninth Circuit in *Associated Press v. U.S. District Court*, the trial court reacted to "wide press coverage" of the case by ordering the filing under seal of all documents "in order to permit this court to initially review them and to make a determination with regard to disclosure." 705 F.2d at 1144 (quoting trial court order). Like the Respondent trial court here, the District Court

in *Associated Press* subsequently modified the process to allow the parties and the press to comment on whether the documents should remain sealed — with the parties' comments themselves filed under seal. *Id.*

The Ninth Circuit held that this approach violated the public's presumptive right of access to criminal proceedings. The court explained that the presumptive sealing process failed all three tests a court must satisfy to "justify abrogating the first amendment right of access." *Id.* at 1145. First, the court failed to demonstrate that there was a "substantial probability" that the defendant's fair trial rights would otherwise be violated, noting the U.S. Supreme Court's remonstration that even pervasive pretrial publicity does not "automatically" lead to an unfair trial. *Id.* at 1146. Second, the trial court failed to demonstrate that there was "no less drastic alternative" to the presumptive temporary sealing. The Ninth Circuit stated that "courts can readily devise less drastic procedures that will ensure that parties who contemplate filing any documents that might actually prejudice the right to a fair trial will act responsibly. Various procedures are available to trial judges to persuade parties to refrain from filing such documents or, if exceptional circumstances exist, to file the few documents of that nature that must be filed under seal." *Id*. The court also noted that voir dire questioning provided another less-restrictive means of protecting the defendants' fair trial rights. *Id.*

Finally, the Ninth Circuit held that the trial court failed to demonstrate that the sealing process would have the intended effect. As the Ninth Circuit explained, the sealing process had done little to quell the rampant publicity in the case; accordingly, an order infringing the public's rights could not be justified. *Id.* at 1146 ("Given the extensive publicity that is occurring even while the orders are outstanding, we doubt that the limitation on publicity accomplished by the closure orders would have any significant effect on [the defendant's] right to a fair trial.").

The Respondent trial court's sealing process here fails for similar reasons. By presumptively sealing all *legal briefing* on the very issue of whether to seal particular records, the trial court prevents the public from evaluating the merit of the court's sealing decision. Indeed, such an outcome is inconsistent with even the trial court's own understanding of the right of access, as there can be no doubt that legal briefing "implicate[s] the decision making responsibility of the trial court." (J.R. Ex. 42 at 3). Whether grounded in the First Amendment, common law or statute, the presumptive right of access most certainly applies to legal briefing by the parties requesting the court to take action. *See, e.g., Republic of Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) (stating that access to the summary judgment records enables the public to "make a contemporaneous review of the basis of an important decision of the district court."); *cf. Joy v. North*, 692 F.2d 880, 893 (2nd Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.").

Allowing the counsel for Relators to review and comment on the contested filings does little to protect the *public's* right of access. The U.S. Supreme Court has repeatedly emphasized that the constitutional right of access is one held by the public as well as the press. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (stating that precedent had "firmly established . . . that the press and general public have a constitutional right of access to criminal trials."). Allowing limited file access to the counsel that represents some media organizations, with no ability for that counsel to communicate to his clients or the public on the filings, keeps the sealing process secret from the public.

Moreover, there are many less restrictive measures available to the trial court here that would not require the presumptive sealing from the public. There has been no showing that the

voir dire process or, in the alternative, transfer to another venue, would not satisfy the court's concerns. And finally, there is no showing that the sealing process has had the desired effect. The Respondent trial court's own December 21, 2010 order asserts that the press coverage in this matter has been "intense," and it is unquestionable that the coverage has been ongoing. The sealing procedure, in other words, has done little if anything to affect that coverage.

Conclusion

This Court need not rely on the First Amendment to recognize the public's right of access here. If, however, this Court reaches the constitutional issue, *amicus* urges this court to hold that the First Amendment protects the public's right of access to the filed bills of particulars and to meaningfully participate in the sealing process.

Dated this 5th day of May, 2011

Respectfully Submitted,

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Proof of Service

I do hereby certify that a copy of the foregoing document has been mailed via Federal Express, postage prepaid, to the following individuals on this the 5th day of May, 2011.

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