IN THE SUPREME COURT OF PENNSYLVANIA

Misc. No. 106 WM 2018

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

RESPONSE IN OPPOSITION OF CLERGY PETITIONERS TO MEDIA INTERVENORS' APPLICATION TO INTERVENE AND APPLICATION TO OBTAIN PUBLIC ACCESS TO GRAND JURY REPORT AND ASSOCIATED DOCKET SHEETS AND FILINGS

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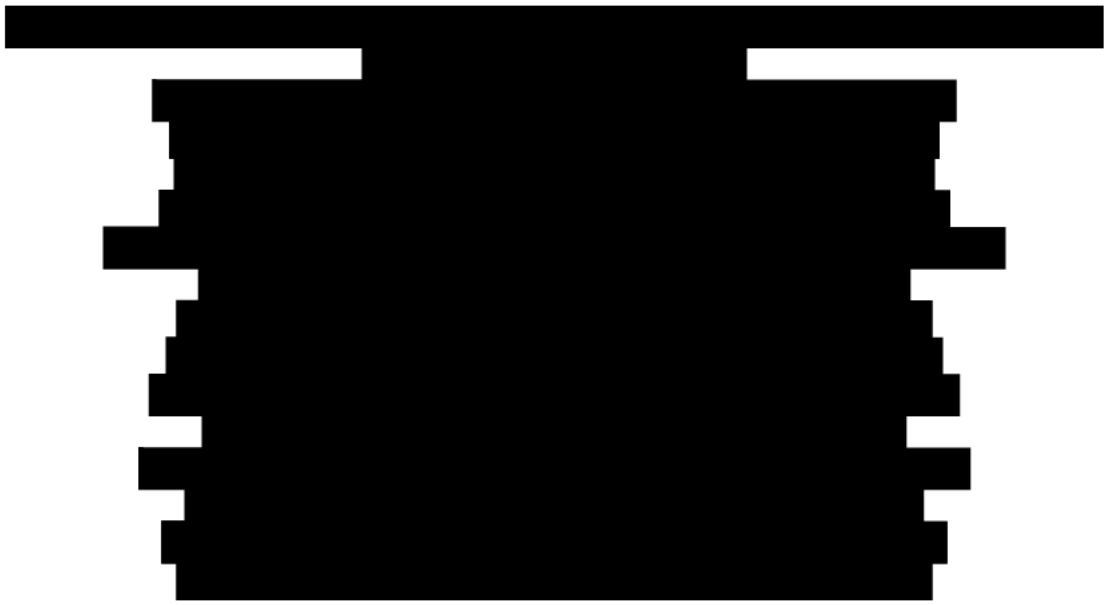

TABLE OF CONTENTS

Page

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY	Supreme Court of Pennsylvania, Western District Misc. Dkt. No. 106 WM 2018

RESPONSE IN OPPOSITION OF CLERGY PETITIONERS TO MEDIA INTERVENORS' APPLICATION TO INTERVENE AND APPLICATION TO OBTAIN PUBLIC ACCESS TO GRAND JURY REPORT AND ASSOCIATED DOCKET SHEETS AND FILINGS

INTRODUCTION

By their Application to Intervene filed June 29, 2018, seven media entities (the "Media Intervenors") seek leave to intervene in pending litigation before this Court on review from the orders of the Fortieth Statewide Investigative Grand Jury Supervising Judge, the Hon. Norman A. Krumenacker, III. The sole purpose of the attempted intervention – as the Media Intervenors' Application to Intervene, and their attached proposed Application for Public Access make clear – is to obtain public access to Report No. 1 of the Fortieth Statewide Investigating Grand Jury (the "Report") as well as any docket sheets and filings associated with challenges to the Report's release. But those materials remain sealed and subject to this Court's Order staying their release for good reason – namely, the fact that this Court has not yet had sufficient opportunity to evaluate the factual inaccuracies and improper assertions in the Report that Petitioners have highlighted in their Petitions for Review. Nor has the Court reviewed Petitioners' various legal claims,

including that the Supervising Judge erred in failing under the Investigating Grand Jury Act to review the allegations against each individual named in the report to ensure that they are supported by a "preponderance of the evidence," and that, in the process, the Supervising Judge violated Petitioners' constitutional rights to due process of law.

There is no basis for the extraordinary relief the Media Intervenors seek. Indeed, the Media Intervenors' requested relief, if granted, would preempt the very legal claims current and former clergy members (collectively, the "Clergy Petitioners") have raised in still pending Petitions for Review before this Court – including their claims that the Report denies them due process; contains clear factual errors (and therefore is not supported by a "preponderance of the evidence"); that the Report's release with such errors would severely damage the reputations of the Clergy Petitioners (including those who did not engage in abuse); and therefore that the Report's release without modification would irreparably harm the Clergy Petitioners' fundamental constitutional reputational interests without due process. The Clergy Petitioners also share the common objective of ensuring that any Report released to the public is one-hundred percent factually accurate and complete by requiring the Supervising Judge to hold the pre-deprivation hearings the Clergy Petitioners have requested. Granting the relief the

Media Intervenors seek will ensure just the opposite, given the notable errors in the Report the Clergy Petitioners have identified.

These arguments – which this "Court recognizes . . . raise constitutional claims and matters of first impression," Per Curiam Slip Op. at 4[1] – led this Court to grant an emergency (but temporary) stay of the Report's release on June 20, 2018, *see* Stay Order. Nothing in the Media Intervenors' submission warrants a rethinking of this Court's well-reasoned Stay Order and Per Curiam opinion, much less reconsideration of the traditional respect accorded grand jury secrecy, or an unprecedented recognition by this Court of the media's right of access to sealed grand jury materials. On the contrary, the Media Intervenors' Application for Intervention and their Application for Public Access do not argue (much less demonstrate) that there is any right of public access to still unpublished grand jury materials, and they cite no case law in Pennsylvania or elsewhere to support such a breathtaking proposition. Accordingly, both of the Media Intervenors' Applications should be denied.[2]

[1] The Supervisory Judge's June 5, 2018 Order attached to Media Intervenors' Exhibit 1 to their Application for Public Access, similarly observed that its "Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion."

[2] By letter from the Office of the Prothonotary dated July 2, 2018, the Court invited "a response to the Application to Intervene/Application for Public Access by 2:00 p.m. on Thursday, July 5, 2018." Ltr. From the Office of the Prothonotary (July 2, 2018) at 1. The letter could be read as inviting a response, preliminarily, only to the Application to Intervene. Notwithstanding the very short turnaround time for this filing and the intervening public holiday, as well as the fact that the Media Intervenors' first procedural hurdle is to achieve intervention,

The Clergy Petitioners

Undersigned counsel represent nearly two dozen current and former clergy members. The facts specific to each individual's statutory, due process, and constitutional challenges to the Report, as well as their challenge to the Supervising Judge's failure to fulfill his duties under the Investigating Grand Jury Act, are not repeated in full here. As the Court is aware from their Petitions for Review, the Clergy Petitioners have highlighted the Report's strikingly inaccurate observations and grossly mischaracterized conclusions, sometimes on the basis of multiple levels of hearsay, and often without the alleged victim having personally made any complaint. For the limited purposes of this submission, a review of facts relating to four priests illustrate well the concerns of the Clergy Petitioners, as discussed briefly below.

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the Clergy Petitioners have not limited their response to opposing intervention. Indeed, because there is no basis for the underlying relief the Media Intervenors seek, and because economy favors a combined response to both the Application to Intervene and to the Application for Public Access attached as Exhibit A to the Application to Intervene, the Clergy Petitioners respond to both in this filing. Because the Media Intervenors' substantive arguments fail on the merits, and the outcome of their Application for Public Access is therefore a foregone conclusion, allowing intervention under these circumstances serves no purpose.

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The gross errors confronting these clergy members are not unique to them; other Clergy Petitioners have similar stories to tell. These errors provide stark illustrations of the kind of inaccuracies and falsities the Clergy Petitioners have found in the mere snippets the OAG has elected to share with them from the much lengthier Report they have not yet seen in its entirety. It is deeply disconcerting that such errors, discovered in just a sampling of the Report's pages, may underrepresent the full scope of errors not yet known to the Clergy Petitioners since they have never received a copy of the entire Report.

In sum, the gross mischaracterizations, oversimplifications, and outright erroneous conclusions in the Report that violate the Investigatory Grand Jury Act and Constitutional due process must be corrected before the Report is released to the public. Releasing the Report in its current flawed form would disserve the victims of abuse as much as it would disserve those wrongly accused and falsely implicated.

I. THE APPLICATION TO INTERVENE SHOULD BE DENIED BECAUSE THE MEDIA INTERVENORS' APPLICATION FOR PUBLIC ACCESS IS WITHOUT MERIT AS A MATTER OF LAW

The Media Intervenors' Application to Intervene relies – ***entirely*** – upon a line of cases addressing public access to open criminal proceedings, not closed

grand jury proceedings. *See* App. To Intervene at 3 ¶ 9. For example, the leading case on which Media Intervenors rely, *Com. v. Upshur*, 924 A.2d 642 (Pa. 2007), involved not sealed grand jury material subject to a stay order of this Court, but rather a "public judicial record or document" – *i.e.*, an audio recording in a homicide case – that had already been played in open court prior to the media entity's request for access and for which a transcript of the recording was already available.[3]

But as the Superior Court has recently concluded, in a matter of first impression in this Commonwealth, there is no right of public access to grand jury materials. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d 349 (Pa. 2018) (Petition for Allowance of Appeal filed April 13, 2018). Indeed, far

[3] Media Intervenors' other citations (each of which, notably, recognize that the right of public access even to public judicial documents – unlike those here – is limited, and may be outweighed by other factors) are similarly unavailing. *See Com. v. Fenstermaker*, 530 A.2d 414, 420 (Pa. 1987) (concluding that arrest warrants and affidavits are public judicial records after execution of the warrants if they have not been sealed); *PG Pub. Co. v. Com. By & Through Dist. Atty. of Erie Cty., Pa.*, 614 A.2d 1106, 1108-10 (Pa. 1992) (concluding, in dicta, that search warrants are public judicial documents after they are filed with the court and are not under seal, but remanding for factual findings); *Com. v. Long*, 922 A.2d 892, 894 (Pa. 2007) (permitting limited right of access to names of jurors empaneled in jury trial); *see also In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d 349, 358 (Pa. 2018) ("As the law discussed above makes clear, grand jury proceedings are unlike the proceedings at issue in *Fenstermaker*, *PG Publishing*, or *Upshur* to which a constitutional presumption of openness attaches.").

Reliance upon *Capital Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984) is even more unhelpful to the Media Intervenors. That opinion resulted in this Court's reinstatement of an earlier decision ***declining*** to issue a writ of prohibition at the request of media entities, which, if granted, would have prohibited the trial court's discretionary but restrictive orders in a highly publicized trial. That unfavorable outcome for the unsuccessful media petitioners is of no value to Media Intervenors here, and like the other authority cited above, says nothing at all about their unusual effort to obtain access to grand jury material.

more instructive under our facts than the authority the Media Intervenors cite, is the observation of the U.S. Supreme Court (in a case, ironically, that *Upshur* cites), that "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. ***A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'"*** *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8-9 (1986) (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)) (emphasis added).

Thus, the Media Intervenors' authority relating to open criminal proceedings is inapplicable to grand jury proceedings, which are subject to familiar and quite different secrecy concerns. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 355-56 ("Hence, while the cases discussed above were based upon a presumption of access flowing from the historical tradition and constitutional requirements of open courts and public trials, the opposite is true of grand jury proceedings."). Moreover, Pennsylvania is not unique in its recognition of this important distinction. Indeed, as the Superior Court recently observed in declining to grant media access to grand jury materials, "[g]iven this stark difference between grand jury proceedings on one hand, and criminal trials at their various stages on the other, it is unsurprising that courts in other jurisdictions that

have considered requests for public access to documents related to grand jury proceedings have held that denial of access was appropriate." *Id.* at 356.

As discussed below, the Media Intervenors' proposed Application for Public Access fails to advance any argument that would entitle them to access still unpublished grand jury material that remains under seal and subject to this Court's Stay Order.[4] They do not argue, for example, that the Media Intervenors have either a common law right of access to the grand jury material, or a First Amendment right of access to this material. But even if the Media Intervenors had raised such arguments, they would have no merit under the particular facts here for the reasons set forth below.

A. The Media Intervenors Have No Common Law Right Of Access To Materials That Are Not "Public Judicial Documents"

A common law right of access applies to public judicial documents, but "not all writings connected with judicial proceedings constitute public judicial documents." *Fenstermaker*, 530 A.2d at 418. The categories of such documents that Pennsylvania courts have recognized to date are limited. *See, e.g.*,

[4] The Media Intervenors' failure to cite supportive case law is unsurprising, as there is no precedent for any Pennsylvania court's granting of public access to grand jury materials. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d 349, 351-52 (Pa. Super. Ct. 2018) ("Neither WPXI nor the Commonwealth cites any Pennsylvania decision addressing the public's right (or lack thereof) to access or copy grand jury documents or search warrant documents issued in connection with a grand jury investigation. Nor have we found any."). The Third Circuit has held, however, that there is no right of access to grand jury materials even in redacted form: "there is no presumptive First Amendment or common law right of access to them if secret grand jury material would be disclosed by that access." *United States v. Smith*, 123 F.3d 140, 144 (3d Cir. 1997) (Becker, J.).

Fenstermaker, 530 A.2d at 420 (arrest warrants); *PG Pub. Co.*, 614 A.2d at 1108-10 (search warrants); *Long*, 922 A.2d at 894 (trial juror names); *Upshur*, 924 A.2d at 653 (preliminary hearing audio recording). And even in those instances, the courts recognizing the right of access have noted that the right is qualified and the presumption of openness is rebuttable by other competing considerations. *See Fenstermaker*, 530 A.2d at 420 ("Where the presumption of openness attached to a public judicial document is outweighed by circumstances warranting closure of the document to public inspection, access to the document may be denied.").

The test for determining whether matter constitutes "public judicial documents" is whether the document (1) is filed with a court and thereby made part of the public record, and (2) whether the document informs judicial decisionmaking. *Id.* at 508-10.

Here, the Supervisory Judge has not yet filed the Report with the Court of Common Pleas, pending (1) his own review of any responses Clergy Petitioners may have submitted in response to the Report; (2) the Supervisory Judge's granting of the Clergy Petitioners' request for immediate appeal by Order dated June 5, 2018 (or similar orders adopting the June 5 Order); (3) this Court's Stay Order; and (4) this Court's review of the Clergy Petitioners' pending Petitions for Review. *See* 42 Pa. C.S. § 4552(b) ("The judge to whom such report is submitted shall examine it and the record of the investigating grand jury and, except as

otherwise provided in this section, shall issue an order accepting and ***filing such report as a public record with the court of common pleas*** established for or embracing the county or counties which are the subject of such report only if the report is based upon facts received in the course of an investigation authorized by this subchapter and is supported by the preponderance of the evidence.") (emphasis added).

Clergy Petitioners' Petitions for Review seek review of precisely those issues that make filing the Report at this time impossible, including – given the factual inaccuracies in the Report – the lack of evidence to support its acceptance and filing. Furthermore, because the Supervisory Judge may decide – ***in his discretion*** – to include the Clergy Petitioners' responses to the Report as an attachment to the Report, the Report is not yet final. *See* 42 Pa. C.S. § 4552(e) ("The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b)."). Thus, the Report cannot be and has not yet been publicly filed. And because the Report is not yet filed or publicly accessible – indeed, it has not yet been reviewed in its entirety by the Clergy Petitioners themselves – it is not a public document.

Finally, even if the Media Intervenors had asserted a common law right of access, and even if they in fact had such a right, that would not end the issue. As

noted below, the trial court would still be required to balance the competing interests asserted. *See infra*, Part II.

B. The Media Intervenors Have No First Amendment Right Of Access To Grand Jury Materials That Are Traditionally Treated As Secret For Well-Founded Reasons

Even where no common law right of access exists, the First Amendment has been applied to permit access to judicial proceedings under appropriate circumstances – specifically, where the two requirements of "experience and logic" are satisfied. *See, e.g.*, *Long*, 922 A.2d at 897-98, 901 (finding no common law right to access trial juror names or addresses, but concluding that a qualified First Amendment right exists to access trial juror names). The "experience and logic" test requires a court to consider (1) in light of historical practice and experience, whether there exists a "tradition of accessibility" – *i.e.*, "whether the place and process have historically been open to the press and general public"; and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co.*, 478 U.S. at 8-9.

In addition, "even when a right of access attaches, it is not absolute." *Id.* at 9. Indeed, '"[t]he presumption may be overcome," but "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."' *Id.*

Applying the *Press-Enterprise* test here yields a self-evident conclusion: neither experience nor logic support a constitutional right of public access to sealed grand jury materials. ***First***, as for historical experience, there is clearly no "tradition of accessibility" to grand jury materials of the kind *Press-Enterprise* contemplates. "Simply put, there is not, nor has there ever been, any public access to or oversight of grand jury proceedings such that a presumption of openness attaches to the documents to which [media] sought access." *In re 2014 Allegheny County Investigating Grand Jury*, 181 A.3d 349, 358 (Pa. Super. Ct. 2018). Indeed, "[i]n Pennsylvania, grand jury proceedings have traditionally been conducted in secrecy, and for a salutary reason. The secrecy of grand jury proceedings is 'indispensable to the effective functioning of a grand jury.'" *In re Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d 491, 502 (Pa. 2011). And that is not the only reason for grand jury secrecy. Of particular relevance here, grand jury secrecy protects those, like the Clergy Petitioners, whose reputations may be unjustly harmed, including the innocent wrongly accused. *See In re Investigating Grand Jury of Philadelphia Cty.*, 437 A.2d 1128, 1130 (Pa. 1981) (grand jury secrecy is designed, in part, "to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt"); *see also In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 356 ("[B]y

preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.").[5]

Second, as for logic – or, "whether public access plays a significant positive role in the functioning of the particular process in question" – the answer is the same. Public access not only does not play a significant positive role in the functioning of investigative grand juries, such access, particularly if premature, can thwart the grand jury's function and undermine important interests that secrecy is designed to serve. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 357 ("[P]ublic access to grand jury proceedings would hinder, rather than further, the efficient functioning of the proceedings.").

Finally, as is the case with a common law right of access, a constitutional right of access is subject to a balancing of competing interests. *See infra*, Part II.

C. The Media Intervenors' Arguments Lack Merit

1. The Media Intervenors incorrectly assume the validity of the Supervising Judge's conclusion that the Report was supported by a preponderance of the evidence, and that permitting Clergy Petitioners to submit a response sufficiently protected their constitutional rights

As noted above, the Clergy Petitioners have argued in their Petitions for Review that the Supervising Judge's acceptance of the Report, purportedly on the basis of his conclusion that the Report supported by a "preponderance of the

[5] The need for secrecy is not eliminated by virtue of the grand jury's completion of its function. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 356; *Smith*, 123 F.3d at 148.

evidence" was clearly erroneous – both as a matter of law, and as a matter of fact. The examples of [redacted] discussed above illustrate the grand jury's errors and the Supervising Judge's failure to conduct the statutorily required examination of the Report to satisfy the "preponderance of the evidence" threshold. *See* 42 Pa. C.S. § 4552(b).

Glaring errors of the magnitude described above should surprise no one, because they are the inevitable product of a process that denied the Clergy Petitioners due process; a right essential to any investigatory body's truth-seeking function. Such error should concern every Pennsylvanian, even if not the OAG.

The Media Intervenors also incorrectly assume that the Clergy Petitioners have had a full and unfettered opportunity to review the Report.[6] *See* App. For Public Access at 5 ¶ 6 ("The supervising judge appears . . . to have provided all of the unknown petitioners with the opportunity to review Report No. 1 and to submit a written response to be attached to Report No. 1 itself."). That is not true. In fact, the Clergy Petitioners have received only sections of the Report the OAG has seen fit – in ***its*** discretion – to share with the Clergy Petitioners and, in many instances,

[6] The authority the Media Intervenors cite for the proposition that criminal defendants have no opportunity to challenge search warrants, arrest warrants, or grand jury presentments – and, therefore, that the Clergy Petitioners should be grateful for the meager scraps they have received – is inapposite. *See* App. For Public Access at 6 (arguing, on the basis of these examples, that the Clergy Petitioners have received more "process" than is usual). In each of those scenarios, the targeted party (*i.e.*, a criminal defendant), unlike the Clergy Petitioners, eventually has a full and complete opportunity to challenge the accusations against him and to have his day in court.

only received those excerpts after challenging the previous provision by the OAG of even more limited excerpts. Even now, in light of the haphazard procedure the OAG used to disseminate this material, it is entirely unclear whether the clergy Petitioners have in fact received all relevant pages of the Report that reference them.

Finally, the statute permits the Supervising Judge to publish the Clergy Petitioners' responses at his discretion. *See* 42 Pa. C.S. § 4552(e). Thus, there remains no guarantee that all the responses will be published, or, if they are published, that they will be published in the form they were submitted.[7]

2. Releasing a redacted report that Petitioners have not yet themselves had the opportunity to review will not sufficiently protect their constitutional rights

The Media Intervenors' suggestion that this Court release a redacted version of a Report the Clergy Petitioners have not themselves even had an opportunity to review in full offers no assurance that the redacted materials will sufficiently protect the Clergy Petitioners' constitutional rights. Furthermore, given the Clergy Petitioners' lack of opportunity to review the full Report, the Media Intervenors' mere supposition that "it is ***likely*** that only some of Report No. 1 – and ***perhaps*** just a very small portion of it – contains material that identifies any of the unknown

[7] Although the Supervising Judge has indicated his intention to attach Responses that have been filed, while also suggesting to counsel that they should not be unduly long, without making clear what length limitations the Supervising Judge will apply in light of the statute's silence on this point.

petitioners" cannot be verified. App. For Public Access at 7 ¶ 9. The Clergy Petitioners cannot rely upon unverified assumptions to ensure their fundamental reputational interests are protected.

Furthermore, in light of the constitutional challenges the Clergy Petitioners have raised, there remains a possibility that this Court will determine that the Report was improperly accepted by the Supervising Judge and therefore not appropriate for public dissemination in any form. Media Intervenors should await this Court's decision on the merits, which may foreclose their request for even a redacted version of the Report.

3. The Media Intervenors offer no persuasive reason to unseal the docket and filings this Court has seen fit to seal for now

The sole reason the Media Intervenors offer for their demand that this Court immediately unseal the docket and filings in this matter is that doing so would purportedly be consistent with this Court's practice in other matters. Not so. As reflected in the very docket sheets the Media Intervenors have attached to their filing, the cases they reference are distinguishable.

First, it is unclear – and the Media Intervenors fail to show – whether the dockets and filings they reference were unsealed only at the close of the case. *See, e.g.*, Intervenors' App. For Public Access, Ex. 5 at 1 (reflecting closed status); *id.* at 7 (ordering unsealing only upon supervising judge's request at close of case); *see also* Ex. 6 at 1 (reflecting closed status). Furthermore, even if the dockets had

been unsealed from the outset of the case, the dockets do not reflect whether the parties sought – as the Clergy Petitioners have done here diligently – to keep the dockets sealed.

Second, some of the docket sheets the Media Intervenors reference do not identify individuals, and therefore would not have posed the same risk of reputational harm that exists here, where public access to dockets that reflect the initials of Clergy Petitioners would permit the Media Intervenors to identify them in short order, thereby thwarting the very Constitutionally protected reputational interest the Clergy Petitioners seek to protect. *See* Intervenors' App. For Public Access, Ex. 4.[8]

Third, one docket reflects this Court's declination to permit sealed filings where the subject matter – unlike here – was already in the public domain. *See* Intervenors' App. For Public Access, Ex. 6 at 6.

Finally, even if the docket and filings reflected on the docket in this case could be redacted in order to protect the reputational interests that Clergy Petitioners have asserted, the costs of doing so would outweigh any minimal

[8] The Clergy Petitioners' concerns are heightened by the Attorney General's publicly announced intention to single out those Clergy Petitioners who have dared to assert their constitutional rights in this matter. Specifically, the Attorney General has stated that "[t]he people of Pennsylvania have a right to see the report, ***know who is attempting to block its release and why***, and to hear the voices of the victims of sexual abuse within the Church." *See* Press Release, "Attorney General Josh Shapiro Will Take Action to Make Grand Jury Report Public," Office of the Pennsylvania Attorney General (June 29, 2018), *available at* https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-will-take-action-to-make-grand-jury-report-public/ (last visited July 4, 2018).

benefit the Media Intervenors could hope to gain from the resulting disclosure. In sum, because this Court has good reason to maintain the sealed docket, and inapposite examples from other contexts do not counsel otherwise, and because redacting the docket to a degree sufficient to protect Clergy Petitioners' interests would impose administrative burdens without offering any value to Media Intervenors, the Court should decline to unseal the docket and filings in this case.

II. EVEN IF THE MEDIA INTERVENORS' APPLICATION FOR PUBLIC ACCESS HAD MERIT (AND IT DOES NOT), THE APPLICATION TO INTERVENE SHOULD STILL BE DENIED AS UNRIPE FOR THIS COURT'S REVIEW

Even if this Court did not have ample basis for denying intervention as a matter of law, intervention would still be inappropriate on this procedural posture. This is because, as noted above, even if the Media Intervenors had made an argument for common law or constitutional right of access (which they have not), this Court could not review the argument without a sufficient factual record established before a trial court balancing the various parties' competing public and private interests in secrecy, reputational harm, and public access. *See In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 359 n.5 ("Had we reached the opposite conclusion on the threshold legal issue, we would have been required to remand the case for the trial court to disclose its reasoning."); *see also Upshur*, 924 A.2d at 646 ("As the [Court of Common Pleas] did not develop its reasoning with regard to the latter issue . . . we remanded the case for preparation of an

opinion specifying the rationale, together with any necessary factual findings, supporting the discretionary component of its ruling."); *PG Pub. Co.*, 614 A.2d at 1110 (affirming Superior Court's remand because "[w]ithout the benefit of findings of fact, the Superior Court was unable to conduct a meaningful appellate review"); *Capital Cities Media, Inc.*, 483 A.2d at 1344 (noting that media entities should have first sought relief before trial court "in accordance with our well-established and strongly held view that it is essential to meaningful judicial review that objections should be addressed to the court of first instance to permit that court to evaluate such claims and to have the opportunity to correct its own errors").

Absent a developed record below, this Court cannot exercise meaningful appellate review of a balancing of interests yet to be undertaken. Indeed, as the Superior Court has instructed, "[f]or the sake of judicial economy," when a party asserts a common law or constitutional right of access to grand jury materials, "a trial court faced with such concerns should detail its findings and rationale for this Court and then seal the opinion." *In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d at 359 at n.5. Absent such findings – to say nothing of the absence of an argument that a common law or constitutional right of access exists in the first place – the Media Intervenors' Application for Intervention is not ripe for this Court's review.

And, in any event, given that granting the Media Intervenors' requested relief would mean *de facto* denial of the underlying Petitions for Review – because it would result in the publication of an inaccurate and incomplete Report that would irreparably harm the Clergy Petitioners' fundamental and constitutionally protected reputational interests – a balancing of the relevant interests would require denial of the Media Intervenors' Applications.

CONCLUSION

To overcome the weight of history and precedent that cuts so strongly against them, the Media Intervenors would have had to marshal compelling authority of their own. That they have found none strongly supports the denial of their Applications at this time.

Accordingly, for the reasons set forth above, the Court should deny the Media Intervenors' Application to Intervene and Application for Public Access.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE:	:	Misc. No. 106 WM 2018
THE FORTIETH STATEWIDE INVESTIGATING GRAND JURY	:	

ORDER

AND NOW, this _____ day of _____, 2018, it is hereby ORDERED that the Media Intervenors' Application to Intervene and Application to Obtain Public Access to Grand Jury Report and Associated Docket Sheets and Filings dated July 2, 2018 is **DENIED.**

BY THE COURT:

_____

J.

CERTIFICATE OF SERVICE

I, Justin C. Danilewitz, Esquire, hereby certify that a copy of the foregoing Response in Opposition of Clergy Petitioners to Media Intervenors' Application to Intervene and Application for Public Access was served on July 5, 2018 upon the following:

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Dated: July 5, 2018

By: ***/s/ Justin C. Danilewitz***
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CERTIFICATE OF COMPLIANCE

I, Justin C. Danilewitz, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

In addition, I certify that this filing complies with the provisions of Pa.R.A.P. 2135. Though this filing exceeds 30 pages, the word count remains under 30,000 words.

Dated: July 5, 2018

By: ***/s/ Justin C. Danilewitz***

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