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IN THE SUPREME COURT OF PENNSYLVANIA

[redacted]

IN RE: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

MERITS BRIEF SETTING FORTH COMMON LEGAL ARGUMENTS OF CLERGY PETITIONERS IN OPPOSITION TO PREMATURE RELEASE OF UNREDACTED GRAND JURY REPORT NO. 1

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STATEMENT OF JURISDICTION

By per curiam Orders dated July 6, 2018, this Court set an expedited schedule for briefing the merits of issues Petitioners raised in their Petitions for Review. This Court has exclusive jurisdiction over grand jury matters originating from Courts of Common Pleas, including each of the Orders in Question (described, *infra*). *See* 42 Pa. C.S. § 722(5).

The Orders in Question are final orders under Pennsylvania Rule of Appellate Procedure 341(b)(1). Each of the Orders in Question disposes of all claims of all Petitioners. The Orders in Question have fully adjudicated Petitioners' claims. As such, the Orders in Question are final and ripe for review. *See In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929, 935 (Pa. 2007).

Alternatively, the Court has jurisdiction under Pennsylvania Rule of Appellate Procedure 3331. Rule 3331 recognizes two kinds of orders pertaining to grand juries that are subject to this Court's review. First, the Court may review "[a]n order entered in connection with the supervision, administration or operation of an investigating grand jury or otherwise directly affecting an investigating grand jury or any investigation conducted by it." Pa. R.A.P. 3331(a)(3). Second, the Court may review an order involving a grand jury that "contains a statement by the

lower court pursuant to 42 Pa. C.S. § 702(b) (interlocutory appeals by permission)." Pa. R.A.P. 3331(a)(5).

This Court has jurisdiction to review the June 5, 2018 Opinion and Order (and those subsequent orders predicated on the June 5 Order) because it is an interlocutory order appealable by permission under Pa. R.A.P. 3331(a)(5). Indeed, the Supervising Judge included the referenced language from 42 Pa. C.S. § 702(b) in the Opinion and Order, stating: "the Court is of the opinion this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Opinion and Order may materially advance the ultimate termination of this matter." *See* Exhibit A (June 5, 2018 Opinion and Order) at 11.

Alternatively, this Court also has jurisdiction to review the Orders in Question because they are collateral orders under Pa. R.A.P. 313(b), which are subject to immediate appeal. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d 204, 209 (Pa. 2014) (recognizing that in the context of grand jury proceedings an otherwise interlocutory order may be reviewable if it satisfies the requirements of the collateral order doctrine).

ORDERS IN QUESTION

The Orders in Question are those of the Supervising Judge, below, including: (1) the June 5, 2018 Order and Opinion denying Petitioners' motions for a pre-deprivation hearing, *see* Exhibit A; (2) the May 31, 2018 Order (without opinion) denying motions for a protective order, *see* Exhibit B; (3) the May 22, 2018 Order (without opinion) accepting the Report, *see* Exhibit C; and (4) related Orders of the Supervising Judge predicated upon the foregoing Orders.

Additionally, this brief is submitted in response to this Court's per curiam opinions dated July 6, 2018 ("July 6 Orders"), setting an expedited schedule for briefing on the merits of those issues raised in Petitioners' various Petitioners for Review in light of the failure of the Pennsylvania Office of the Attorney General ("OAG") to file timely answers to the Petitioners' Petitioners for Review, or the OAG's indication that it had not fully developed the merits of its counter-argument to the Petitioners' claims.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court's construction of the Investigating Grand Jury Act, 42 Pa. C.S. § 4541 *et seq.*, is plenary. *See In re Thirty-Third Statewide Investigating Grand Jury*, 86 A.3d at 215.

The standard of review this Court applies to pure questions of law involving the Pennsylvania Constitution is *de novo* and its scope of review is plenary. *See* C*ommonwealth v. Shabezz*, 166 A.3d 278, 285 (Pa. 2017).

QUESTIONS PRESENTED

The questions presented – as distilled from the various per curiam orders the Court has issued in certain dockets[1] – can be summarized as follows:

1. Did the Supervising Judge clearly err by failing to exercise his statutory duty to "examine" Grand Jury Report No. 1, and the grand jury record purportedly supporting it, *see* 42 Pa. C.S. § 4552(b), where Petitioners – even without the opportunity to review the Report in its entirety – identified and brought to the attention of the Supervisory Judge clearly material factual errors that the Attorney General does not dispute and which cannot, by definition, support the Report by the statutorily required "preponderance of the evidence" threshold?

   Answer below: The Supervising Judge found the Report was supported by a preponderance of the evidence.

2. Did the Supervising Judge abuse his discretion, and in so doing, violate Petitioners' fundamental reputational interests under Article I, Sections 1 and 11, of the Pennsylvania Constitution, by refusing to correct or redact indisputably incorrect, misleading, and unreliable statements that identify (and implicitly accuse) the Petitioners in the Report by name?

   Answer below: The Supervising Judge concluded that he was without authority to amend, correct, or redact the Report.

3. Did the Supervising Judge abuse his discretion, and in so doing, violate Petitioners' due process rights under the Pennsylvania

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[1] A representative of the Petitioners whose counsel are signatories to this brief, conferred with the Court's Deputy Prothonotary, and understands the Court does not object to the Petitioners' submission of a single brief addressing common legal issues. Although stated in somewhat varying ways, the points of commonality among the per curiam orders are summarized above. To the extent the summary above is broader than questions raised in any Petitioner's Petition for Review, the questions presented above are nonetheless fairly suggested by the record and the Court is able to address them on the basis of the record. *See* Pa. R.A.P. 1513(d)(5) and Official Note.

Constitution, by failing to provide the Petitioners notice and a meaningful opportunity to be heard before accepting the Report and its findings, notwithstanding the errors Petitioners identified?

Answer below: The Supervising Judge concluded that Petitioners were not entitled to a pre-deprivation hearing.

STATEMENT OF THE CASE

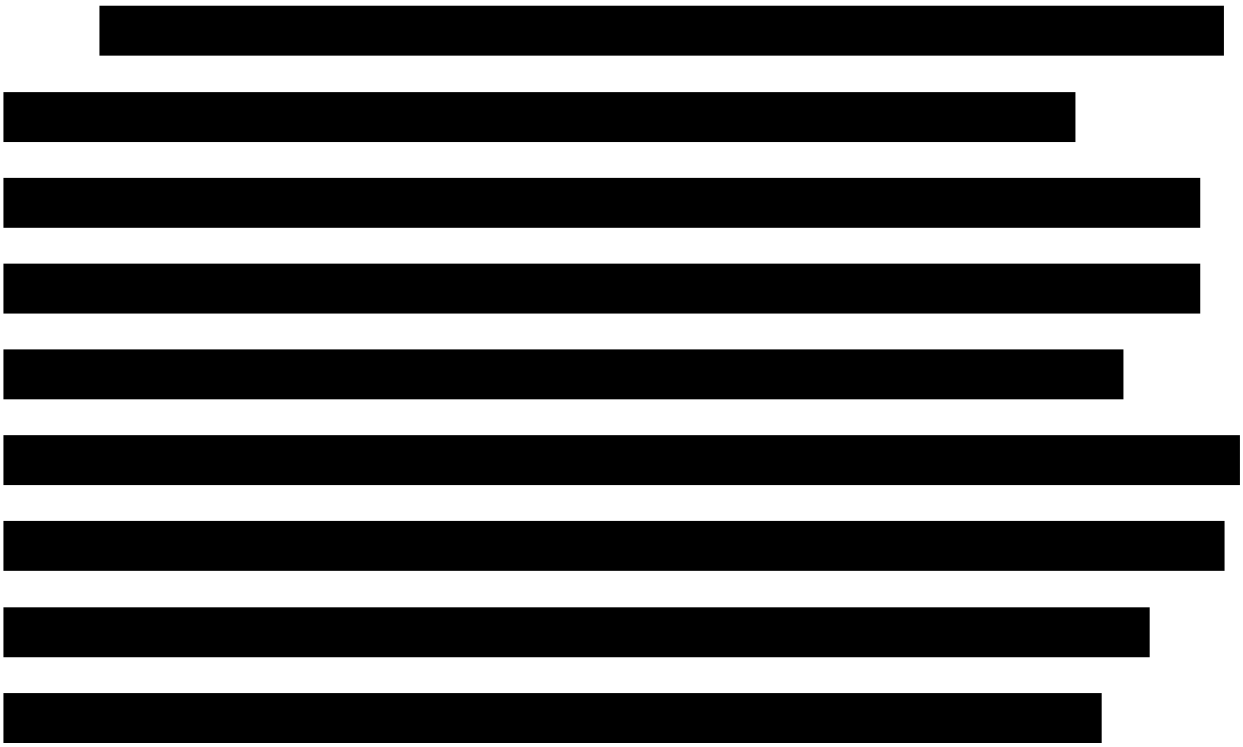
A. The Fortieth Statewide Investigating Grand Jury And Report

The OAG convened the grand jury to investigate alleged child abuse within six dioceses of the Catholic Church in Pennsylvania under the supervision of the Honorable Judge Norman A. Krumenacker III, of the Court of Common Pleas of Cambria County. [redacted]

B. Petitioners Belatedly Learn Of The Existence Of The Report

After it issued the Report, the grand jury disbanded. But because Petitioners were unaware of the scope and details of the Grand Jury's investigation, the Report's existence, or any references to them, Petitioners had no opportunity to challenge any references or characterizations before the Grand Jury's term ended.

To be sure, the excerpts of the Report Petitioners have received do not allege facts establishing that they engaged in child sexual abuse. Nor do they allege facts establishing that they enabled others to engage in such conduct, or failed to safeguard children. But the Report purports to summarize incidents of misconduct that in some instances are untrue. Other aspects of the Report exclude exculpatory evidence that would demonstrate the clear falsity of certain allegations. Because Petitioners learned of these gross mischaracterizations and falsities only after the Report was completed (and, indeed, only after a diocese – not the government – shared relevant source materials with many of them), they had neither an opportunity to appear before the Grand Jury to address these issues, nor to respond at a meaningful time or in any meaningful way to these gross mischaracterizations.



[redacted]

[redacted]

C. Petitioners' Motions Challenging The Report Before The Supervisory Judge, And The Judge's Acceptance Of The Report

Because the Report, if published, would deprive Petitioners of their good reputations without due process, various Petitioners filed various motions under seal, including: [redacted]

[redacted]

[redacted]

D. The OAG's Supplemental Disclosures Reveal The Report's Clear Errors And Mischaracterizations Of Petitioners

Following the May 22 Order, certain Petitioners began receiving disclosures from the OAG. Review of these supplemental materials revealed factual errors and gross mischaracterizations. These errors are described in greater detail in the individual supplemental submissions of Petitioners. Upon learning that the Report contained such inaccurate misrepresentations, certain Petitioners sought a hearing before the Supervising Judge.

E. The Supervising Judge Denies Some Petitioners' Motions For Protective Order, And A Petitioner's' Motions For Pre-Deprivation Hearings

On May 25, 2018, the Supervising Judge held a hearing on certain Petitioners' Motions. [redacted]

[redacted]

On June 5, 2018, the Supervising Judge issued the unsealed Order and Opinion denying certain Petitioners' Motions for a Pre-deprivation Hearing. As the OAG provided other Petitioners their supplemental disclosures of the Report, they – like the certain Petitioners before them – also uncovered additional errors and mischaracterizations. These Petitioners also filed Motions for Pre-deprivation Hearing that the lower Court subsequently denied.

SUMMARY OF ARGUMENT

Report No. 1 (the "Report") of the Fortieth Statewide Investigating Grand Jury is replete with improper and inaccurate characterizations [redacted] And yet the OAG – which is unwilling to correct, redact, or amend the Report in any way – has imbued the Report with the sanctity of holy writ. The irony is not lost on the Petitioners, given their lives' work.

In the typical criminal case, error of this magnitude and scope typically would not make it past the starting gate. That is because prosecutors – mindful of the risk of loss at trial, and endowed with broad discretion in making charging decisions – would be unwilling to seek an indictment on the basis of such flimsy testimony, let alone subject witnesses to the withering cross-examination at trial such evidence would elicit. But this is not a criminal case, much less a typical one, because the Report was issued, not by a grand jury performing the function of issuing a criminal indictment, but by an investigating grand jury. Consequently, the OAG has seen itself wholly unconstrained by the requirements of the Pennsylvania Constitution and due process of law. At least, until now.

Against the backdrop summarized above, the OAG is not only unconcerned by the certain prospect of erroneously and irrevocably damaging the reputations of Petitioners identified in the Report. The OAG has ***insisted*** – in court, and in the press – on the Report's immediate release, without correction or redaction. And more than that, the OAG has heaped public scorn upon Petitioners who have dared to invoke their constitutional rights, knowing full well that grand jury secrecy and the very relief Petitioners seek have prevented the fair response the OAG's tactics have invited.

Furthermore, the OAG maintains that it is constitutionally sufficient for Petitioners to have the "opportunity" to file responses to the Report – even without

having had an opportunity to read the Report in full, and even though such responses will be of mere academic value, because the Supervising Judge and the OAG have refused to alter the Report in any way, notwithstanding the kinds of errors identified above. The Petitioners may respond, in other words, but only to a *fait accompli*.

For the reasons discussed below, the Supervising Judge and OAG are wrong. The Supervising Judge's Orders of June 5, May 31, and May 22, 2018 (and subsequent orders incorporating them) were clearly erroneous because the Supervising Judge: (1) failed to exercise his statutory duty to examine the Report (and the grand jury record purportedly supporting the Report) in order to establish that the Report was supported by a preponderance of the evidence; (2) improperly denied Petitioners' motions for protective orders – without regard for the reputational harm that would inevitably result from an uncorrected and unredacted Report; and (3) denied Petitioners the most basic requirements of due process – *i.e.*, notice, and an opportunity to be heard – before accepting the Report. Furthermore, as argued below, although the OAG places great weight on the Supervising Judge's discretionary decision to permit the Petitioners to respond to the Report in this instance, the OAG's strategic use of the press to thoroughly undermine and malign the Petitioners has severely damaged their responses (which

already afforded them constitutionally insufficient due process) well before their public release.

In sum, this Court should reverse the opinions and orders below and Order the Supervising Judge (or another lower court judge) to: (1) undertake the statutorily required examination of the Report and record that is minimally necessary to establish that its findings as to each Petitioner identified are supported by a preponderance of the evidence with respect to each Petitioner; and (2) prior to the Supervisory Judge's final determination to accept or reject the Report, permit the Petitioners sufficient opportunity to rebut (and change) the Report to avoid unnecessary reputational harm.

ARGUMENT

I. THE SUPERVISING JUDGE FAILED TO EXERCISE THE STATUTORY DUTY TO EXAMINE THE REPORT AND RECORD TO ESTABLISH THE REPORT WAS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

A. The Supervising Judge Failed To Conduct A Sufficiently Thorough Examination Of The Report And Record To Determine Whether The Report Was Supported By A "Preponderance Of The Evidence"

The Investigating Grand Jury Act (the "Act") requires the supervising judge to conduct a sufficiently thorough review of not only the investigating grand jury's report, but also of the record that purportedly supports the Report. The relevant provision of the Act states as follows:

> **(b) Examination by court.** – 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***.

42 Pa. C.S § 4552(b) (emphasis added).

A supervising judge's review of the grand jury ***record***, not just the ***report***, is essential, and, as noted above, is required by statute. Indeed, a supervising judge cannot possibly conduct a sufficiently probative or meaningful review of a report's findings without thoroughly reviewing the record itself. Moreover, the record produced in this case over the course of the grand jury's two-year term – much of

which would have been required to be recorded, by statute, *see* 42 Pa. C.S § 4549(a) – is doubtless voluminous.

[redacted] The Order suggests, by its silence, that the Supervising Judge did not review the grand jury record. Indeed, he likely could not have, given the volume of material the Grand Jury would have amassed in two years of investigation, and the lack of passage of any real amount of time before the Court accepted the Report.

Furthermore, the Order leaves unclear what analysis the Supervising Judge undertook to determine that the Report in its entirely – which is reportedly approximately one thousand pages in length – was supported by a preponderance of the evidence. [redacted]

[redacted]

B. The Errors Petitioners Identified – Without Even Having Had The Opportunity To Review The Entire Report – Prove The Supervising Judge's Failure To "Examine" The Report And Record

In separate filings with the Court, the Petitioners have summarized facts specific to each of them that they have identified in the piecemeal materials the OAG has seen fit – in its exclusive discretion – to share with the Petitioners. None of the Petitioners have had an opportunity to review the Report in its entirety. And yet even in the scraps the OAG has deigned to share with them, the Petitioners have identified gross factual errors, clearly misinterpreted documents, unsupported conclusions, and generally misleading inferences drawn from unreliable sources.

In other words, the facts Petitioners have discovered, from serial disclosures by the OAG only after motions counsel filed, prove that portions of the Report could ***not*** be supported by a preponderance of the evidence. On the contrary, a preponderance of the evidence disproves the Report's factual statements. Just four examples suffice to paint the picture.

[redacted]

[redacted]

[redacted]

The gross errors confronting these Petitioners are not unique to them; others have similar stories to tell. These errors provide stark illustrations of the kind of inaccuracies and falsities the 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

[redacted]

known to the 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 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.

An end product that contains such errors will undoubtedly disappoint the victims who hoped for more. But in some sense this result, though disappointing, should not be surprising. That is because the adversarial system – not a cloistered grand jury – is a far better mechanism for accurate truth finding. *See Commonwealth v. Santiago*, 591 A.2d 1095, 1110 (Pa. Super. Ct. 1991) ("In our system, truth is determined through an essentially adversarial process in which, truth is best discovered by powerful statements on both sides of the question." (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984) (quotations marks, alterations omitted))). "Thus, we have placed reliance in a system in which parties take an active, highly partisan role in unearthing and arguing the significance of relevant evidence from which the decision-maker may relatively passively determine truth." *Id.*

As discussed below, *see infra* Part III, the errors Petitioners discovered (and brought to the attention of both the Supervising Judge and the OAG, to no avail) are the product of their denial of due process. Their inability to persuade "the decision-maker" of the faulty determination of the "truth" bespeaks the failure of the Act to protect important constitutional rights that cannot be safeguarded by the OAG.

C. The Release Of Indisputably Incorrect, Misleading, And Unreliable Statements In The Report Is Contrary To The Plain Language, Purpose, And History of the Act

1. The plain language of the Act conveys a limited purpose – and limited subject matter jurisdiction – to investigate organized crime and public corruption

The Act is codified at 42 Pa. C.S § 4541 *et seq.* As the plain language of the Act makes clear, a statewide or "multicounty" investigating grand jury has "jurisdiction to inquire into ***organized crime*** or ***public corruption*** or both under circumstances wherein more than one county is named in the order convening said investigating grand jury." *Id.* § 4542 (emphasis added); *see also id.* § 4544(a). "Organized crime" and "public corruption" are both defined in the Act. *Id.* § 4542. Neither definition applies here.

Given the limited subject matter jurisdiction of multicounty investigating grand juries, the OAG must specifically justify the need for such a grand jury to investigate either organized crime or public corruption. *Id.* § 4544(a) (noting "the

Attorney General shall state that, in his judgment, the convening of a multicounty investigating grand jury is necessary ***because of organized crime or public corruption or both***") (emphasis added).

Assuming this proper jurisdictional basis, the multicounty investigating grand jury may then issue an "investigating grand jury report." This is defined in the Act as "[a] report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings." *Id.* § 4542. Of course, the "proposing [of] recommendations for legislative, executive, or administrative action in the public interest ***based upon stated findings***," § 4542 (emphasis added), would logically seem to refer to findings from the investigation into organized crime and public corruption. Otherwise, the desire to make such recommendations would create much broader subject matter jurisdiction than the Act permits, in order to investigate a host of social issues having nothing to do with "organized crime" or "public corruption" as defined in the Act.[4]

Given the limited statutory grant of subject matter jurisdiction to multicounty grand juries, like the kind of investigating grand jury at issue here, the

[4] Notably, the State of New York requires that a grand jury report submitted for this particular reason – *i.e.*, for "[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings" – may not be "critical of an identified or identifiable person." *See* N.Y. Crim. Proc. Law § 190.85(1)(c), (2)(b).

OAG is not permitted to use such grand juries as free-wheeling instruments for reform. That is what legislatures are for.

Petitioners can only wonder – not having received or had any opportunity to review the OAG's application and order establishing the grand jury in this case – how and why the OAG expanded the scope of inquiry from organized crime or public corruption (as defined under the Act) into allegations of historic abuse in Catholic dioceses that name individual Petitioners. As has been typical in this case, the OAG's parsimonious and untimely disclosures have fettered Petitioners' ability to discern the precise contours of the arguments and adversaries they are shadow boxing.

What is clear, in any event, is that the Act does not contemplate the proper use of any investigating grand jury – whether for organized crime, public corruption, or otherwise – to defame innocent third parties or to publish erroneous, misleading, unreliable, and scandalous rumors. Such conduct, which violates Petitioners' fundamental constitutional interest in their good reputations, cannot possibly be "in the public interest" because it is illegal.

2. Legislative history reveals particular concern that grand jury investigative reports not give voice to unsupported defamatory statements

When debated in the Commonwealth's House of Representatives, the Act was considered "the center piece" of the legislature's efforts to combat "organized

crime-official corruption." H.R. 162 – Pa. Legis. J. Vol. 1, No. 46, Sess. of 1978, Report of Comm. of Conf. on S.B. No. 1319, at 3739-40 (Pa. 1978) (Statement of Mr. Rhodes); *see also id.* at 3740 (Statement of Mr. Davies) ("I have got to agree . . . on the importance of the bill and the necessity of it in passing it this session to have an instrument by which they can do what they want to do with corruption and the infiltration of crime and those aspects of it."). Of particular note, Representative Rhodes emphasized that the Act "is not a bill designed to discredit people." *Id.* (Statement of Mr. Rhodes).

Unsurprisingly, the legislature's purpose – in a bill clearly designed to address organized crime and public corruption – was plainly not to confer authority upon the OAG to undertake investigations beyond the scope of the limited authority the Act's plain language confers. Still less did the legislature intend that this authority would be used to defame – or, in the words of Mr. Rhodes, "discredit" – individuals.

II. THE SUPERVISING JUDGE'S REFUSAL TO CORRECT OR REDACT ERRORS THAT HAVE NO PROBATIVE VALUE WILL HARM PETITIONERS' REPUTATIONS AND VIOLATE THEIR FUNDAMENTAL CONSTITUTIONAL INTERESTS

As discussed above, and in the separate submissions of the Petitioners, the Report is riddled with clear errors and improper, misleading, and unreliable accusations and conclusions. The OAG does not dispute that the Report in its

current form contains errors. Releasing the Report in this form would therefore harm Petitioners' fundamental reputational interests. Such defamation violates Petitioners' fundamental constitutional interest in their good reputations. *See* Pa. Const. Art. I §§ 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.") and 11 ("[E]very man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . . . Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."); *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 149 (Pa. 1994) (reputation is "an interest that is recognized and protected" by our Constitution). Thus, the OAG's argument elsewhere that grand jury reports do not "change the legal right of [any] person," App. To Lift Stay at 5 ¶ 10, clearly ignores the Pennsylvania Constitution's explicit protection of the fundamental constitutional right of all citizens to their good reputation.

Unfortunately, however, the Supervising Judge refused to countenance a sensible remedy some proposed – *i.e.*, a protective order that would redact non-probative information (*i.e.*, names and other unnecessary identifying references), but that would leave for public consumption the probative aspects of

the Report. [redacted] This was incorrect on several levels.

First, the provisions of the Pennsylvania Constitution that most clearly permit redaction of erroneous and defamatory portions of the Report are those cited above – namely, the provisions protecting the fundamental reputational interests of Pennsylvanians. *See* Pa. Const. Art. I §§ 1, 11. Second, the Act itself logically permits redaction of any material that is not supported by the required "preponderance of the evidence" and, because it is defamatory and unconstitutional, is not "in the public interest." *See* 42 Pa. C.S. §§ 4542, 4552(b). Third, as noted above, the Supervising Judge's conclusory statement that "the findings of [the Report] are supported by the preponderance of the evidence" was devoid of proper analysis or support, and makes doubtful whether the Supervising Judge reviewed the voluminous record allegedly supporting the Report, making it impossible for this Court to exercise meaningful appellate review.

In sum, the Supervising Judge's conclusion is untenable. It cannot possibly be, and is not the law in this Commonwealth, that a Supervising

Judge is powerless to correct manifest error, no matter how serious or how violative of fundamental constitutional protections the errors may be. Indeed, releasing the Report under these circumstances would produce the very predicament some commentators have identified:

> The potential for unfairness is magnified by the absence of satisfactory remedies. If the grand jury's report is unauthorized, it may be expunged from the court's records, but not from the memory of the public. And if a critical report is permissible under state law, ***the accused may have no remedy at all, even if the accusations are demonstrably false***.

Grand Jury Law and Practice § 2:3 (2d ed.) (emphasis added).

Thankfully, Petitioners in this Commonwealth are not wholly without remedy. Their remedy lies in this Court's authority to reverse the improper Orders and opinion below.

III. THE ORDERS BELOW DEPRIVED PETITIONERS OF MINIMALLY SUFFICIENT DUE PROCESS SAFEGUARDS

While acknowledging that the right to reputation is fundamental and constitutionally protected in Pennsylvania, the Supervising Judge concluded that the only "process" due Petitioners was the *ex post* opportunity to respond to a *fait accompli*: (1) notice that language in the Report was critical of them; and (2) an opportunity to file a response that would be included in some fashion in the Report released to the public (but which would have no chance of successfully curing errors in the Report). *See* Exhibit A (June 5, 2018 Order and Opinion) at 1. This

token opportunity to respond in a way that has no possibility of changing the outcome is not due process worth the name.

A. Applicable Law

Reputation is a fundamental interest that cannot be harmed without due process under Pennsylvania law. *See R. v. Com., Dept. of Public Welfare*, 636 A.2d at 149 ("[I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to 'reputation,' providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection."); *see also D.C. v. Dep't of Human Servs.*, 150 A.3d 558, 566 (Pa. Commw. Ct. 2016) ("In Pennsylvania, therefore, reputational harm alone is an affront to one's constitutional rights."). Here, there is no dispute, as the Supervising Judge concluded, "that there is a fundamental interest affected by naming a nonindicted person in a grand jury report." Exhibit A (June 5, 2018 Order and Opinion) at 2. The only open question, given this fundamental interest, is what process is due an individual named in such a report – a question the Court recognized as "one of first impression in the Commonwealth." Exhibit A (June 5, 2018 Order and Opinion) at 2.

A three-part test, adopted by this Court, requires "flexible" balancing of three factors when determining whether due process requires procedural safeguards before the state deprives a citizen of a fundamental right:

1. the private interest affected by the governmental action;
2. the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and
3. the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state.

Bundy v. Wetzel, 184 A.3d 551, 557 (Pa. 2018) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

B. The "Process" Afforded Petitioners Was Constitutionally Deficient

Each of the factors this Court adopted in *Bundy* from the U.S. Supreme Court's *Matthews* decision strongly favor Petitioners' due process arguments.

1. The private interests Petitioners maintain in their reputations could not be weightier

The private interest affected by the governmental action in this case is a fundamental right under the Pennsylvania Constitution – *i.e.*, the right to one's good reputation. *See* Pa. Const. Art. I §§ 1, 11. This is a particularly strong interest here, given Petitioners are challenging inflammatory accusations (that are erroneous, improper, and misleading) that they engaged in, enabled, or were indifferent to reports of child sexual abuse. The Supervising Judge acknowledged

the constitutional import of Petitioners' "fundamental" reputational interest. *See* Exhibit A (June 5, 2018 Order and Opinion) at 5.

Furthermore, whether the government's branding of Petitioners is the result of an "investigative" or "adjudicative" process, as discussed by the Supervising Judge, is of no consequence. Either way, the unfair damage to their reputations will be the same.

2. Petitioners have proven the risk of erroneous deprivation and the value of additional or substitute safeguards that would have averted the Report's errors

The risk of erroneous deprivation absent due process protections. The risk of an erroneous deprivation of the Petitioners' fundamental rights to their good reputations under the procedures the Supervising Judge employed is significant. This Court need look no further than the grievous perversion of the truth in these cases. Indeed, Petitioners proved not only a "risk" of erroneous deprivation of due process, but clear-cut errors in fact that will harm Petitioners' reputational interests. As discussed above (and in each of the supplemental filings of Petitioners), Petitioners have proved that the grand jury unquestionably erred. These errors were not harmless, for they cut to the very core of the Grand Jury's project: accurately identifying abuse.

While the Supervising Judge cites his role as a judicial overseer who must determine whether the Report is supported by a preponderance of the evidence, this

helps little those who are falsely accused in the Report because: (1) most of them had no opportunity to testify before the Grand Jury, and none had the opportunity for a hearing before the Supervising Judge; (2) the prosecutor had no obligation to introduce exculpatory evidence to the Grand Jury; and (3) there was no obligation on the part of the prosecutor to make the Supervising Judge aware of the exculpatory or mitigating evidence before the Supervising Judge determined that he would accept the Report. This perfect storm of insufficient due process protections produced a regrettable, although predictable result: an erroneous Report.

Indeed, it is hard to imagine more serious mistakes in this context, or facts that so clearly call into question the validity of the Report when the preponderance of the evidence clearly ***undermines*** rather than supports the Report's statements relating to Petitioners. Moreover, the Supervising Judge's reference to the number of witnesses and documents the Grand Jury considered does not, without more, establish the preponderance of the evidence. That standard of proof is concerned not only with the quantity, but with the quality of evidence. And the quality of evidence in this case – in the illustrative examples cited above – was poor.

The value of additional or substitute due process safeguards. *Bundy* and *Matthew* also counsel that this Court consider not just the risk of error from a failure to provide sufficient due process protections, but whether the value of

additional or substitute safeguards could have averted the error. This factor also weighs in Petitioners' favor.

Our legal system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). This case is an illustration, *par excellence*, of *Polk*'s maxim, given the lack of meaningful participation by the Petitioners, resulting in a Report that misrepresents the truth of their actions in significant and highly prejudicial ways.

Indeed, if Petitioners simply had a meaningful opportunity to participate before the Grand Jury completed its work in order to present a more accurate rendering of the diocesan source materials, Petitioners could have demonstrated the Grand Jury's error before the Grand Jury finalized its Report and before the Supervising Judge accepted it.[5]

Furthermore, the Supervising Judge could have (and should have) still cured any errors in the Report by conducting pre-deprivation evidentiary hearings. Nothing in the Act prohibits such a procedure. On the contrary, such hearings

[5] Such *ex ante* protective mechanisms – despite the OAG's protestations that they are unfeasible – are not impossible, as the experience of other jurisdictions reveals. *See, e.g.*, N.Y. Crim. Proc. Law § 190.85(2)(b) (requiring, for certain kinds of grand jury reports, that court ensure, when grand jury report is submitted to the court, "that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report"); *see also id.* § 190.85(5) (in the case of particular grand jury reports, and under certain circumstances, a court not satisfied that the report complies with the statute "may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report"); 18 U.S.C. § 3333(e) (same).

would have enabled the Supervising Judge to fulfill his statutory mandate to ensure that the Report was "in the public interest" and supported by a preponderance of the evidence. Moreover, it would be consistent with this Court's recognition of the power of a supervising judge to conduct an evidentiary hearing (even though not expressly empowered to do so in the Act) when the grand jury begins to exercise its power over an individual. *See In re Investigating Grand Jury of Philadelphia County (Appeal of Washington)*, 415 A.2d 17, 21-22 (Pa. 1980) (authorizing the Supervising Judge to "hear evidence from the challenger which is relevant to the validity of the statements or allegations" in the application to empanel a grand jury or the notice of submission of investigation).

In fact, if the General Assembly intended for the Supervising Judge to be powerless to stop the publication of a grand jury report containing undisputed falsities – which is the inescapable inference from the OAG's position – this would violate the Pennsylvania Constitution and this Court's description of the important role of the Supervising Judge. *See In re Dauphin County Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011) ("The very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings."); *see also In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006) ("We are cognizant that the substantial powers exercised by investigating grand juries, as well as the secrecy in which the

proceedings are conducted, yields the potential for abuses. The safeguards against such abuses are reflected in the statutory scheme of regulation, which recognizes the essential role of the judiciary in supervising grand jury functions. We believe that adherence to the statutory framework is adequate to assure regularity in the proceedings."). Of course, it could not possibly have been the Legislature's intent for a supervising judge to have no discretion to subtract a false allegation from a grand jury report. This authority – along with the authority to redact (or otherwise reject) non-conforming aspects of a grand jury report – is presumed in the statutory mandate requiring a supervising judge to conduct a preponderance of the evidence and public interest analysis. The Supervisory Judge's refusal to exercise this authority in this case frustrated the Legislature's purpose.

The Commonwealth Court has required due process safeguards of the kind Petitioners seek in matters concerning a public registry where individuals have been implicated in child abuse. *See, e.g., J.P. v. Dep't of Human Servs.*, 170 A.3d 575, 581-84 (Pa. Commw. Ct. 2017) (placement of teacher's name on child abuse registry implicated protected reputational interest, and "failure to provide a hearing resulted in a violation of Petitioner's right to due process"); *see also G.V. v. Dep't of Pub. Welfare*, 91 A.3d 667, 676 (Pa. 2014) (Saylor, J., concurring) ("[T]he inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question.").

Finally, even though federal courts afford significantly less protection to reputation under the federal constitution than this Court does under the Pennsylvania Constitution, federal courts have respected the reputational rights of individuals identified in grand jury reports and indictments – even those, unlike Petitioners, who have criminal liability as unindicted coconspirators. In considering this matter of first impression, the Court may benefit from the considered views of these federal courts. *See, e.g. United States v. Smith*, 776 F.2d 1104, 1115 (3d Cir. 1985) (affirming trial court's grant of protective order redacting names of unindicted coconspirators in grand jury indictment because "disclosure would almost certainly result in extremely serious, irreparable, and unfair prejudice to those" named but not charged); *United States v. Briggs*, 514 F.2d 794, 806 (5th Cir. 1975) (in naming unindicted coconspirators the "grand jury acted beyond its historically authorized role, and we are shown no substantial interest served by its doing so"; "[t]he scope of due process afforded them was not sufficient"); *In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F. Supp. 875, 877 (N.D. Iowa 1990) ("The interest of the named individuals in not having their names published in a non-indicting Grand Jury report outweighs the public's interest in knowing the identity of the specific individuals. Therefore, the information contained in category one shall be redacted so that the individuals cannot be identified by name.").

3. Affording Petitioners constitutionally sufficient due process could have been achieved with minimal administrative burden and while still achieving relevant state interests

The Supervising Judge rejected Petitioners' due process argument allegedly because of the "administrative burden" that affording minimally sufficient due process protections would visit upon the Commonwealth. But pre-deprivation evidentiary hearings need not wreak havoc during an investigating grand jury's proceedings, particularly because such hearings, as in this case, can follow the termination of the grand jury's investigation.[6] The Petitioners simply seek a pre-deprivation evidentiary hearing before the Supervising Judge at which time the evidentiary sufficiency of the allegations in the Report can be determined by the Court prior to publication. Thus, the argument of administrative burden is flawed for several reasons.

First, given the *Bundy-Matthew* balancing test, the violation of a fundamental right cannot be justified on the basis of administrative burdens. It cannot be that no further due process is required when (a) a matter of the greatest constitutional import (b) is handled in a way that results in provable error merely because (c) correcting the error could be burdensome. Even if minimally sufficient

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[6] Petitioners here of course are not seeking hearings in the context of a charging grand jury. Their request for a pre-deprivation hearing is limited to the context of an investigating grand jury, and therefore will not impinge in any way upon grand jury proceedings leading to the issuance of a presentment, after which the full panoply of constitutional rights are afforded to the accused.

due process protections ***were*** burdensome (and they are not), this factor cannot outweigh the other two *Bundy-Matthew* factors. *See Simon v. Commonwealth*, 659 A.2d 631, 639 (Pa. Cmwlth. Ct. 1995) ("[W]hen the right of a citizen to preserve his/her constitutionally protected reputation is balanced against the interests of the Commonwealth in proceeding without the constitutional guarantee of procedural due process when conducting an investigation to discover the state of affairs in crime in the Commonwealth, the scale must be tipped in favor of the citizen.").

Contrary to the protests of the OAG, *see* App. To Lift Stay at 6 ¶¶ 14-15, when grand jury proceedings are conducted appropriately (unlike this case) and the supervising judge properly executes the duty to review the report to ensure its factual accuracy (unlike this case), the burden of conducting *ex ante* procedures is limited. In contrast, in instances like this case, where the proceedings were flawed and errors clearly exist, the Constitutional right to one's reputation and to due process trump the procedural burdens on the Supervising Judge. *See Simon*, 659 A.2d at 636-40. Further, the availability of such *ex ante* procedures will be a powerful check on grand jury abuses and will help prevent abuses such as those evidenced by the factually incorrect and improper content of the Report here.

Second, the OAG's administrative burden argument is neither coherent nor consistent. It claims that affording named priests an opportunity to appear before the grand jury or to participate in grand jury proceedings before the end of the

grand jury's term would be burdensome. But this has nothing to do with the failure to hold pre-deprivation hearings before the Supervising Judge even after the grand jury term expired. Moreover, even as to testimony before the grand jury, the Supervising Judge's opinion notes that "all current Bishops for the Dioceses were afforded an opportunity to testify before the Grand Jury with one, the bishop for the Diocese of Erie, testifying and five electing to submit written statements." Exhibit A (June 5, 2018 Order and Opinion) at 5. Unfortunately, the OAG never extended this opportunity to most of the Petitioners. Moreover, the practices of other jurisdictions reveal that affording the opportunity to be heard before a grand jury is not as burdensome as the OAG suggests. *See supra* note 5.

Third, following a pre-deprivation evidentiary hearing, the Supervising Judge would be authorized to remove information in the Report determined to be false, misleading, or otherwise unsupported by a preponderance of the evidence. Analogs to this procedure abound. *See, e.g.*, *Commonwealth v. D.M.*, 695 A.2d 770, 772-73 (Pa. 1997) (holding expungement of arrest record constitutionally required following acquittal); *Carlacci v. Mazaleski,* 798 A.2d 186, 190-91 (Pa. 2002) (establishing constitutional right to petition for expungement of Protection From Abuse Act record); *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978) (establishing constitutional right to expungement of mental health records); *Simon*, 659 A.2d 631 at 639-40 (enjoining continued publication and dissemination of

government report unless statements regarding petitioners were deleted). Here, the Supervising Judge expressly foreclosed the unburdensome remedy of expungement, which is Petitioners' only adequate constitutional remedy to prevent the permanent destruction of their reputations.

Fourth, the two state interests alleged – (a) "having a[n] effective and efficient grand jury process" and (b) "the interest in protecting children from child sexual predators and those who enable them," Exhibit A (June 5, 2018 Order and Opinion) at 7 – are not advanced or protected under the circumstances described above. An argument about burden might be persuasive if the process used here ***was*** effective in producing findings supported by a preponderance of the evidence. But the clear errors identified here suggest otherwise. If anything, the unreliability of the procedure used here disserves and undermines the Report. In addition, because the Grand Jury's investigative mandate was statutorily limited "to propos[ing] recommendations for legislative, executive, or administrative action in the public interest ***based upon stated findings***," 42 Pa. C.S. § 4542 (emphasis added), that purpose is not furthered by the release of a Report with "findings" that are clearly erroneous and a procedure that offers no avenue for correcting them.

4. The distinction between "investigative" and "adjudicatory" functions at issue in *Hannah* makes no difference to the violation of a fundamental constitutional interest here

The Supervising Judge's heavy reliance on *Hannah v. Larche*, 363 U.S. 420 (1960), is misplaced. In *Hannah*, the U.S. Supreme Court held, as a matter of federal constitutional law, that individuals summoned to appear before the federal Civil Rights Commission were not entitled to learn the identity of persons who filed complaints against them, nor were they entitled to cross-examine witnesses called by the Commission, because the Commission's activities were "investigatory" rather than "adjudicative" in nature. However, the *Hannah* Court's decision is distinguishable from this case in several important respects.

First, and most obviously, *Hannah* does not bind this Court's interpretation of the Pennsylvania Constitution. Indeed, it is well accepted that this Court is free to interpret the Pennsylvania Constitution in a manner providing even greater protection to its citizens than the federal constitution affords. *See Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991).

Second, a Pennsylvania citizen's fundamental right to his or her good reputation, as guaranteed by the Pennsylvania Constitution, was not at issue in *Hannah*. This is a critical distinction, because the federal constitution affords far less protection to reputational interests than does the Pennsylvania Constitution. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that reputation is not

protected under the federal due process clause in the absence of a "more tangible" injury, creating the so-called "stigma-plus" line of federal cases concerning reputation); *see also Simon*, 659 A.2d at 639 ("[W]hen viewed in conjunction with the nature of the right involved, the fact that the Commission is investigatory does not justify the abrogation of petitioners' right to possess and protect their reputations without due process of law.").

Third, holding a pre-deprivation evidentiary hearing before a Supervising Judge would not cause the kind of disruptions in the investigative process that were of concern in *Hannah*. Indeed, the investigation is over; the Grand Jury has been discharged.

Fourth, the Supervising Judge's decision to accept the Report as supported by a preponderance of the evidence is an adjudicative, not an investigative act. This is a function of his judicial oversight role, which this Court has held is so critical in our grand jury system.

In this case, despite the fundamental interest in reputation at stake, the risk of erroneous deprivation was great because the Grand Jury's investigative function yielded to adjudicatory opprobrium. In *K.J. v. Pennsylvania Dep't of Pub. Welfare*, Judge Friedman, noted, in dissent, that an investigator's unchallenged findings could assume the character of *de facto* adjudication absent due process. *See* 767 A.2d 609, 616 n.9 (Pa. Commw. Ct. 2001) (Friedman, J., dissenting) ("It

shocks my conscience that the Law would allow the investigating caseworker to render a *de facto* adjudication that is adverse to an individual's reputation *without* an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). The *de facto* adjudicatory imprimatur of the grand jury in this case is no different.[7]

C. Where A Fundamental Constitutional Right Is Violated, The *Ex Post* "Opportunity" To Respond To A *Fait Accompli* Is Really No Opportunity At All

The *ex post* opportunity to submit a response to the erroneous Report – but without hope of changing the errors in the Report – is no opportunity at all. Without *ex ante* notice and a meaningful opportunity to be heard – two well

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[7] The views of other jurisdictions are supportive. *See Wood v. Hughes*, 173 N.E.2d 21, 26 (N.Y. 1961) ("In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted."); *People v. McCabe*, 266 N.Y.S. 363, 367 (N.Y. Sup. Ct. 1933) ("A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."); *In re Presentment by Camden Cty. Grand Jury*, 169 A.2d 465, 471 (N.J. 1961) ("But there is a more fundamental reason for imposing restraint upon the privilege of a grand jury to hand up presentments reprobating a public official by name or inescapable imputation, where no evidence warranting indictment for crime has been submitted to it. When an indictment is returned, the official becomes entitled to a trial. He has an opportunity to face his accusers and to achieve public exoneration from a court or jury. Not so with a presentment. It castigates him, impugns his integrity, points him out as a public servant whose official acts merit loss of confidence by the people, and it subjects him to the odium of condemnation by an arm of the judicial branch of the government, without giving him the slightest opportunity to defend himself.").

accepted requirements of elemental due process – the OAG's conception of due process is not more than the "opportunity" to vent, *i.e.*, to object to a *fait accompli*. *See Bundy*, 184 A.3d at 557 ("In terms of the right to be heard at a meaningful time, the second *Mathews* element reflects that avoiding erroneous deprivations ***before*** they occur is an important concern under the Due Process Clause. There is thus a general preference that procedural safeguards apply in the ***pre-deprivation*** timeframe." (emphasis added)); *see also Simon*, 659 A.2d at 639 ("Under this scheme, there is no forum for an individual who believes that his reputation has been adversely affected to seek a remedy until after the possible damage has been done. This is clearly an unconscionable abrogation of a state protected constitutional right without procedural due process . . . Moreover, providing prior notice to an individual who is going to be named in a report published by the Commission would not be unduly burdensome to the process.").[8]

[8] The Supervising Judge read *Simon* incorrectly for the proposition that affording the opportunity to respond to a report before it becomes public is itself sufficient due process. *Simon* is to the contrary. Indeed, the *Simon* Court was troubled by the fact that "[t]he only acknowledged recourse an individual had . . . was a right of rebuttal after the report became public information." *Simon* 659 A.2d 631 at 639. This kind of *ex post* opportunity, *Simon* held, provided "no forum for an individual who believes that his reputation has been adversely affected to seek a remedy until after the possible damage has been done." *Id.* The *Simon* Court clearly viewed this as constitutionally inadequate, and described the rebuttal opportunity as "clearly an unconscionable abrogation of a state protected constitutional right without procedural due process." *Id.* There is no meaningful distinction between the right of rebuttal in *Simon* after the report became public, and the right to respond to the Report here before it becomes public, but without the opportunity to correct the Report's errors before it becomes public.

The OAG's position is constitutionally indistinguishable from another kind of deprivation of a fundamental interest that would violate due process even with the "opportunity" to register a *post hoc* complaint with the government. Consider, for example, the horror of Citizen Smith, awoken to the sound of bulldozers on her front lawn, only to be informed after donning a night gown, that – not to worry – the "Takings Commission" will gladly accept her "response" when the new highway is complete. Or, perhaps the beneficent Commission grants Ms. Smith the "opportunity" to submit a response to this action even before demolition is complete – but with the proviso that she agree her response will have no impact upon the Commission's decision or on the bulldozers' fateful course. This, like Petitioners' "opportunity" here, is only a chance to vent, not to change an outcome.

But under the government's theory, Ms. Smith, like the Petitioners here, has no basis for complaint. She has been accorded notice, and the opportunity to be heard, albeit after the damage is done. Ms. Smith should be grateful for what she has received and return to sleep, comfortable in the knowledge that her rights, and those of her neighbors, are well protected. Maybe this logic carries the day for the Queen of Hearts in *Alice in Wonderland*. It is unpersuasive here.

IV. THE OAG'S UNFAIR, IMPROPER, AND STRATEGIC USE OF THE PRESS TO MALIGN PETITIONERS HAS SEVERELY ERODED ANY VALUE PETITIONERS' RESPONSES MIGHT HAVE HAD

During the course of this litigation the OAG has made numerous public comments carefully calculated to bring public pressure to bear on the Petitioners by maligning their good faith assertion of fundamental constitutional rights. Not content with the mere "power to persuade" that the Report offers, *see* Application To Lift Stay at 5 ¶ 10, the OAG has improperly amplified its own power – even before the Report's release – using a loudspeaker, an eager press, and a receptive public audience.

For example, following a large hearing including many of the Petitioners' counsel, the OAG publicly stated that a delay in the Report's release would only occur if "one of the bishops or dioceses would seek to delay or prevent public accounting."[9] On another occasion, after this Court issued its Stay, the OAG publicly vowed to "tak[e] legal action . . . to make the grand jury report . . . known to the public."[10] Last week, following this Court's issuance of the Stay Order and

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[9] *See* Exhibit F at 1 (Office of Pennsylvania Attorney General, "Statement of Attorney General Josh Shapiro on Sexual Abuse Investigation Within Catholic Church," Taking Action (May 21, 2018), *available at* https://www.attorneygeneral.gov/taking-action/statements/statement-of-attorney-general-josh-shapiro-on-sexual-abuse-investigation-within-catholic-church/ (last accessed July 6, 2018)).

[10] *See* Exhibit F at 3 (Office of the Pennsylvania Attorney General, "Attorney General Josh Shapiro Will Take Action to Make Grand Jury Report Public," Taking Action – Press Release (June 29, 2018), *available at* https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-will-

Per Curiam opinion explaining the basis for the Stay, the Attorney General publicly announced his intention to single out those Petitioners who dared to assert their constitutional rights in this matter. Specifically, the Attorney General 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."[11] In addition, after the Clergy Petitioners exercised their legal and constitutional rights to protect themselves and their reputations by opposing the Media Intervenors' Applications – and did so, unlike the OAG, by thoughtfully redacting grand jury material not yet public (but which actually strongly supports the Clergy Petitioners' arguments, and would have given the public the full picture the OAG has not shared with them) – the Attorney General maligned Petitioners and disingenuously criticized their well-intended redactions:

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take-action-to-make-grand-jury-report-public/ (last accessed July 4, 2018)); *see also* Exhibit F at 2 (Office of the Pennsylvania Attorney General, "Statement of Attorney General Josh Shapiro on Supreme Court Order Staying Issuance of Grand Jury Report on Sexual Abuse within Catholic Church," Taking Action (June 20, 2018), *available at* https://www.attorneygeneral.gov/taking-action/statements/statement-of-attorney-general-josh-shapiro-on-supreme-court-order-staying-issuance-of-grand-jury-report-on-sexual-abuse-within-catholic-church/ (last accessed July 6, 2018)).

[11] *See* Exhibit F at 3 (Office of the Pennsylvania Attorney, "Attorney General Josh Shapiro Will Take Action to Make Grand Jury Report Public," Taking Action (June 29, 2018) (emphasis added), *available at* https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-will-take-action-to-make-grand-jury-report-public/ (last accessed July 4, 2018)).

> Attorney General Josh Shapiro, whose office led the investigation that produced the grand jury report, on Thursday called the clergy members' legal filing ***"nothing more than a desperate attempt to stop the public from learning the truth about their abhorrent conduct."***
>
> In a statement, he called the report accurate and said, ***"The airing of these facts should happen in public — not hidden behind redacted, meritless legal motions designed to further cover up decades of abuse and reprehensible conduct."***[12]

The Attorney General also knowingly and falsely stated that the Report is accurate – something Petitioners have proved is untrue, with evidence shared with the Supervisory Judge and the OAG:

> "***The report is accurate*** and these individuals have had the chance to respond, and their responses will be included in the final grand jury report," he said.[13]

In fact, the OAG has also publicly filed an unsealed response to the Media Intervenors' Application to Intervene, and in doing so, utilized much of the material from its sealed Motion to Unseal verbatim. Though the OAG stated that it

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[12] *See* Exhibit F at 7 (Angela Couloumbis and Liz Navratil, Philly.com, "Current and former clergy members behind push to block report on clergy sex abuse," *available at* http://www.philly.com/philly/news/pennsylvania/current-and-former-catholic-clergy-behind-push-to-block-state-report-on-clergy-sex-abuse-20180705.html (last accessed July 6, 2018) (emphasis added)).

[13] *See* Exhibit F at 9 (Peter Smith, Pittsburgh Post-Gazette, "Clergy claim false accusations in grand jury report," *available at* http://www.post-gazette.com/news/faith-religion/2018/07/05/Clergy-sexual-abuse-Catholic-priests-grand-jury-attorney-general-Josh-Shapiro-Diocese-of-Pittsburgh-Greensburg-Harrisburg-Allentown-Erie-Scranton/stories/201807050134 (last accessed July 6, 2018)).

"respectfully takes no position on the request to intervene," the intention was clear, for the OAG proceeded, wholly unnecessarily, to restate in its unsealed filing the very arguments it has made before this Court under seal. Unsurprisingly, the filing was promptly covered in the press.[14]

These public relations tactics reflect the OAG's desire to litigate in the court of public opinion rather than in this Court of law. What makes this approach so surprising is that all agree Petitioners have committed no crime, have not been charged with committing any crime, and will not be charged with committing any crime. And yet the OAG has steadfastly insisted upon the inclusion of the identities of these innocent bystanders in a report that is critical of them – even when based upon erroneous conclusions. Such overzealousness bespeaks the OAG's abandonment of its first and foremost duty to see that justice is done, to say nothing of the Attorney General's oath of office requiring allegiance to the Pennsylvania Constitution. *See* Pa. Const. Art. I §§ 1 (inherent rights, including right to reputation), and 11 (civil remedies for injuries against reputation); *id.* Art. VI § 3 (oath of office). As the U.S. Supreme Court said nearly a century ago, in words that echo loudly in this case, a prosecutor:

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[14] *See, e.g.*, Exhibit F at 13-15 (Mark Scolforo, "AG argues church abuse grand jury report should be public," Penn Live (July 4, 2018), *available at* https://www.pennlive.com/news/2018/07/ag_argues_church_abuse_grand_j.html (last accessed Jul 5, 2018)).

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

Here too, the role of the Attorney General, as an advocate for all of the Commonwealth's citizens, is to serve all citizens, including those – like Petitioners here – who have committed no crime.

Of course, the OAG is keenly aware that Petitioners do not feel similarly free to make such public statements for several reasons: because doing so would *ipso facto* destroy the reputational interests they seek to protect; because of their respect for the secrecy of grand jury proceedings; and because they lack the authority of the seal, office, and imprimatur of the OAG.[15]

[redacted]

The OAG has so deeply poisoned the well of public sentiment, that the supposed "opportunity" to submit a response to a *fait accompli – i.e.*, an erroneous grand jury Report that neither the Supervising Judge nor the OAG will permit to be corrected or even redacted – is now of even less value to Petitioners.[16] This "opportunity" to respond was previously incorrectly thought (by the Supervising Judge and the OAG) to offer sufficient due process to Petitioners. It is even more clear now that the OAG's use of his office's power and authority to galvanize public opinion against Petitioners – and against this Court[17] – have thoroughly eviscerated even that pitiful modicum of redress.

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[16] As some commentators have noted:

> In contrast to an indictment, which initiates proceedings that result in a trial of the grand jury's accusations, a report does not ordinarily initiate any further proceedings. The state is never called upon to prove the charges, and the accused is not given an opportunity to disprove them. The standard of proof applied by the grand jury and the evidence upon which it relied are not disclosed. ***This procedural unfairness is especially troubling because the charges receive substantial publicity, and the public is ordinarily unaware of the fact that the accusations have never been proven in an adversary proceeding.***

Grand Jury Law and Practice § 2:3 (2d ed.) (emphasis added).

[17] *See* Exhibit G at 16-17 (The Inquirer Editorial Board, "Our View: Pa. Supreme Court enables toxic secrets in priest sex scandal – Editorial," The Inquirer, (June 22, 2018), *available at* http://www.philly.com/philly/opinion/editorials/pa-supreme-court-grand-jury-report-catholic-church-priests-sex-scandal-editorial-20180622.html (last accessed July 6, 2018). ("For decades, the alleged abusers were able to hide behind a cloak of secrecy to commit sickening crimes. ***Now the state's highest court is prolonging the victims' suffering by suppressing the report.***" (emphasis added))); Exhibit G at 18-19 (The Editorial Board – The Pittsburgh Post-Gazette, "Release the report: No reason to hold back grand jury report on abuse" The Pittsburgh Post-Gazette, (June 22, 2018), *available at* http://www.post-gazette.com/opinion/editorials/2018/06/22/Release-the-report-No-reason-to-hold-back-grand-jury-report-on-abuse/stories/201806220019 (last accessed July 6, 2018). ("***If it***

In sum, the OAG's litigation by press release is unfair and improper. *See, e.g.*, Pa. R. Prof'l Resp. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."); Pa. R. Prof'l Resp. 3.8(e) (prosecutors must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused"); Pa. R. Prof'l Resp. 3.8 cmt 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Pa. R. Prof'l Resp. 3.8 cmt 4 ("a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused" and "a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused"). And

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delays releasing a report that sheds light on decades of scandal in the church, the Supreme Court can consider itself part of the problem, too." (emphasis added))); *see* Exhibit G at 20-21 (PennLive Editorial Board, "Editorial: The Pa. Supreme Court has denied church abuse victims a voice," PennLive (June 22, 2018), *available at* https://www.pennlive.com/opinion/2018/06/the_pa_supreme_court_has_denie.html (last accessed July 6, 2018); *see also* Exhibit G. at 21-22 ("Editorial: Praise to Shapiro, judge, for seeking abuse report's release" Wilkes-Barre Times Leader (June 22, 2018), *available at* https://www.timesleader.com/opinion/708805/our-view-praise-to-shapiro-judge-for-seeking-abuse-reports-release (last accessed July 6, 2018)).

while Petitioners are forced to fight with one hand tied behind their back, the OAG has not felt similarly constrained.

It is regrettable that the OAG has abandoned its public mandate as a representative of all Pennsylvanians. While this may garner favorable editorials for the OAG, and improve its standing in public polling, it is deeply harmful to the stature of this Court, to the grand jury as an institution, and to the individual citizens the OAG is sworn to protect. The Court should not countenance this strategy.

CONCLUSION

In the turbulent political times in which we live, this Court's fidelity to our deepest constitutional moorings is even more important. Precisely in these times – when the public clamors for justice, and understandably so – judicial review and protection of the fundamental rights of those least protected, the accused and the unpopular, is an essential bulwark against the tyranny of the mob. This Court cannot – it must not – compromise constitutional protections for the sake of expediency, or in the face of public discontent or outcry. Lest the desire for justice yield to vigilantism, this Court must prevent the Commonwealth from conducting what amounts to a drive by shooting of those without blame or guilt.

To be sure, the abuse the Report alleges, if established, must be addressed. Those responsible must be held to account. And the tragic victims must be given their due. But a flawed report – purportedly based upon a "preponderance of the evidence" standard of proof that in fact contains clear and demonstrable factual error – without the input or fair response of innocent third parties named in it, will undermine rather than achieve the Grand Jury's laudable aims. And that result, regrettably, would disserve Petitioners and victims alike.

For these reasons, this Court should: (1) reverse the Supervising Judge's Orders denying Petitioners' Motions; (2) remand this case to the Supervising Judge (or another Judge) with instruction to conduct a *de novo* pre-deprivation

evidentiary hearing to determine whether the Report and grand jury record is supported by a "preponderance of the evidence"; and (3) redact erroneous material from the Report.

Respectfully submitted,

/s/ Justin C. Danilewitz

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CERTIFICATE OF SERVICE

I, Justin C. Danilewitz, Esquire, hereby certify that a copy of the foregoing Merits Brief Setting Forth Common Legal Arguments Of Clergy Petitioners In Opposition To Premature Release Of Unredacted Grand Jury Report No. 1 on July 10, 2018 upon the following:

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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. Although this filing exceeds 30 pages, the word count (excluding supplementary matter) remains under 14,000 words.

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

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Dated: July 10, 2018

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EXHIBIT A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

	*	
	*	Supreme Court of Pennsylvania
IN RE:	*	2 W.D. MISC. DKT. 2016
THE FORTIETH STATEWIDE	*	
INVESTIGATING GRAND JURY	*	Allegheny County Common Pleas
	*	No. 571 M.D. 2016
	*	
Motions for Pre-depravation Hearing	*	
	*	Notice Number 1
	*	

OPINION AND ORDER

Krumenacker, J: Currently before the Court are various Motions for Pre-depravation Hearings filed by persons named, but not indicted, in the Fortieth Statewide Investigating Grand Jury's Report Number 1 relative to Notice Number 1 (Report). The Motions seek to have evidentiary hearings prior to the release of the Report arguing that such hearings are required by due process as the reputation interest of the nonindicted named persons will be harmed by the release of the Report. The Office of Attorney General (OAG) responds that the Investigating Grand Jury Act (Grand Jury Act), 42 Pa. C.S. §§ 4541-4553, provides the requisite due process by: requiring that a named nonindicted person be informed of the existence of the critical language in the report; providing an opportunity to file a written response to the report; and providing for the inclusion of such response in the report that is released to the public. 42 Pa. C.S. § 4552 (e).

DISCUSSION

The specific constitutional question before the Court is whether a named nonindicted person in a grand jury report is, prior to the public release of the report, entitled by virtue of due process to have a full pre-depravation hearing, including the right to cross-examine Commonwealth witnesses, present witnesses of their own, and present evidence. "Courts examine procedural due process questions in two steps: the first asks whether there is a life,

liberty, or property interest with which the state has interfered, and the second examines whether the procedures attendant to that deprivation were constitutionally sufficient." J.P. v. Dep't of Human Servs., 170 A.3d 575, 580–81 (Pa. Cmwlth. 2017) (citing Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)). In Pennsylvania a person's reputation is recognized as a fundamental right in Sections 1 and 11 of Article I of the Pennsylvania Constitution. "In Pennsylvania, therefore, reputational harm alone is an affront to one's constitutional rights." D.C. v. Dep't of Human Serv., 150 A.3d 558, 566 (Pa. Cmwlth. 2016). Accordingly, our Courts have long recognized that this fundamental interest in reputation "cannot be abridged without compliance with constitutional standards of due process and equal protection." R. v. Com., Dep't of Pub. Welfare, 535 Pa. 440, 454, 636 A.2d 142, 149 (1994) (citing Hatchard v. Westinghouse Broadcasting Co., 516 Pa. 184, 193, 532 A.2d 346, 350 (1987)). Having answered the first question and determined that there is a fundamental interest affected by naming a nonindicted person in a grand jury report the second question, what level of due process is owed, must be addressed. This question is one of first impression in the Commonwealth.

The Pennsylvania Supreme Court has recently explained that

> "Due process is a flexible concept which "varies with the particular situation." Zinermon v. Burch, 494 U.S. 113, 127, 110 S.Ct. 975, 984, 108 L.Ed.2d 100 (1990). Ascertaining what process is due entails a balancing of three considerations: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The central demands of due process are notice and an "opportunity to be heard at a meaningful time and in a meaningful manner." Commonwealth v. Maldonado, 576 Pa. 101, 108, 838 A.2d 710, 714 (2003) (quoting Mathews, 424 U.S. at 333, 96 S.Ct. at 902); see also Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246, 64 S.Ct. 599, 606, 88 L.Ed. 692 (1944) ("The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as

> are adequate to safeguard the right for which the constitutional protection is invoked.").

Bundy v. Wetzel, ___ Pa. ___, ___, ___ A.3d ___, ___, 2018 WL 2075562, at *4 (Pa. 2018).

In Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15, 4 L.Ed.2d 1307 (1960), the United States Supreme Court addressed the questions of: (1) whether the Commission on Civil Rights was authorized by Congress to adopt Rules of Procedure which provide that the identity of persons submitting complaints to the commission need not be disclosed and that those summoned to testify before the commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the commission; and (2) if so, whether those procedures violated the Due Process Clause of the Fifth Amendment. The Hannah court held that the Commission's procedural rules were authorized by the Civil Rights Act and did not, in view of the purely investigative nature of the commission's function, violate the due process clause of the Fifth Amendment.

The Court in Hannah was careful to distinguish the level of due process required differs based upon whether the action taken by the government is adjudicative or investigative in nature, with the former requiring a higher degree of due process than the latter. In this regard the Court opined that

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that

> proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.
>
> It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate it need not be bound by adjudicatory procedures.

Id. 363 U.S. at 442, 80 S.Ct. at 1514–15.

In Pennsylvania Bar Ass'n v. Commonwealth, 147 Pa. Cmwlth. 351, 607 A.2d 850 (1992), the Commonwealth Court concluded that before an attorney's name could be placed on a suspected fraud list because the attorney's client was suspected of fraud, the state was required to give the attorney notice and an opportunity to be heard. Later in Simon v. Commonwealth, 659 A.2d 631 (Pa. Cmwlth. 1995), our Commonwealth Court, relying on Hannah, concluded that due process required the Pennsylvania Crime Commission to give notice and the opportunity to respond to persons named in public reports. The Grand Jury Act in section 4552(e) already provides the due process protections required by Simon by requiring notice to named nonindicted persons and providing them a right to respond. 42 Pa. C.S. § 4552(e).

Similar to the Civil Rights Commission and the Crime Commission, a grand jury is an investigative not adjudicative body and so a lesser degree of due process is required than is afforded to those who appear before adjudicative governmental entities. Hannah, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514–15. Nonetheless as the Simon Court recognized, because the right to reputation is a fundamental one in the Commonwealth some amount of due process is required when a person is named in an investigative report. Simon, 659 A.2d 631, 639. Here application of the Mathews factors results in the same conclusion reached by the Simon Court, that given the investigative nature of a grand jury due process only requires notice and an opportunity to response to a report prior to the release of any report.

The first Mathews factor requires a determination of the nature of the private interest affected by the governmental action and whether such interest is entitled to due process protections. As discussed *supra* under Pennsylvania law there is no question that the right to reputation is a fundamental interest that cannot be abridged without some due process protections. The second Mathews factor requires a consideration of the risk of an erroneous deprivation with the value of additional or substitute safeguards. The Grand Jury Act provides a person named in a report notice of the report, an opportunity to review that portion of the report critical of them, and an opportunity to file response. See, 42 Pa. C.S. §4552(e). The issue then is whether the additional process sought would reduce the risk of erroneous deprivation. The nature of grand jury proceedings significantly minimizes the risk of erroneous depravations by requiring the findings of the grand jurors be supported by a preponderance of the evidence presented by the OAG through witnesses testifying under oath. Specifically with regards to the Report, the grand jury, in reaching its findings, heard from dozens of witnesses, examined numerous exhibits, and reviewed over half a million pages of internal diocesan documents from the archives of various Dioceses. Further, all current Bishops for the Dioceses were afforded an opportunity to testify before the Grand Jury with one, the Bishop for the Diocese of Erie, testifying and five electing to submit written statements. See, Gr. J., Notice 1 Exs. 472, 478, 479, 480, 481 501, 502, 513, 514, 515, 516.This level of protection is significantly higher than that afforded to the Simon plaintiffs who were named in Crime Commission report with no clear evidentiary basis for their inclusion.

The movants argue that due process requires the opportunity to present evidence to the grand jury to refute the evidence presented by the OAG that resulted in the language critical of them contained in the Report. The Court has found no support for this proposition in either the

laws of the Commonwealth, in Pennsylvania Supreme Court, or United States Supreme Court due process jurisprudence. In comparing the nature of the Civil Rights Commission to other traditional investigative bodies the Hannah Court commented on the nature of grand jury proceedings and explained

> we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

Hannah, 363 U.S. 420, 448–49, 80 S.Ct. 1502, 1518. The Hannah Court acknowledged that in the context on grand jury proceedings permitting cross-examination and presentation of evidence by potential targets would be unduly disruptive to the purely investigative function of the grand jury. Similarly, permitting those named in grand jury reports to present evidence would disrupt the investigative function while affording little additional safeguards. Further, permitting persons named in grand jury reports to present evidence, including potentially their own testimony subject to cross-examination, to the grand jury would turn an investigative proceeding into an adjudicative one which is not the purpose or function of an investigative grand jury. See, 42 Pa. C.S. § 4548 (providing that investigative grand juries have the power or inquiry and investigation not adjudication); Commonwealth v. Bradfield, 352 Pa. Super. 466, 508 A.2d 568 (1986)(purpose of statute authorizing Supreme Court to convene multicounty, investigating grand juries is to enhance ability of Commonwealth to inquire into criminal activity or public corruption reaching into several counties). Adopting the position advanced by the movants

would fundamentally change the Grand Jury Act's procedures, change the historical function of grand juries, and effectively bring the grand jury process to a halt turning each investigation into a full adjudication.

The final Mathews factor requires consideration of the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state. Here there are two identifiable state interests are implicated: the interest in having a effective and efficient grand jury process; and the interest in protecting children from child sexual predators and those who enable them. Relative to the first consideration concerning grand juries, the state interest is to have an entity that is capable of conducting inquiries into organized crime or public corruption or both involving more than one county of the Commonwealth. As noted above, never in the history of grand juries have persons under investigation been permitted to cross-examine witnesses or present evidence to an investigative grand jury. To permit persons named in a report the full panoply of due process rights would be a substantial burden to the Commonwealth who would be required to allow such persons access to the testimony of witnesses traditionally shielded in grand jury secrecy, permit them to recall and cross-examine those witnesses, and allow the presentation of new evidence.

Such requirements would disrupt the functions of the grand jury and distract it from its sole function as an investigative body and transform it into an adjudicative body. Investigative grand juries are, by their nature, not adjudicative in nature and the Grand Jury Act narrowly prescribes their authority to be investigative only. It would be a substantial overreach to transform a grand jury into an adjudicative body where the legislature has clearly intended to limit their authority to investigative functions only. Such a transformation would be contrary to the long standing historical role grand juries serve in our system of jurisprudence and would

require the creation of new procedures and safeguards that would burden all those involved with the process including the OAG, supervising judges, and most importantly the grand jurors themselves. Further, if persons named in a report were afforded the right to an evidentiary hearing it would require the hearing be held before the grand jury, whose function it is to weigh the evidence and make factual findings. This procedure would be extremely burdensome significantly increasing the time and expense required to complete each investigation. In some cases, such as the matter *sub judice*, permitting such hearings would be impossible as the grand jury's term has expired and so it cannot be reconvened to review this additional evidence or make or approve changes to the report it issued.

Movants suggest that this can be overcome by having the court conduct pre-depravations hearings and then making any necessary redactions or changes to the Report. There is no provision in the Grand Jury Act, other laws of the Commonwealth, or Pennsylvania Constitution that would authorize the Court to redact or rewrite a grand jury report once it has been submitted by the grand jury. Providing a court with such authority would effectively eviscerate the Grand Jury Act relative to grand jury reports by taking the power to make findings and recommendations away from the grand jury and placing it in the hands of the supervising judge. A grand jury report consists of factual findings by the grand jury supported by a preponderance of the evidence found credible by the jurors and in some cases, such as this one, recommendations for changes to the laws of the Commonwealth. Once a report is submitted to the supervising judge, the Grand Jury Act mandates the supervising judge review the report and if it is supported by a preponderance of the evidence accept the report and make it public. 42 Pa. C.S. § 4552. There exists only a narrow exception to this requirement for reports that are either not supported by a preponderance of the evidence or reports whose immediate release would

prejudice a pending criminal matter. Id. Authorizing a supervising judge to alter the report after its acceptance would fundamentally alter the Grand Jury Act and the power of the grand jury.

The second interest implicate is the Commonwealth's substantial interests to prevent child abuse, to provide justice to those abused children, and to protect abused children from further abuse by identifying abusers and those individuals and institutions that enable the abuses to continue abusing children. See *e.g.*, 23 Pa.C.S. § 6302 (finding and purpose of CPSL). Here the Report is the culmination of two years of investigation into the Dioceses related to allegations of child sexual abuse, failure to make a mandatory report, acts endangering the welfare of children, and obstruction of justice by individuals associated with the Roman Catholic Church, local public officials, and community leaders. This investigation followed the report issued by the Thirty-Seventh Statewide Investigating Grand Jury concerning child sexual abuse in the Altoona-Johnstown Diocese and the failure of Diocesan leaders to protect children from such abuse and to conceal that the abuse occurred. The Commonwealth's interest in protecting children from sexual predators and persons or institutions that enable them to continue their abuse is of the highest order.

Balancing these Mathews factors the Court reaches the same conclusion as did the Commonwealth Court in Pennsylvania Bar and Simon that where an individual is named in an investigative report due process requires only that they be afforded notice of the report and an opportunity to respond to the report in writing. Distinguishable are recent cases involving placing individuals on child abuse registries, such as ChildLine, without affording the affected person any or only limited due process rights. See, J.P. v. Dep't of Human Servs., 170 A.3d 575 (Pa. Cmwlth. 2017) (Department of Human Services violated teacher's due process rights in placing teacher's name on ChildLine and Abuse Registry of alleged child abuse perpetrators, pursuant to

the Child Protective Services Law, where Department did not provide any form of hearing despite teacher's clear request for one). See also, G.V. v. Dep't of Pub. Welfare, 625 Pa. 280, 295, 91 A.3d 667, 676 (2014) (Saylor, J. dissenting) ("I would only observe that the inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question."); D.C. v. Dep't of Human Servs., 150 A.3d 558 (Pa. Cmwlth. 2016) (person whose name is entered into the ChildLine Registry as a perpetrator of child abuse is entitled to a clear and unequivocal notice of the post-deprivation hearing as a matter of due process); K.J. v. DPW, 767 A.2d 609, 616 n. 9 (Pa.Cmwlth.2001) (Friedman, J., dissenting) ("It shocks my conscience that the Law would allow the investigating caseworker to render a *de facto* adjudication that is adverse to an individual's reputation *without* an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). In each of these cases the state, through one or more agencies, engaged in an adjudicative not investigative role in finding a person a perpetrator of child abuse and as such due process clearly required more process than was afforded to the individuals placed on the registry. Here, by its very nature as an investigating grand jury, the Grand Jury was involved in an investigative function not an adjudicative one and as such those named in its report are entitled to a lesser degree of due process. See, Hannah, 363 U.S. 420, 80 S.Ct. 1502; Simon, 659A.2d 631; Pennsylvania Bar, 147 Pa. Cmwlth. 351, 607 A.2d 850. This degree of due process is met by providing named persons notice of the report and an opportunity to respond to their inclusion in the report. Id.

For the foregoing reasons the following Order is entered:

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

	*	Supreme Court of Pennsylvania
IN RE:	*	2 W.D. MISC. DKT. 2016
THE FORTIETH STATEWIDE	*	
INVESTIGATING GRAND JURY	*	Allegheny County Common Pleas
	*	No. 571 M.D. 2016
	*	
Motions for Pre-depravation Hearing	*	
	*	Notice Number 1

ORDER

AND NOW, this 5 day of June 2018, upon consideration of the Motions for Pre-depravation Hearing and for the reasons discussed in the foregoing Opinion, it is hereby **ORDERED, DIRECTED, AND DECREED** that the Motions for Pre-depravation Hearing are **DENIED**. It is **FURTHER ORDERED, DIRECTED, AND DECREED** that the Motions for Stay are **DENIED**.

The request to certify this matter for immediate appeal is **GRANTED** as the Court is of the opinion that this Opinion and Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Opinion and Order may materially advance the ultimate termination of this matter.

This Opinion and Order are not sealed.

BY THE COURT:

Norman A. Krumenacker, III
Supervising Judge
40th Statewide Investigating Grand Jury

cc: Daniel Dye, Esq., SDAG
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EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

Statement

Statement of Attorney General Josh Shapiro on Sexual Abuse Investigation Within Catholic Church

May 21, 2018 | Topic: Rights

HARRISBURG – "Today, in a reversal of their position, the bishops and dioceses of Greensburg and Harrisburg agreed to make public the results of a grand jury investigation of widespread sexual abuse within the Catholic Church. I commend Bishop Malesic and Bishop Gainer for doing the right thing," Attorney General Josh Shapiro said.

"Now all of the dioceses support the release of the investigation's findings and results."

"Victims of this sexual abuse deserve the right to tell their stories to the people of Pennsylvania. That is why my legal team and I have worked tirelessly to have each diocese agree to give victims the opportunity to be heard."

"I expect to speak publicly on this comprehensive investigation by the end of June. The only thing that could stop these findings from becoming public at that time is if one of the bishops or dioceses would seek to delay or prevent this public accounting."

Statement

Statement of Attorney General Josh Shapiro on Supreme Court Order Staying Issuance of Grand Jury Report on Sexual Abuse within Catholic Church

June 20, 2018 | Topic: Peoples AG

HARRISBURG – "Just moments ago, the Supreme Court of Pennsylvania accepted legal challenges to the issuing of a grand jury report detailing widespread sexual abuse within the Catholic Church. In an unsealed order, the Supreme Court has issued a stay of proceedings to review and decide those challenges," Attorney General Josh Shapiro said.

"My legal team and I will continue fighting tirelessly to make sure the victims of this abuse are able to tell their stories and the findings of this investigation are made public to the people of Pennsylvania."

# # #

Contact the Press Office

Press Release

Share

Attorney General Josh Shapiro Will Take Action to Make Grand Jury Report Public

June 29, 2018 | Topic: Criminal

HARRISBURG — The Office of Attorney General Josh Shapiro is taking legal action on Monday to make the grand jury report on child sexual abuse in the Catholic Church in Pennsylvania known to the public.

In an opinion issued earlier this week by the Supreme Court of Pennsylvania, the Court invited the Office of Attorney General to "lodge an objection to a continued stay" of the report's release. The Office of Attorney General is responding to that invitation from the Court.

"There are legal filings the Court must decide. In acting on Monday, we are hopeful the Court will expeditiously decide these issues and lift the stay. The 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," Attorney General Shapiro said.

# # #

News (Http://www.philly.com/news)

— Pennsylvania (http://www.philly.com/philly/news/pennsylvania)

Current and former clergy members behind push to block report on clergy sex abuse

Updated: JULY 5, 2018 — 4:16 PM EDT

(http://philly.reprintmint.com/006-default.html?src=http%3A%2F%2Fmedia.philly.com%2Fimages%2F250*250%2Fdixon-597106-f-wp-content-uploads-2018-07-1147738_5d95ad85c7c8d04-1200x800.jpg&verification=http%3A%2F%2Fmedia.philly.com%2Fimages%2Fdixon-597106-f-wp-content-uploads-2018-07-1147738_5d95ad85c7c8d04-1200x800.jpg&source=006& Buy Photo

title=MCMASTER11-D&caption=The office of Pennsylvania Attorney General Josh Shapiro, pictured above at the podium, conducted a nearly two-year investigation into allegations of clergy sexual abuse at nearly every Catholic diocese in the state. JESSICA GRIFFIN / Staff Photographer)

JESSICA GRIFFIN/STAFF PHOTOGRAPHER

The office of Pennsylvania Attorney General Josh Shapiro, pictured above at the podium, conducted a nearly two-year investigation into allegations of clergy sexual abuse at nearly every Catholic diocese in the state. JESSICA GRIFFIN / Staff Photographer

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by **Angela Couloumbis** & **Liz Navratil** - Staff Writers

HARRISBURG — Nearly two dozen current and former members of the clergy are among those seeking to block the release of a highly anticipated grand jury report outlining decades of alleged sexual abuse by clergy in Catholic dioceses across the state, according to a court document filed Thursday.

The revelation that clergy members are behind the fierce secret legal battle came in response to a push by the Inquirer and Daily News, the Pittsburgh Post-Gazette, and seven other news organizations, which have together asked the state Supreme Court to lift its stay (http://www.philly.com/philly/news/josh-shapiro-pennsylvania-attorney-general-grand-jury-report-on-clergy-sex-abuse-20180629.html) on the report's release.

News organizations have called the report a "matter of extraordinary public importance." The more than 800-page grand jury report, which was expected to have been released last month, details alleged clergy abuse in all of the state's Catholic dioceses except for Philadelphia and Altoona-Johnstown, which already were the subject of similar investigations.

The documents filed Thursday offered a glimpse into the intense legal maneuvering that could result in the report's being permanently shielded from the public. They also offered the most detail to date

about the people who have fought for months to keep their names out of the public realm.

That fight has occurred almost entirely under court seal, in part because it involves a two-year-long investigation by the Attorney General's Office during which dozens of victims testified before a grand jury.

Officials in the six affected dioceses had said in recent months that they would not stand in the way of the report's release. But abuse victims have nevertheless fretted that their voices will again be silenced.

Attorneys for those pushing to block the report say there is much at stake on their side, too.

Attorney Justin Danilewitz of Saul Ewing Arnstein & Lehr LLP on Thursday wrote on behalf of the nearly two dozen current and former clergy members who are seeking to block the report's public release. He said the report is full of inaccuracies that would unfairly tarnish the reputations of the clergy, whose names were redacted.

Danilewitz presented examples of four priests whose stories, he argued, represent wider factual problems with the report. Those priests' names, and specifics of their stories, were outlined in roughly two pages of court documents that were blacked out from the public file.

"Of particular relevance here, grand jury secrecy protects those, like the Clergy Petitioners, whose reputations may be unjustly harmed, including the innocent wrongly accused," he wrote.

Attorney General Josh Shapiro, whose office led the investigation that produced the grand jury report, on Thursday called the clergy

members' legal filing "nothing more than a desperate attempt to stop the public from learning the truth about their abhorrent conduct."

In a statement, he called the report accurate and said, "The airing of these facts should happen in public — not hidden behind redacted, meritless legal motions designed to further cover up decades of abuse and reprehensible conduct."

A small group of priests separately filed court documents saying they would not object if the court released a redacted version of the report that blacked out references to them.

Yet another filing was almost entirely redacted. Efrem Grail of the Grail Law Firm argued that his client had "a unique issue" that the state Supreme Court must still consider. Releasing the report ahead of that, he said, would be an "injustice."

"There is simply no reason why speed in this entire proceeding will lead to anything other than injustice and confusion," Grail wrote.

The filings came in response to the effort by the nine media organizations that asked the state Supreme Court to lift its stay blocking the release of the report.

The high court was asked by a group of unnamed individuals and organizations to block the report's public dissemination. At the heart of their objections is that they have a right (https://www.apnews.com/d43fd8c9371b4596a2c73cabe18f8bfb)under the Pennsylvania Constitution to protect their reputations and should be allowed to rebut portions of the report before it is released.

The justices agreed to temporarily block (http://www.pacourts.us/assets/opinions/Supreme/out/74_75wm2018.pdf) the report while they weighed those issues. The high court has not publicly established

a timeline for making a decision in that matter, which could have far-reaching implications for the grand jury system in Pennsylvania.

While lawyers for the media organizations have advocated for release of the full report, they have said that if the justices need more time to consider other legal challenges, they should order that a redacted version be released in the interim.

Shapiro's office said in a filing Thursday that it supports the public release of the report and does not oppose the media organizations' attempts to see it.

In its filing, Senior Deputy Attorney General Daniel J. Dye, who led the sweeping investigation into clergy abuse, said the people named in the report have had an opportunity to respond in writing. They have been given portions that are relevant to them and any written response will be attached to the report before release, he said. The six dioceses that came under scrutiny have copies of the full report.

"They are free to go further – to make any statements they wish, to appear in any forum, to go before any camera or microphone," Dye said of the individuals named in the report. "That is not true for the grand jury.... The report itself is their last word."

MORE COVERAGE

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Pittsburgh Post-Gazette

Clergy claim false accusations in grand jury report

July 5, 2018 6:15 PM

By Peter Smith / Pittsburgh Post-Gazette

Attorneys for more than two dozen people, including current and former clergy members, are challenging the release of a mammoth report by a statewide grand jury of sexual abuse in the Catholic Church, claiming Thursday the report leaves them "wrongly accused and falsely implicated."

The challengers — who also include the executrix for a deceased person named by the grand jury as an offender within the Diocese of Pittsburgh — denounced the report as riddled with "inaccuracies and falsities" and alleged that the supervising judge of the 40th statewide grand jury failed in his duty to ensure the report was based on at least a "preponderance of evidence."

Attorney General Josh Shapiro defended the report's integrity in a statement later Thursday.

"The report is accurate and these individuals have had the chance to respond, and their responses will be included in the final grand jury report," he said. "This legal filing is nothing more than a desperate attempt to stop the public from learning the truth about their abhorrent conduct."

The challengers' claims came in filings Thursday by attorneys for the clergy members with the state Supreme Court. They were the first public documents to give any concrete description of those challenging the report before the top court, which had previously described them only as "many individuals."

The names of the clergy, along with four specific examples of alleged inaccuracies, were redacted from the publicly released version of the filings.

There were at least three separate filings.

One is on behalf of nearly two dozen current and former clergy. Catholic clergy can include priests or deacons.

A second filing is on behalf of a retired priest.

A third filing is on behalf of three people, living and dead, described only as "individuals" who were "defamed" and did nothing "that warrants ... branding them as offenders."

The challengers claim that by identifying them in the report, the grand jury and its supervising judge denied their constitutional right to due process in defending their reputations.

The grand jury report, two years in the making, was based on an investigation overseen by the attorney general's office into sexual abuse in the dioceses of Pittsburgh, Greensburg, Erie, Harrisburg, Allentown and Scranton. The Supreme Court late last month ordered an indefinite stay of the report pending the appeal.

Thursday's filing was in response to a June 29 filing by numerous media organizations, including the Pittsburgh Post-Gazette and the Philadelphia Inquirer. They called for the Supreme Court to lift its indefinite stay of the report's release and to make public the names of those fighting to block its release. As an alternative, the media asked that a redacted report be released, omitting only the parts involving those challenging the report until that could be resolved.

Mr. Shapiro's office also filed a response Thursday to the media petition.

Senior Deputy Attorney General Daniel Dye wrote that the office was neutral on whether the media should have status to intervene, but he agreed with their call for the report to be immediately released.

"If courts were to lay claim to the power to rewrite grand jury reports, overruling language approved by the jurors, then reports would no longer be grand jury reports; they would be judge reports," Mr. Dye wrote.

The grand jury, which convened in Pittsburgh from mid-2016 until earlier this year, weighed evidence and testimony presented by Mr. Shapiro's office. Its final report was approved by Supervising Judge Norman A. Krumenacker III of Cambria County, but remains sealed.

Mr. Dye echoed Judge Krumenacker's conclusion that grand juries don't prosecute, they only investigate, and that those criticized by a grand jury have the legal right to file a written reply that is released with the report.

In fact, the accused "are free to go further," Mr. Dye added.

They're able "to make any statements they wish, to appear in any forum, to go before any camera or microphone," he wrote. "That is not true for the grand jury. The jurors have been discharged and disbanded, and are bound by their secrecy oath. The report itself is their last word."

He argued that unlike in a criminal trial, the law doesn't give the accused in a grand jury proceeding the rights they're seeking, such as to cross-examine witnesses and bring their own witnesses and evidence in hopes of reshaping the report.

But attorneys for the clergy said the report violates their right to due process before being deprived of their constitutional right to their reputations.

They cited four examples, all blacked out in the public version, of what they said were "gross characterizations, oversimplifications and outright erroneous conclusions in the report that violate the Investigatory Grand Jury Act and Constitutional due process."

The challengers' attorneys all opposed making the report public. The filings appeared to diverge only in that some of the challengers didn't oppose the media bid for intervenor status and for a redacted copy of the report, while the largest group opposed those as well.

The challengers accused Judge Krumenacker of failing to adequately confirm the accuracy of the report.

State law allows those criticized but not indicted by a grand jury to file a written rebuttal with the report. The clergy group's attorneys said they've only seen the portions of the report that criticize them, and they allege that some cases are built on "multiple levels of hearsay, and often without the alleged victim having personally made any complaint."

They added: "Releasing the report in its current flawed form would disserve the victims of abuse as much as ... those wrongly accused and falsely implicated."

They said the media do not have First Amendment or other rights to sealed grand jury proceedings and that it would be premature to grant access to the report at this time.

The challengers are represented by 12 individual attorneys or law firms, according to the filings.

Peter Smith: psmith@post-gazette.com or 412-263-1416. Harrisburg bureau reporters Liz Navratil and Angela Couloumbis contributed.

PENNSYLVANIA REAL-TIME NEWS

AG argues church abuse grand jury report should be public

Posted July 5, 2018 at 2:36 PM

Pennsylvania Attorney General Josh Shapiro answers questions during an interview in his office on Feb. 1, 2018.Joe Hermitt | jhermitt@pennlive.com(Joe Hermitt | jhermitt@pennlive.)

Comment

By Mark Scolforo
The Associated Press

HARRISBURG, Pa. (AP) -- Pennsylvania's attorney general told the state Supreme Court on Thursday he supports a request by news organizations that the court order the release of an extensive report into child sexual abuse and attempts to cover it up in several of the state's Roman Catholic dioceses.

Attorney General Josh Shapiro also said in the court filing that his office opposes requests by unnamed parties to present their own evidence, question witnesses and rewrite the grand jury report "in accordance with their preferred view of the facts."

He argued the report should not be delayed, calling it a matter of exceptional public interest.

"Hundreds of victims, thousands of parishioners and many members of the community are awaiting the report," Shapiro wrote in the court filing. "The longer it is held, the greater the risk of undermining public confidence in the judicial system."

The judge who supervised the statewide investigative grand jury ordered the report's release a month ago, but the Supreme Court on June 20 held it up, citing challenges to the release by "many individuals" named in the document.

The court has sealed the names of people challenging the report's release, as well as any court papers that they may have filed.

Harrisburg, Greensburg dioceses tried to block grand jury: report

In a five-page opinion released last month, the Supreme Court said most of the challengers claim the report's discussion of them would violate reputational rights guaranteed by the state constitution and that they have a due process right to be heard by the grand jury.

Shapiro countered that unindicted people who were cited in the report in a way that "could be construed as critical" were given an unrestricted right to file responses that are expected to be released along with the report.

Shapiro filed a document under seal seeking the release on Monday, the same day the news organizations separately asked to intervene and argue for it to be made public, along with docket sheets and filings.

The report concerns six of the state's Roman Catholic dioceses -- Allentown, Erie, Greensburg, Harrisburg, Pittsburgh and Scranton. Five of the six bishops declined to appear before the grand jury, instead submitting written statements. The Erie bishop testified, according to court papers.

The grand jury supervising judge, Norman Krumenacker, described the investigation as involving allegations of child sexual abuse, failure to report it, endangering the welfare of children and obstruction of justice by people associated with the church, as well as local public officials and community leaders.

Thursday's filing by the attorney general said a further delay in its release "cannot be justified."

"The challengers have failed completely to explain why their right of unrestricted response is insufficient to comply with due process and permit immediate release of the report here," Shapiro wrote. "Their responses will function in the same way as the report -- by speaking directly to the citizenry. The only 'adjudicating' body is the public itself."

The grand jury has finished its term and been disbanded.

The attorney general opposed a suggestion by the news organizations that, if the court decides it needs more time to consider the legal challenges, it could immediately order the report's release with only those parts that are in question shielded from view.

Redaction, Shapiro argued, "would only further undermine confidence in the process, and could suggest the appearance of preferential treatment of particular citizens."

Continued secrecy over challenges to the grand jury as an institution, he said, "may itself undermine confidence by suggesting the appearance that certain citizens are granted the privilege of litigating out of the public eye despite the impact of the litigation on the rights of all citizens."

View Comments

EXHIBIT G

NewsRoom

6/22/18 Phila. Inquirer (Pg. Unavail. Online)
2018 WLNR 19126221

Philadelphia Inquirer, The

June 22, 2018

EDITORIAL: Pa. Supreme Court enables toxic secrets in priest sex scandal

June 22--Just as a grand jury was about to release an 800-page report detailing allegations of sexual abuse by priests and Catholic Church coverups, the Pennsylvania Supreme Court chose to keep it a secret.

Over the last two years, dozens testified in secret before the grand jury which examined abuse allegations in every diocese in the state except for Philadelphia and Altoona-Johnstown, which have already been the subjects of criminal probes. According to court documents made public, the victims were raped and molested. They have waited long enough to tell their stories.

For decades, the alleged abusers were able to hide behind a cloak of secrecy to commit sickening crimes. Now the state's highest court is prolonging the victims' suffering by suppressing the report.

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Attorney General Josh Shapiro was not expected to charge anyone criminally. But the report itself is a powerful document. It would acknowledge the pain of so many who have been forced to suffer alone -- and demand accountability from the abusers and their protectors.

The report also follows the path blazed by former Philadelphia District Attorney Lynne Abraham and repeated in jurisdictions throughout the country. She issued her grand jury report in 2005 detailing the abuse, even though the crimes it alleged were too old for criminal charges.

"The important thing for me is that the stories be told," she said. "The stories were so important, the crimes so astoundingly cruel, and the church willfully and intentionally covered it up. "

Abraham's work signaled to prosecutors that they had a responsibility to investigate similar allegations in their communities. And, it laid the groundwork for a second probe here in 2011, which resulted in the arrests of four priests.

During the course of his investigation, Shapiro charged two Western Pennsylvania priests with abusing children. He has said little about his probe other than that he expected to speak publicly about it this month. Now, with powerful forces wanting to keep their secrets, it's unclear if that can happen.

The Supreme Court did not explain its decision. In an unusual move, justices did not put their names on the opinion.

The names of those fighting the release of the report are hidden as well. We don't know if they are the same people fighting a state law that would extend the statute of limitations so older victims could sue the institutions that cover up child abuse.

The court should order those fighting the release to argue their points in public. The victims and the public should know who would deny the victims justice. It could be any one of the institutions named in the report or the hundreds of church and public figures said to be implicated in this scandal.

The bishops whose dioceses are under investigation said they wouldn't stand in the way of the report.

Bishop Lawrence Persico of Erie issued a statement saying, "The grand jury investigation and its report will provide a voice for the victims. We must listen to that voice and learn from it."

He's right.

Supreme Court justices have a responsibility to the victims, and to the public at large, to unshroud the secrets that have damaged so many lives.

---- Index References ----

News Subject: (Catholic Church (1CA30); Christianity (1CH94); Crime (1CR87); Criminal Law (1CR79); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Religion (1RE60); Sex Crimes (1SE01); Social Issues (1SO05))

Region: (Americas (1AM92); North America (1NO39); Pennsylvania (1PE71); U.S. Mid-Atlantic Region (1MI18); USA (1US73))

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End of Document

NewsRoom

6/22/18 Pitt. Post-Gazette A14
2018 WLNR 19115871

Pittsburgh Post-Gazette (PA)

June 22, 2018

Section: EDITORIAL

RELEASE THE REPORT: NO REASON TO HOLD BACK GRAND JURY REPORT ON ABUSE

The state Supreme Court owes the people of Pennsylvania an explanation.

Its decision Wednesday to bar release, even temporarily, of a grand jury's report on sexual abuse in six Catholic dioceses is an affront to the victims. It's also an insult to members of the grand jury - citizens who gave 22 months of their lives on an investigation that required them to review half a million pages of documents and hear testimony from dozens, if not hundreds, of witnesses.

If the result is nothing but secrecy, why put the witnesses and jurors through the trouble and spend an untold sum on the process?State Attorney General Josh Shapiro said he would work "to make sure the victims of this abuse are able to tell their stories and the findings of this investigation are made public to the people of Pennsylvania." Well he should.

The 40th Statewide Investigating Grand Jury produced a voluminous, possibly damning, report on decades of misconduct in thePittsburgh, Greensburg, Allentown, Erie, Harrisburg and Scranton dioceses. The court hasn't bothered to explain why it's sitting on it, whether it is doing so temporarily or eternally, or who might have filed petitions precipitating its order.

Kim Bathgate, the court's spokeswoman, defended the secrecy with the patently false assertion that"all grand jury matters are sealed, including the rationale." Grand juries gather information and indict behind the scenes but their work often is made public. Witness a previous grand jury's scathing report, released in in 2016, on sexual abuse in the Altoona-Johnstown Diocese.

While grand juries are entitled to a certain amount of secrecy, courts are supposed to operate in daylight. Earlier this month, Cambria County President JudgeNorman A. Krumenacker III, who supervises the 40th grand jury, publicly explained an order he issued regarding the investigation. If he can do so, the Supreme Court can, too.

Judge Krumenacker's order rejected petitions from an unknown number of parties who demanded to appear before the grand jury or a judge, tell their side of the story and mold the report to their liking.

Who were these parties? Their identities remain secret. It ought not be the dioceses, which publicly have agreed to the report's release. It might be individuals in linefor the kind of criticism that the Altoona-Johnstown report heaped on church leaders and civil authorities who had an overly cozy relationship with each other and failed to properly investigate

reports of abuse. Fearing similar embarrassment, they now may be scrambling to keep their names out of the report, or modify the narrative, to protect their reputations.

These individuals may have appealed JudgeKrumenacker's order to the Supreme Court, and the court may have decided to block release of the report at least until it sorts things out. If so, they don't deserve this highly unusual treatment.

As Judge Krumenacker helpfully and clearly explained in his public order last month, people criticized by a grand jury have an opportunity to provide a written rebuttal. That's their avenue for redress. Anything else represents a fundamental, unnecessary change in the operation of grand juries, which summon witnesses and are not supposed to be summoned by them.

Anyone who played even a minor role in covering up clergy child abuse should think long and hard about what Pope Francis reportedly said after initially downplaying allegations of wrongdoing in Chile:"I was part of the problem. I caused this and I apologize to you."

If it delays releasing a report that sheds light on decades of scandal in the church, the Supreme Court can consider itself part of the problem, too.

---- Index References ----

News Subject: (Catholic Church (1CA30); Christianity (1CH94); Crime (1CR87); Criminal Law (1CR79); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Religion (1RE60); Sex Crimes (1SE01); Social Issues (1SO05))

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NewsRoom

6/22/18 Patriot-News (Pg. Unavail. Online)
2018 WLNR 19177337

Patriot-News, The (Harrisburg, PA)

June 22, 2018

OPINION: The Pa. Supreme Court has denied church abuse victims a voice | Editorial

PennLive Editorial Board; The Patriot-News, Harrisburg, Pa.

June 22--In most cases, we depend on our courts to shine the light of truth, to right injustices and to ensure that the voiceless among us have a voice proportionate to those who are in power.

But the Pennsylvania Supreme Court did the exact opposite this week when it blocked the release of an 800-page grand jury report detailing decades of sexual abuse by Roman Catholic clergy and the subsequent cover-ups that allowed those priests to continue their abuse -- sometimes for decades.

Hundreds of victims, and the surviving families of those who tragically took their own lives because the trauma of abuse was too much to bear, once again have been victimized by the court's frustrating action.

Pennsylvania Attorney General Josh Shapiro was not expected to file criminal charges in connection with the report. Its release alone was expected to offer a powerful enough indictment of decades of alleged crimes and cover-ups.

The court's order was shrouded in unnecessary secrecy. The high court did not explain its decision nor did any of its seven justices sign their names to the order.

It's also not known who filed the appeal asking for the stay. And it's now likely to delay legislative approval of a bill extending the civil statute of limitations allowing victims to sue for damages.

What also isn't known is how long this could delay the reveal: weeks, months or longer.

State Rep. Mark Rozzi, a Berks County Democrat, and an abuse survivor who was leading the fight to extend the statute, has been openly critical of efforts to block the report.

"The Catholic Church has spent millions to block justice for all victims," Rozzi said. "And they are at it again," he said at a recent Capitol news conference. "Just last week, unnamed individuals filed a motion for a stay of the release of the six-diocese grand jury report findings. Mind you, there are only six people that have this report right now; that is six bishops."

But the bishops whose dioceses were under investigation have publicly said they would not stand in the way of its release.

"The grand jury investigation and its report will provide a voice for the victims. We must listen to that voice and learn from it, Bishop Lawrence Persico of Erie said in a statement.

With its order, the high court is standing in the way of the lessons the report would teach, denying victims a voice, and the church a chance to atone and learn from its mistakes.

We depend on justices to provide a voice to voiceless. The court should reconsider its action.

---- Index References ----

News Subject: (Catholic Church (1CA30); Christianity (1CH94); Crime (1CR87); Criminal Law (1CR79); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Religion (1RE60); Sex Crimes (1SE01); Social Issues (1SO05))

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NewsRoom

6/22/18 Wilkes-Barre Times Leader (PA) (Pg. Unavail. Online)
2018 WLNR 19129408

Times Leader, The (Wilkes-Barre, PA)

June 22, 2018

EDITORIAL: Praise to Shapiro, judge, for seeking abuse report's release

June 22--We respect the sanctity of the American judicial system, including the necessary secrecy of grand jury proceedings.

That doesn't prevent us from feeling grossly disappointed in the Pennsylvania Supreme Court's order Wednesday indefinitely holding up the release of a grand jury report into the handling of sexual abuse claims involving six of the eight Roman Catholic dioceses across the state, including the Scranton Diocese.

The report is expected to reveal details of widespread abuse and efforts to conceal it and protect clergy by officials within and outside the church.

The court's two-paragraph order did not reveal who had filed petitions blocking release of the report, only that those petitions had been granted.

The order specifically stated that grand jury supervisory Judge Norman A. Krumenacker III and the state Attorney General's Office may not release the findings until the court gives its permission.

The order did not explain the court's reasoning or say how long it would take to consider the issue, as the Philadelphia Inquirer pointed out. It tersely indicated that all other documents in the file remain sealed.

That's all we knew as of Thursday, when this editorial was written.

We'd love to get scooped by a late-night development in which the court suddenly changes course, but that's highly unlikely.

Short of seeing this landmark document being released for the public good, we'd most like to know who felt that abuse victims and the general public should wait even longer to know what the two-year investigation discovered.

Despite its incendiary contents, bishops in all of the state's eight dioceses previously stated that they would not block release of the report, as the Pittsburgh Post-Gazette and other outlets reported. Some did say they wanted to be allowed to read it first, however.

Scranton Bishop Joseph Bambera last week issued a statement offering "my deepest apologies to the victims of such abuse, to their families, to the faithful of our Church and to everyone impacted by the behaviors described in this report."

We're going to take the bishops at their word. So who wanted it blocked?

We don't know. Perhaps we may never know.

What we do know is that Pennsylvania Attorney General Josh Shapiro has been on the right side of this issue, as has Krumenacker.

The Cambria County-based judge earlier this month made public a decision rejecting an effort to delay the release of the report or let those named in it challenge the details before it's made public. Krumenacker said the state has a strong interest in preventing child abuse "by identifying abusers and those individuals and institutions that enable (them) to continue abusing children."

We applaud the push for transparency by Krumenacker and by Shapiro, who released this statement on Wednesday: "My legal team and I will continue fighting tirelessly to make sure the victims of this abuse are able to tell their stories and the findings of this investigation are made public to the people of Pennsylvania."

The people of Pennsylvania number nearly 12.8 million, and a quarter of us -- 3.2 million -- remain members of the Roman Catholic faith.

As Shapiro points out, all of us deserve to hear what the victims have to say. We have a right to know who may have enabled child abuse to continue and go unpunished. Catholics have a right to know the leaders of their church are not above the law.

We believe justice will eventually prevail. But as the saying goes, justice delayed is justice denied.

Shame on those who continue to seek delays.

-- Times Leader

---- Index References ----

Company: PHILADELPHIA INQUIRER (THE)

News Subject: (Catholic Church (1CA30); Christianity (1CH94); Crime (1CR87); Criminal Law (1CR79); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33); Religion (1RE60); Sex Crimes (1SE01); Social Issues (1SO05))

Region: (Americas (1AM92); North America (1NO39); Pennsylvania (1PE71); U.S. Mid-Atlantic Region (1MI18); USA (1US73))

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