[PUBLIC/REDACTED VERSION]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 15 EM 2022

IN RE: THE THIRTIETH COUNTY
INVESTIGATING GRAND JURY

COMMONWEALTH'S RESPONSE IN OPPOSITION TO PETITION FOR SPECIALIZED REVIEW PURSUANT TO PA. R.A.P. 1611

On Petition for Specialized Review of orders entered March 4, 2022, by the Honorable Kai N. Scott, Supervising Judge, Thirtieth County Investigating Grand Jury, Court of Common Pleas of Philadelphia County, at Misc. No. 0008094-2018.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

CITATION CONVENTIONS vi

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. The Grand Jury's Investigation, Findings and Recommendations. 4

6. Subsequent DAO involvement and Grand Jury investigation. 10

B. The Pre-Publication Process Implemented by the Supervising Judge 11

1. Judge Scott carefully examined the Report and its underlying record 11

2. The supervising judge invited responses from multiple affected persons, heard their requests for relief, and ruled. 12

ARGUMENT 15

I. THE REPORT SATISFIES THE STATUTORY REQUIREMENTS FOR A GRAND JURY REPORT. 15

A. The ██████ Report is Authorized by Statute Because It Proposes Recommendations for Government Action in the Public Interest. 16

B. The ██████ Report Relates to "Public Corruption," Defined to Include Unlawful Activity by Public Employees. 20

II. THE SUPERVISING JUDGE DID NOT ERR IN ACCEPTING THE REPORT AS SUPPORTED BY THE PREPONDERANCE OF EVIDENCE. 21

III. THE SUPERVISING JUDGE DID NOT ERR IN FINDING THAT PUBLICATION WOULD NOT VIOLATE PETITIONER'S RIGHTS TO REPUTATION AND DUE PROCESS. 24

A. The Commonwealth cannot accomplish its interest in some manner besides releasing the Grand Jury Report. 27

B. The Commonwealth's interest in correcting and preventing public corruption going forward is compelling and justifies some infringement upon Petitioner's rights 28

C. The degree of infringement upon Petitioner's right of reputation is limited, particularly in light of ██ office. 30

D. Finally, the ample due process protections afforded Petitioner resulted in the narrowest possible infringement upon ██ interest consistent with effectuating the state interest involved. 32

1. Petitioner received all the process ██ was legally due. 32

2. Petitioner also received additional process to minimize any infringement of ██ right of reputation. 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

Bundy v. Wetzel, 184 A.3d 551 (Pa. 2018) 26

In re F.C. III, 2 A.3d 1201 (Pa. 2010) 25

In re Fortieth Statewide Inv. Grand Jury (Fortieth I), 190 A.3d 560 (Pa. 2018) .... passim

In re Fortieth Statewide Inv. Grand Jury (Fortieth II), 197 A.3d 712 (Pa. 2018) .... passim

In re Grand Jury Inv. No. 18, 224 A.3d 326 (Pa. 2020) 15, 19, 20

Mathews v. Eldridge, 424 U.S. 319 (1976) 26

Moore v. Jamieson, 306 A.2d 283 (Pa. 1973) 26

N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) 31

Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975) 26

Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir. 1942) 31

Constitutional Provisions

Pa. Const. art. I, § 1 30

Statutes

42 Pa. C.S. § 4544 15

42 Pa. C.S. § 4552 .... passim

Other Authorities

Rpt. No. 1 of the Fortieth Statewide Inv. Grand Jury, No. CP-02-MD-571-2016, at 307-315 (Allegheny Ct. Com. Pls.) 19

CITATION CONVENTIONS

Citations of the form "SA__" refer to pages in the Sealed Appendix filed contemporaneously with this Response.

Citations of the form "ICA__" refer to pages in the In-Camera Sealed Appendix filed contemporaneously with this Response.

INTRODUCTION

Grand Jury 30 wanted the public to know the following: [redacted]

To improve accountability, the Grand Jury issued a Report containing the findings from its investigation and, based on those findings, its recommendations for reforms. (*See infra* Section A.)

Prior to any public disclosure of the Report, the supervising judge (Kai N. Scott, J.) implemented a thorough process to ensure affected persons would be heard and that the Report itself would be thoroughly examined. (*See infra* Section B.)

Following the adoption of the Report by the Grand Jury, the supervising judge carefully reviewed all the notes of testimony, examined a version of the

Report that referenced the underlying record, and scrutinized the underlying exhibits as well, ultimately determining that the Report was supported by a preponderance of the evidence.

The supervising judge then invited responses from multiple people whose reputations could be affected by publication, and she heard their motions for relief, including requests for redactions. She urged the Commonwealth and the affected individuals to discuss potential redactions, and that process led to successful agreements about redactions that would protect individual reputations while allowing publication of the essential and important findings in the Report.

[REDACTED], Petitioner, was the only person who, throughout that process, adhered to the extraordinary position that the Report should never be published in any form, and [REDACTED] is the only party below who continued to urge redactions so severe they that would eviscerate key sections of the Report—such as striking all mention of [REDACTED] Over multiple hearings spanning six months, the supervising judge reviewed all parties' requests for specific redactions or other relief, and she ruled on each request, one at a time, on a page-by-page, line-by-line basis. During that process, the supervising judge granted Petitioner significant relief, over the Commonwealth's objections, including allowing [REDACTED] name to be pseudonymized [REDACTED] and redacting from the Report many of the passages that were most critical of [REDACTED]

conduct, such as the Grand Jury's conclusion that

(*Compare* SA498 with SA994.)

Today, Petitioner again stands alone in petitioning this Court, arguing that interest in protecting self from tangential criticism outweighs the Commonwealth's compelling interest in publishing the Grand Jury's findings and recommendations to the public. Not satisfied with the relief Judge Scott painstakingly granted , Petitioner now asks this Court to do exactly what the Grand Jury considered to be "inconceivable": asks for the extraordinary relief of concealing forever the Grand Jury's findings relating to , and sealing the recommendations it considered essential for going forward.

* * *

In evaluating Petitioner's request, the Commonwealth respectfully asks this Court to consider the strength of the Grand Jury investigation; the line-by-line review of the resulting record (exceeding 3,000 pages) conducted by the supervising judge in finding the Report to be supported by a preponderance of the evidence; the extensive due process already offered to Petitioner here (including the opportunity to testify, the right to respond, and the use of a pseudonym among

other significant redactions), particularly in light of the comparatively limited right of reputation available to a public figure conducting public business from a leadership position; and finally, the enormous irony of sealing a Grand Jury Report, already extensively redacted, which investigated highly credible allegations of a cover-up of [redacted].

This Court should deny the Petition.

STATEMENT OF THE CASE

A. The Grand Jury's Investigation, Findings and Recommendations.

In making the numerous factual findings that underlie its recommendations, the Grand Jury considered nearly 200 exhibits, including [redacted] (ICA140-1399.)

The bench copy of the Report resulting from the Grand Jury's investigation contains nearly a thousand footnotes, and cites to the record reviewed by the Grand Jury for each of its factual findings. (ICA1-139.)

In summary, the Grand Jury's findings are as follows.

[redacted]

6. Subsequent DAO involvement and Grand Jury investigation.

The DAO opened a grand jury investigation into [redacted] [redacted]. Grand Jury [redacted] term expired, and the DAO lacked the resources at the time to continue the investigation in Grand Jury [redacted]. (SA69-70.)

Grand Jury 30 completed the investigation—to the extent that was possible. Petitioner testified before Grand Jury 30, with counsel present.[2] (ICA2411-2494; SA1059-60.)

Although Grand Jury 30 viewed its findings as "outrageous" (SA11) and found it "inconceivable . . . that nothing should come of [its] investigation" (SA104-105), it determined that it could not "recommend criminal charges" against any [redacted] [redacted] because [redacted] [redacted]

[2] The Commonwealth provided both [redacted] and Petitioner an opportunity to be heard before Grand Jury 30. (ICA2411, ICA3215.) [redacted] declined to appear. (SA383-84, SA387-88, ICA3215.) Of the other potential respondents identified by the supervising judge, [redacted] testified before Grand Jury [redacted] (SA168, ICA457), and the remaining [redacted] did not testify at all, but gave statements [redacted] that were read into the Grand Jury's record (ICA195, ICA207, ICA222, ICA232, ICA249, ICA322, ICA429, ICA446).

On April 2, 2021, Grand Jury 30 voted to adopt and submit to the supervising judge a Report on [redacted]

(SA138.)

B. The Pre-Publication Process Implemented by the Supervising Judge.

Prior to publication, the supervising judge implemented a thorough process to scrutinize the Report and hear from affected individuals.

1. Judge Scott carefully examined the Report and its underlying record.

Prior to accepting the Report, the supervising judge conducted an exhaustive review of the Report and the underlying record. In particular, the Commonwealth furnished to the supervising judge the version of the [redacted] Report adopted by the jury including more than 900 footnote citations to the underlying record (ICA1-139) and accompanied by more than 3,000 pages of exhibits and testimony. (ICA140-3199.) On June 3, 2021, at an *in camera* hearing, the supervising judge determined that the conclusions drawn by the Grand Jury in the Report were supported by the preponderance of evidence and ordered it accepted pursuant to 42 Pa. C.S. § 4552. (SA136.) In so doing, she detailed the evidence she relied upon in the record to support her finding that the report was indeed supported by a preponderance of the evidence. (SA136, ICA3223-26.)

2. The supervising judge invited responses from multiple affected persons, heard their requests for relief, and ruled.

Petitioner, among numerous other individuals named in the Report, received extensive process to limit undue damage to ■ reputation, including notice of the Grand Jury proceedings prior to their conclusion, an invitation to testify before the Grand Jury, the right to receive and review the Grand Jury's Report prior to public release, the opportunity to author a response to be appended to the published Report, and the right to be heard by Judge Scott regarding any other requests.

Upon acceptance of the Report, the supervising judge ordered that, pursuant to 42 Pa. C.S. § 4552(e), nine individuals named in the Report would be offered an opportunity to respond in writing and otherwise be heard by the court before the Report's public release. (SA247-64.) Those nine individuals were ■■■■■■■■ (SA247-64.) All of these individuals retained counsel, and the Commonwealth served Orders upon counsel that notified these individuals of their respective opportunities to respond in writing or to otherwise be heard before the supervising judge. (SA245-46.) Of the nine individuals invited to respond, two individuals—■■■ and Petitioner, both of whom also testified before the Grand Jury—chose to submit a written response to the Report. (SA265-68, SA286-308.) The other seven individuals provided this opportunity did not submit any written

response, but [redacted] did request other relief. (SA271-281, SA387-88.)

On August 19, 2021, after reviewing the submitted responses and requests for relief from all parties, the supervising judge heard argument. (SA330.) At that hearing, the supervising judge denied Petitioner's and the [redacted] requests to reject the Report or to permanently seal it in its entirety. (SA335, SA355, SA369-70.) The supervising judge ordered that the report would be redacted, and directed counsel to meet and confer regarding whether they could reach an agreement that accommodated all parties. (SA380-81.)

On October 22, 2021, the Commonwealth advised the court that it had reached a nearly complete agreement with the [redacted] regarding their proposed redactions. (SA393, SA394-608.) At a subsequent hearing on October 27, 2021, the court ruled on the few remaining disagreements. (SA614-62, SA634-39.) Following those rulings, those [redacted] did not pursue any further redactions to the Report and did not object to the release of that redacted Report. (SA1088.) Additionally, following those redactions, [redacted] asked that [redacted] submitted response not be appended to the publicly released redacted Report. (SA1089.) Those redactions are not at issue here.

In contrast, Petitioner and the Commonwealth were unable to reach an agreed upon resolution for redactions to the Report at any point. In particular,

Petitioner reiterated ██ request that the Report be sealed in its entirety and never released (SA282-85, SA646), which was a result that was unacceptable to the Commonwealth and already ruled legally unsupported by the supervising judge. Petitioner also requested extensive redactions that removed entire sections from the Report, and frustrated the Grand Jury's stated purpose and recommendations, such as eliminating all references to ███. (SA669-776.) The Commonwealth could not accede to these proposed redactions. (SA669.)

The supervising judge held further hearings where she heard the parties' positions and adjudicated the redactions proposed by Petitioner on a page-by-page, line-by-line basis. (SA782, SA1003.)

Over the Commonwealth's objection, the supervising judge ruled that Petitioner's name would be pseudonymized in the Report as ████████████ ████████████(SA792, SA796-97, SA1008-09.) The supervising judge also ordered certain statements in the Report redacted or modified to cloak Petitioner ██████ identity. (*E.g.*, SA1007-11, SA1014-16, SA1027.)

The supervising judge also ruled that the Grand Jury made some remarks in the Report were unduly editorial, and conducted a second, specific preponderance-of-the-evidence review on the criticisms of Petitioner. Based upon those findings, the supervising judge ordered some passages redacted and others excised in full. Petitioner requested some of these redactions; the Commonwealth offered others,

and the supervising judge ordered some of these statements redacted *sua sponte*. (*E.g.*, SA798, SA803, SA833-36, SA851-53, SA1017-18, SA1022-23, SA1027-29.)

Following those hearings, the parties met and conferred to produce a version of the Report that implemented the court's rulings, and the Commonwealth presented that version to the court. (SA1085, SA3-135.) On March 4, 2022, the court ordered that, effective March 14, 2022, the Report would be unsealed and released in a form that implemented its prior rulings. (SA1-2.)

On March 10, 2022, Petitioner [redacted] petitioned for specialized review in this Court, contending that the supervising judge erred in ordering the public release of the Report as redacted. (Pet. 11.)

ARGUMENT

I. THE [redacted] REPORT SATISFIES THE STATUTORY REQUIREMENTS FOR A GRAND JURY REPORT.

Under the Investigating Grand Jury Act, a county investigating grand jury is empowered to investigate "the existence of criminal activity within the county which can best be fully investigated using the investigative resources of the grand jury." 42 Pa. C.S. § 4544(a); *In re Grand Jury Inv. No. 18*, 224 A.3d 326, 333 (Pa. 2020) (Donohue, J., concurring). "[A]t any time during its term, a majority of the investigating grand jury can vote to submit to the supervising judge an investigating grand jury report." *Grand Jury Inv. No. 18*, 224 A.3d at 331 (citing

42 Pa. C.S. § 4552(a)). An investigating grand jury report is "a report submitted by the investigating grand jury to the supervising judge regarding conditions related to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon state findings." 42 Pa. C.S. § 4542(a). An investigating grand jury does not have statutory authority to adopt a report unless it satisfies at least one of the two criteria. *Id.* at 332-33.

In this instance, Grand Jury 30 had statutory authority to adopt the ████████ Report because that Report meets both criteria.

A. The ████████ Report is Authorized by Statute Because It Proposes Recommendations for Government Action in the Public Interest.

On its face, the ████████ Report "propose[s] recommendations for legislative, executive, or administrative action in the public interest based upon stated findings." 42 Pa. C.S. § 4542. And taken as a whole, the Report and its recommendations are animated by an important public interest purpose beyond relief or condemnation concerning a narrow group of individuals. As a result, the Report qualifies as an investigating grand jury report.

Initially, Grand Jury ██ opened a criminal investigation into ██████████ ████ but that investigation could not be concluded before the expiration of its term. (SA84-86, ICA1789, ICA1806-07.) After Grand Jury 30 concluded its own

investigation, it acknowledged that it would be unable to recommend charges against any specific individual for , in part because of

(SA11, SA146.) The Grand Jury's at the end of its investigation, was

(SA240.)

To avoid that result, the Grand Jury adopted a Report to be released to the public (SA147.) Consistent with this goal of addressing deficiencies the Grand Jury's Report recommended :

These specific recommendations demand "legislative, executive, or administrative action in the public interest based upon stated findings." *Grand Jury Inv. No. 18*, 224 A.3d at 332 (citing 42 Pa. C.S. § 4542) They were not "added as an afterthought," as Petitioner mistakenly suggests. (Pet.14.)

Petitioner complains that only "seven pages" are "allotted" for the section that lists recommendations, and that the Grand Jury's recommendations are not sufficiently "specific" or detailed, as compared to the Grand Jury's detailed factual findings and its subsequent assignments of responsibility. (Pet. 17-18.) But the Grand Jury's recommendations should not be evaluated in a vacuum; instead, it is the Grand Jury's detailed factual findings that convey the pressing *need* to address these problems going forward.

In that respect, it is useful to compare the [redacted] Report recommendations to those adopted by grand juries in prior cases before this Court.

In *Fortieth*, the grand jury adopted a 900-page report that identified more than 300 persons as child sexual abusers or facilitators. *In re Fortieth Statewide Inv. Grand Jury (Fortieth I)*, 190 A.3d 560, 511 (Pa. 2018). At the conclusion of that report, the grand jury dedicated only eight pages to making explicit recommendations, which related to changing certain statutes of limitations,

clarifying penalties for failure to report child abuse, and prohibiting certain non-disclosure agreements. *Rpt. No. 1 of the Fortieth Statewide Inv. Grand Jury*, No. CP-02-MD-571-2016, at 307-315 (Allegheny Ct. Com. Pls.). There is no suggestion, however, that the report in *Fortieth* failed to meet the statutory criteria or that its recommendations were somehow too succinct to be in the public interest. *See Fortieth I*, 190 A.3d at 515 (expressing "little doubt" that the grand jurors "would prefer for any mistakes [in the report] be eliminated . . . over suppression of their entire findings, explanations, and *recommendations*" (emphasis added)).

In contrast, the report in *Grand Jury Inv. No. 18* failed the statutory criteria for reasons that are not applicable here. In that case, the grand jury's recommendations were "focus[ed] exclusively" on punishing a single, specifically named person and on providing "resources or catharsis" to his alleged victims. 224 A.3d at 332. Those recommendations were not "'in the public interest,' as contemplated by the Act," because they were focused on that specific alleged perpetrator and his victims and "were not directed at broad-based legislative, executive, or administrative action." *Id.* In the ██████ Report, the reforms recommended are of the "broad-based" type that were found lacking in *Grand Jury Inv. No. 18.* While the Grand Jury "also hope[d] that th[e] report finally gives ██ ██████████ some answers," this additional purpose in no way invalidates the recommendations it made for public reform. (SA147.)

B. The [redacted] Report Relates to "Public Corruption," Defined to Include Unlawful Activity by Public Employees.

The Investigating Grand Jury Act defines "public corruption" to include (among other things) the unlawful activity of a public employee or officer in connection with that employment or office. *Id.* Under that clear and unambiguous language, "public corruption" extends to unlawful conduct that is not necessarily criminal. *See Grand Jury Inv. No. 18*, 224 A.3d at 332 (holding that the statute's plain language controls when it is "clear and free from ambiguity").

Fundamentally, this Report and its recommendations relate to public corruption as defined. The Report finds that [redacted] The Report finds a failure to [redacted], and urges reform going forward as a result.

Petitioner argues that the Report cannot be about public corruption because "[redacted], their actions were not unlawful, and thus the report does not in

any way relate to public corruption." (Pet. at 14). However, Petitioner fails to grasp that whether or not ██ is convinced that █████ actually engaged in unlawful conduct, no one can dispute that the Grand Jury's findings *relate* to unlawful conduct, at the very least by ████████████████████.

In addition, the Report relies for its findings on the testimony of multiple ██████████████ who firmly believed ██████████████████████████ were "steered" to minimize ████ accountability. Several further testified that in response to their complaints ███████████████████████████, they feared or actually experienced retaliatory ██████████████████████—almost textbook conditions that not only relate to public corruption but enable and perpetuate it. (SA194-203, SA241-42, ICA812-23, ICA849-53, ICA873-74, ICA1238-39, ICA1245-46, ICA1250-51, ICA1775, ICA2096, ICA2258-2263, ICA2102, ICA2273-74.)

II. THE SUPERVISING JUDGE DID NOT ERR IN ACCEPTING THE REPORT AS SUPPORTED BY THE PREPONDERANCE OF EVIDENCE.

"Any investigating grand jury, by an affirmative majority vote of the full investigating grand jury, may, at any time during its term submit to the supervising judge an investigating grand jury report." 42 Pa. C.S. § 4552(a). Following the submission of such a report, "the supervising judge [is] required to examine the report and the confidential record of the proceedings and to issue an order

accepting and filing the report as a matter of public record 'only if the report is based upon facts received in the course of an investigation authorized by [the Investigating Grand Jury Act] and is supported by the preponderance of the evidence.'" *Fortieth I*, 190 A.3d at 564 (quoting 42 Pa. C.S. § 4552(b)).

The role of the supervising judge is to review the findings of the grand jury and determine whether those findings are factually supported by the record. In *Fortieth I* this Court distinguished between a report-wide preponderance analysis performed by a supervising judge and a discrete analysis of the "specific criticism of each individual" to ensure that the preponderance standard was met, not just report-wide, but for each criticized individual. *Id.* at 575.

The record here clearly establishes that the supervising judge carefully followed the Investigating Grand Jury Act procedures and did not legally err. After the Grand Jury submitted the Report, the supervising judge thoroughly examined it and the underlying record, and she accepted the Report as supported by the preponderance of evidence. The final Report was delivered to her after it was voted on by the Grand Jury, and she reviewed all of the transcripts and exhibits over the course of several days, approving the ████████ Report and putting her findings on the record on June 3, 2021. (SA137, SA1033, ICA3223-26.) In addition, she determined that certain individuals would be granted a right to append a response

to the Report, in part by determining the level and nature of criticism adhering to each on a case-by-case basis. (SA247-64, SA386-88, ICA3226-38.)

To the extent a supervising judge must perform discrete analysis of the "specific criticism of each individual" to ensure that the preponderance standard was met, not just report-wide, but specifically for Petitioner, *Fortieth I*, 190 A.3d at 575, the supervising judge heard Petitioner's request, following her acceptance of the Report, to reconsider her ruling that the Report was supported by a preponderance of the evidence. (SA284, SA1034, SA1038.) She considered and rejected the request. (SA1034, SA1038.) The supervising judge's determinations are entitled to deference, and she did not legally err in reaching those findings.

Petitioner broadly claims again here that the Report as a whole is unsupported by a preponderance of evidence. (Pet. 21.) However, ■ does not identify any specific basis on which to challenge the gravamen of the Report, much less a reason to find that it amounted to an abuse of discretion for a factfinder, and thus has waived those arguments.

Instead Petitioner argues selective facts from the Report and declares: "The report's claim that [redacted] is flatly contradicted by the evidence presented to the grand jury, and thus the report's finding that [redacted] is not supported by the preponderance of the evidence." (Pet. 23-

24.) But the Grand Jury considered evidence from a multitude of sources, including (*e.g.*, SA98-99), (*e.g.*, SA56-58), and (*e.g.*, SA9, SA46, SA48). The record is clear that . (*E.g.*, SA53, SA194-203, SA241-42, ICA812-23, ICA1775, ICA2258-63, ICA2102-03.) The Grand Jurors heard not only their testimony, but the testimony of parties who disagreed with that assessment, *including Petitioner*, in addition to having access to underlying documents and other exhibits.

Petitioner may not agree with the factfinder's assessment of the evidence, but has no grounds to claim that it lacked a preponderance of support; nor by cherry-picking from the Report, may substitute own assessment of the evidence in place of the factfinder's.

III. THE SUPERVISING JUDGE DID NOT ERR IN FINDING THAT PUBLICATION WOULD NOT VIOLATE PETITIONER'S RIGHTS TO REPUTATION AND DUE PROCESS.

"[T]he General Assembly has authorized Pennsylvania investigating grand juries to issue public reports," and "such reports—like the institution of the grand jury itself—have a long lineage." *Fortieth I*, 190 A.3d at 569. In addition, the

supervising judge of an investigating grand jury is vested with "discretion . . . to permit the public release of information." *Id.* at 563.

At the same time, this Court has recognized the "tension between the grand jury's reporting function and the constitutional rights [to reputation] of the individuals who are impugned in the report." *Id.* at 565. To resolve this tension, this Court's caselaw indicates that some degree of due process is required when a grand jury report implicates a person's right of reputation and criminal charges (which would otherwise trigger a variety of due process protections) are not forthcoming. *Id.*; *In re Fortieth Statewide Inv. Grand Jury (Fortieth II)*, 197 A.3d 712, 721 (Pa. 2018).

"Due process is a flexible concept and calls for such procedural protections as the circumstances require." *In re F.C. III*, 2 A.3d 1201, 1215 (Pa. 2010). This Court has used in many of its investigating grand jury decisions, generally in the context of motions to disqualify counsel or quash, a test that centers the Commonwealth's interests in a functional, fair grand jury proceeding:

> In balancing the conflicting rights of the state and the petitioners, four considerations dominate the weighing process:
>
> '(1) Whether the state interest(s) sought to be achieved can be effectively accomplished in some manner which will not infringe upon interests protected by constitutional rights;
>
> (2) Whether the state interest(s) (are) sufficiently compelling when compared with the interests affected, (to justify) any infringement of those interests;

> (3) Whether the state interest(s) (are) sufficiently compelling to justify the degree of infringement that is necessary to effectuate that interest;
>
> (4) Whether the provision under challenge represents the narrowest possible infringement consistent with effectuating the state interest involved.'

Pirillo v. Takiff, 341 A.2d 896, 905 (Pa. 1975) (quoting *Moore v. Jamieson*, 306 A.2d 283, 289 (Pa. 1973)), *opinion reinstated*, 352 A.2d 11 (Pa. 1975). This balancing test is consistent with the three-part due process framework articulated in the *Mathews* line of cases. *See Fortieth II*, 197 A.3d at 721 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Bundy v. Wetzel*, 184 A.3d 551 (Pa. 2018)).

Releasing the ██████ Report comports with due process. Petitioner received a high degree of procedural protections below, such that all factors of this test weigh in favor of releasing the Report as redacted. First, the Commonwealth has a compelling interest in the release of the Report, which the Commonwealth cannot accomplish by some other manner. (*See infra* Part III.A.) Second, the Commonwealth's interest in releasing the Report to correct and prevent public corruption going forward justifies the degree of infringement upon Petitioner's interests necessary to effectuate the Commonwealth's interest. (*See infra* Part III.B.) Third, the Commonwealth's interest in releasing the Report is sufficiently compelling when compared to Petitioner's interest in sealing the Report to justify infringement upon Petitioner's interests, particularly in light of

the nature of ■ public office. (*See infra* Part III.C.) Fourth and finally, given the significant redactions already made, the Report in its current form represents the narrowest possible infringement upon Petitioner's interest consistent with effectuating the state interest involved. (*See infra* Part III.D.)

A. The Commonwealth cannot accomplish its interest in some manner besides releasing the Grand Jury Report.

The state and public have a compelling interest in publication of the Report. Exposing mal- and misfeasance by public servants in the course of their duties is a time-honored use of the investigating grand jury.[3] In this case, there is no better mechanism in place in the Commonwealth at this moment to review and address

Misconduct within is particularly damaging to the public interest.

[3] *See* Rpt. of 22d Cty. Inv. Grand Jury, Misc. No. 003211-2007 ("DHS Report"); Rpt. of 23d Cty. Inv. Grand Jury, Misc. No. 0009901-2008 ("Gosnell Report").

Indeed, other than the grand jury, there are few if any other institutions with the independence and resources available to investigate the conduct of [redacted] [redacted]—a reality that motivated the Grand Jury's urgent demand in its Report for independent, external oversight. To rely on the possibility that whistleblowers in single incidents might come forward—particularly in the face of potential retaliation—is no way to ensure [redacted]

B. The Commonwealth's interest in correcting and preventing public corruption going forward is compelling and justifies some infringement upon Petitioner's rights.

In the case at bar, a grand jury report is particularly appropriate and necessary precisely because the [redacted] undermined the possibility of any criminal prosecution and trial. To seal this Report incentivizes [redacted] where the evidence could reveal misconduct inconvenient to [redacted].

The public and broader state-actors in the Commonwealth need to understand, not only [redacted] [redacted], but also why no one heard about [redacted], and *then* why no institutional changes were forthcoming. Without a grand jury report detailing the underlying [redacted], the claims and recommendations lose both gravitas and urgency—calls for reform and oversight that exist in response to hypothetical ills, not extant evils never cured. [redacted] [redacted] [redacted] [redacted] [redacted]. In short, such claims need facts and examples to back them up. It is true that [redacted] [redacted] [redacted] may be able to deduce Petitioner's identity (as well as the identities of others in the Report whose names have been pseudonymized). However, this degree of infringement upon Petitioner's right-to-reputation is outweighed by the public interest at stake here. In this instance, the only alternative—permanently sealing an already redacted report—perfects the [redacted] failure and lack of institutional accountability the Grand Jury uncovered and railed against, completely subverts the compelling state interest in

publishing its factually supported recommendations, and consigns Philadelphia to repeating its past.

C. The degree of infringement upon Petitioner's right of reputation is limited, particularly in light of ██ office.

Under our constitution, the right to reputation is a fundamental right. *Fortieth I*, 190 A.3d at 566 (citing Pa. Const. art. I, § 1). In this instance, any infringement on Petitioner's reputational interests by release of the redacted report is outweighed by the public's interest in its release. This is particularly so given Petitioner's leadership position in the public sphere.

First, any impairment to Petitioner's reputation is quite limited. Petitioner's name has been redacted from the Report, and █ is identified only by a pseudonym ████████████████ Moreover, although Petitioner is criticized in the Report, █ is not accused of conduct that is as viscerally reprehensible and odious as the child sexual abuse and facilitation allegations at issue in *Fortieth*. As this Court's caselaw indicates, the scope of procedural protections depends upon the nature of the harm that would result from the publication of the Report. *See Fortieth I*, 190 A.3d at 574 (observing that "the stakes for individuals reproached . . . are substantially heightened" where the grand jury report involved "incendiary" allegations of child sexual abuse and facilitation). Here, even within the ██████ Report, Petitioner is subjected to substantially less stringent criticism

than others—for example, who and who .

Second, because of Petitioner's position as a public official, reputational interests are offset by the public's legitimate need for information and open debate about its officials' on-duty conduct. The U.S. Supreme Court has recognized that we share a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and as a result, public officials must meet a higher burden to establish damages for "[i]njury to official reputation." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). In a similar vein, Petitioner's reputational interest is outweighed by the important public interest in the Grand Jury's findings, because "[t]he protection of the public requires not merely discussion, but information," *id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

Finally, Petitioner's reputational interests are further diminished by the specific nature of position. Individuals in public leadership positions of this kind are subject to public scrutiny.

D. Finally, the ample due process protections afforded Petitioner resulted in the narrowest possible infringement upon ■ interest consistent with effectuating the state interest involved.

This Court has held that "increased procedural protections are implicated in the interest of fundamental fairness" where a report has "a primary objective . . . to censure the conduct of specific individuals," rather than to "address general welfare concerns . . . . " *Fortieth I*, 190 A.3d at 574. In contrast, where the report is "designed to address general welfare concerns, but may have a collateral impact on reputational rights," this Court did not indicate that the same "increased procedural protections" would necessarily apply. *Id.* Nonetheless, Grand Jury 30 provided ample process to Petitioner ■■■, well in excess of the process found inadequate in *Fortieth*.

1. Petitioner received all the process ■ was legally due.

In weighing reputation interests within the grand jury context, due process begins with notice and a right to be heard, and in the grand jury context, this necessarily implicates the ability to testify before the Grand Jury itself. Much of the analysis of both *Fortieth* cases is grounded in the fact that the petitioners there were not given an opportunity to testify before the grand jury, and without the grand jury in session, had no opportunity to remedy that fundamental issue.

Secondarily, the statutory right-of-response provides another avenue for protection. *Fortieth II*, 197 A.3d at 716. Whether a written response appended to a

report is considered "meaningful" depends on considerations such as the likelihood individual responses would be negated or overcome by the size, tenor and scope of the report at issue, or that the cumulative, inflammatory effect of specific allegations would so inflame a reader as to impact their critical faculties and render them incapable of a measured assessment of an individual's authored response. *Id.* at 715.

- Unlike the petitioners in *Fortieth*, Petitioner ■■■■ had the opportunity to testify before the Grand Jury.

In *Fortieth*, this Court expressed disbelief that the Attorney General did not provide living persons, who were later accused of heinous crimes in the grand jury's report, the opportunity to testify. There, this Court found it "difficult to understand why an attorney for the Commonwealth would not wish to present such testimony from living individuals . . . ." *Fortieth I*, 190 A.3d at 574.

In contrast here, Petitioner availed ■■■■ of the foremost pillar of due process—the opportunity to be heard, first hand, by testifying before the Grand Jury. Near the end of Grand Jury 30's term, Petitioner ■■■■ appeared and testified for a half day, but ■ testimony was cut short by the loss of a quorum. (SA1059-60, ICA2411-94.) The Commonwealth invited Petitioner to return and provide additional testimony prior to the expiration of the Grand Jury's term, but ■ declined. (SA1059-60.)

- Unlike *Fortieth*, Petitioner submitted a written response that is more likely to be an effective remedy to protect ███ right of reputation.

Petitioner was given the opportunity to respond to the finished Report. In *Fortieth*, this Court held that "the opportunity to append a hearsay rebuttal statement to a 900-page report otherwise impugning an individual as a sexual predator or facilitator alongside more than 300 others amidst the hierarchy of a religious institution" is not an "effective" remedy to protect the right of reputation. *Id.* at 574-75.

The circumstances at issue here differ significantly and render Petitioner's response substantially more effective. With much respect to both grand juries, all assigned investigators, and prior ADAs, the "scope and tenor" of the ███████ Report, at just over 100 pages with a handful of significantly criticized individuals, simply does not compare with the opus at issue in *Fortieth*. They are both deeply important, but different documents. The ███████ Report does not condemn a long, undifferentiated list of named individuals for universally reviled crimes.

Instead, the Report concludes that ████████████████████████

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████████ While "horrifying," these allegations are not the kind and quality of

specific crimes that inflame public sentiment to such a degree that critical examination of the Report and responses would suffer. [redacted] Secondly, while criticism of [redacted] is harsh, it is simply not as explicitly and exclusively criminal as the pedophilia and sex assault outlined in *Fortieth*.

Petitioner's rebuttal to the Grand Jury's conclusions would be the sole response appended to the Report. The likelihood that a reader could effectively assess Petitioner's response as appended to the report is significantly higher than in *Fortieth*, where an overwhelming number of individuals were seriously impugned and where a reader would have great difficulty assessing the merits of any individual person's response.

Further, Petitioner has been permitted to redact [redacted] name even from [redacted] own written response, voluntarily providing [redacted] own version of events (which the Grand Jury did not find credible), under cloak of pseudonymity. Pursuant to its power to submit reports, the Grand Jury should be permitted to name those individuals who testified before it and are later found to be an integral part of the misconduct and/or

corruption under investigation, particularly public employees.[4] Unlike ■ colleagues who also testified at great risk to their reputations, employment and social connections, Petitioner will not see ■ name in print, simply because the Grand Jury credited them while criticizing ■—a perverse outcome.

The fact that Petitioner had the opportunity to testify, along with a meaningful opportunity to be heard in a subsequent right of response, is all the process that is legally due to Petitioner to protect ■ reputational rights in this instance.

2. Petitioner also received additional process to minimize any infringement of ■ right of reputation.

This Court has determined that, rather than withholding a report in its entirety, redaction can be an appropriate remedy in instances where the individual's constitutional right to reputation requires a judicial remedy. *Fortieth II*, 197 A.3d at 723; *Fortieth I*, 190 A.3d at 576. In addition to testifying and appending a response to the Report, Petitioner also benefited from multiple pre-deprivation hearings held by the supervising judge that resulted in significant redactions of the Report.

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[4] The Commonwealth maintains its position that redaction of names was not legally required. This Court could vacate many of the redactions made by the supervising judge. However, the Commonwealth does not challenge these rulings in this Response, as the supervising judge did not commit any legal error or abuse her discretion.

- Unlike in *Fortieth*, the supervising judge conducted a searching review to determine that the Report was supported by the preponderance and she made line-by-line rulings and redactions in response to challenges offered by Petitioner ████.

In *Fortieth*, this Court found that judicial preponderance-of-evidence review was inadequate to protect the named persons' reputational rights for several reasons: the standard is "best suited to adversarial proceedings," and grand jury proceedings are one-sided affairs; the grand jury need not consider exculpatory evidence and is not bound by rules of evidence; and, in the case of the "predator priests" report specifically, "the supervising judge may have performed his preponderance-of-the-evidence review on a report-wide basis, rather than discretely determining if the grand juror's specific criticism of each individual appellant was supported by the preponderance of the evidence." *Id.* at 574-75.

In this appeal, the preponderance review by the supervising judge was substantially more thorough and searching than in *Fortieth*. Not only did the supervising judge conduct a thorough *in camera* review, but she also ruled on Petitioner's proposed redactions on a line-by-line basis, over the course of multiple hearings. In some instances, the supervising judge agreed with Petitioner that the Commonwealth's interest in achieving the Report's primary purpose (transparency and recommendations) did not outweigh ██ specific reputational rights. In those instances, the court ordered that the findings be redacted.

The supervising judge's review and redaction of certain matters confirms that the lower court provided Petitioner fair and appropriate pre-deprivation process. For Petitioner to petition this Court for even *more* process and the sealing of the Report is breathtaking overreach.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition and lift the stay pending review in this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R.A.P. 127, I certify that the foregoing Response complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

I further certify that the foregoing Response complies with the page/word limits set forth in Pa. R.A.P. 1603 and 1605, because the Response does not exceed 9,000 words.

/s/ Daniel P. Margolskee
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