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IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 75, 77, 78, 79, 80, 81, 82, 84, 86, 87, 89 WM 2018

In re: FORTIETH STATEWIDE INVESTIGATING GRAND JURY

COMMONWEALTH'S RESPONSE TO CATHOLIC LEAGUE *AMICUS CURIAE* BRIEF

Responsive brief on petitions for review of orders of the grand jury supervising judge, Common Pleas Court of Allegheny County, at CP-02-MD-571-2016.

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ARGUMENT

I. The grand jury report was not an attack on "the church," but a way to hold it accountable for crimes committed in its name.

The Catholic League purports to speak on behalf of the church, but it does not. "The church" is comprised not of its hierarchy but of its adherents, several millions of whom live in this Commonwealth. They needed to know what had been hidden in order to know how to fix it. That is why the Legislature created the grand jury investigative reporting process, and why the public supports it.

Despite this pressing public interest, the Catholic League's central argument is that the report should never have been released at all, because it "targets," "disparages," and "denigrates" the Catholic Church. As a result, the *amicus* complains, the church itself has suffered "reputational injury." The church's leader sees it differently. Full awareness "helps us to acknowledge the errors, the crimes and the wounds caused in the past," said the Pope, in his August 20 letter responding to release of the Interim Redacted Report. He accepted the imperative to find "ways of *making all those who perpetrate or cover up these crimes accountable*."

That process of accountability is what shaped this report. If the Catholic League finds it "lurid," that is because of its particular subject matter. There is no nice way to talk about child sex abuse. There is no proper way to prettify it.

Grooming, exposing, groping, even raping were downplayed by church officials for years as "boundary violations." The first step in preventing similar abuse in the future is to stop sugarcoating it.

Nor is it possible to remove those responsible – or to empower those who stood against the tide – without identifying them. A report that spoke only of Father A or B in unidentifiable parish X or Y would be of no use to parishioners wondering if their children might have been, or might still be, subject to abuse. Church leaders, meanwhile, would be largely untouchable. There just aren't that many bishops; it would often be impossible to describe their conduct without revealing their identity. And if it were feasible to keep them anonymous, they would either remain in place or climb even higher through promotion. That is certainly how it went in the past.

Likewise, those officials who did the right thing would remain unknown, their qualities untapped. This grand jury went out of its way to identify the good works of Bishop Persico, and would have commended others had it found them worthy. They serve as examples for further reform.

Of course these same factors apply in other institutions, not just the church. That is why reports – if they are to provide meaningful lessons for the future – must address past actions in unambiguous and identifiable terms. That is what the Penn State report did with the highest university administrators, and what the Moulton report did in reviewing the Sandusky investigation. And that is what this Court itself

did in the Interbranch Commission report laying bare the judicial scandal in Luzerne County. Names were named; fault was apportioned.

Nevertheless, the *amicus* brief suggests that governmental reports be stripped of personal accountability. As support, the League goes so far as to claim that the grand jury here is guilty of actual incitement to physical violence against the subjects of its investigation. The "evidence" for this charge is a recent assault on a Byzantine Catholic priest, in Indiana, who has nothing to do with this report but was himself accused of abuse in 2004.[1] At oral argument, counsel "shuddered" to think what would have happened to the petitioners had their names not been redacted from the interim report. But no shudder was needed for the 270 names that *did* appear in the report. Most of these priests are still alive and locatable. There have been no reported assaults.

Of course, even the remotest possibility of such an untoward event could be prevented by redacting every name in every government report, along with all the potentially identifying material associated with them. In this case, the result would have been hundreds of large black boxes, page after page. The "reputational interest" of the church might have been served; but not the public interest.

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[1] Marias Colias-Pete, *Merrillville Priest Who Was Attacked Was Accused of Child Abuse in 2004, Church Denies Allegation*, CHICAGO TRIBUNE, Sept. 7, 2018, http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-priest-attack-update-st-20180907-story.html.

II. The *amicus*, like the petitioners, seeks suppression, not process.

Like the petitioners, the Catholic League makes a show of calling for more process before release of grand jury reports – not inordinate process, suggests the League; "minimal due process" will do. As it turns out, however, this is largely a theoretical position. Like the petitioners, the *amicus* brief does not insist on any such process in the case actually before this Court. The preferred relief sought here is that the interim report be made "final" – in other words, that all the redactions be made permanent, and that all the petitioners be absolved from the procedures they have been demanding to clear their (still unpublished) names.

This is a bait and switch. In June the petitioners insisted that the report be stayed to allow them an opportunity for pre-deprivation process. That is how this case began. In July this Court responded with a ground-breaking but interim decision, applying the constitutional right of reputation to the grand jury reporting function, and directing the parties to aid the Court by providing additional argument on the specific nature of the procedures to be adopted. The Commonwealth took that directive seriously, proposing a series of steps to ensure notice and opportunity to be heard, with judicial review and a right to public response, both for petitioners and for future subjects of grand jury reports. These procedures can be readily implemented here through the simple expedient of a remand for further proceedings before a sitting grand jury.

But the petitioners, supported by their *amicus*, no longer seem to be much interested. The Catholic League, like the petitioners, has been fond of claiming that the report is full of falsehoods, that the Attorney General knows this personally, and that he is lying, lying, lying. These potshots on the integrity of the report are not made merely for pedantic interest. It is no secret that church leaders are actively opposing the grand jury's recommendations.[2] Under the Grand Jury Act, such "recommendations for legislative, executive, or administrative action" shall be "based upon stated findings." 42 Pa. C.S. § 4542. By attacking the findings, the church undermines the recommendations. The easiest attacks are those that cannot be publicly rebutted: the allegations that are the subject of these appeals, based on still-secret, redacted information that the Commonwealth cannot address in an open forum. Having secured their stay and redactions, petitioners are apparently content to leave their aspersions hanging, without going to the trouble of resolving them under the process they themselves demanded.

The strategy should not be given success. Petitioners did not seek permanent redactions in their original briefing, and they have no entitlement to such a windfall now given the availability of process. Nor have they ever argued that the existing

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[2] *See, e.g.*, Mark Abrams, *Chaput Urges Opposition to Pa. Bill that Would Relax Statute of Limitations for Clergy Sex Abuse Accusers*, KYWNEWSRADIO.COM, Oct. 1, 2018, https://kywnewsradio.radio.com/articles/news/chaput-urges-opposition-pa-bill-would-relax-statute-limitations-clergy-sex-abuse.

Investigating Grand Jury Act is facially invalid absent a legislative "fix," and therefore restrains the Commonwealth from implementing additional procedural protections now. Indeed, this Court specifically rejected any such notion in its July opinion: "And notably, *the Investigating Grand Jury Act does not restrain the attorney for the Commonwealth from implementing additional procedural protections*." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 574 (Pa. 2018) (emphasis supplied). Accordingly, it is hardly surprising that the petitioners have affirmatively renounced and repudiated a facial challenge to the statute.

Petitioners got this far by claiming they wanted more process, not less. "For these reasons," they concluded, "this Court should ... remand this case ... with instruction" for implementing a pre-publication opportunity to be heard. Petitioners' July Common Brief at 56. The Court should allow that process to go forward.

CONCLUSION

For these reasons and those in its supplemental brief, the Commonwealth respectfully requests this Court to remand the matter for implementation of pre-publication process.

Respectfully submitted,

/s/ *Ronald Eisenberg*

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with Pa. R. App. P. 2135(d) (certificate of compliance), as it contains fewer than 14,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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	:	**84 WM 2018, 86 WM 2018,**
	:	**87 WM 2018, 89 WM 2018**
	:	**106 WM 2018**

CERTIFICATE OF SERVICE

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