

**IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

Nos. 75, 77-82, 84-89, 106 WM 2018

**IN RE: FORTIETH STATEWIDE INVESTIGATING
GRAND JURY**

**BRIEF OF *AMICUS CURIAE*
THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS**

**Appeal from the June 5, 2018 Order of the Common Pleas Court at No. 571
M.D. 2016 Denying Various Petitioners' Motions For Pre-Deprivation
Evidentiary Hearing**

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STATEMENT OF INTEREST

Amicus curiae The Catholic League for Religious and Civil Rights (“the Catholic League”) is a not-for-profit corporation and the nation’s largest Catholic civil rights organization. Founded in 1973, the Catholic League defends the right of Catholics, lay and clergy alike, to participate in American public life without defamation or discrimination. The Catholic League works to safeguard both the religious freedom and free speech rights of Catholics.¹

At the outset, the Catholic League makes clear that, unquestionably, child sex abuse should be investigated and rooted out; the question remains, however, as to why the use of the Statewide Investigating Grand Jury—a formidable government tool with broad powers—was deliberately limited to investigating only Catholic entities. Child sexual abuse is a universal crisis affecting myriad public and private institutions, yet Attorney General Shapiro (“AG Shapiro”) persists in his investigation of decades-old allegations of wrong-doing against a single religion and its members. Numerous studies, including several reported by the Catholic League, have shown that the incidence of abuse is no higher—in fact, it is lower—in the Catholic Church than in other religious and secular organizations. Nonetheless, 100% of the Roman Catholic Dioceses in Pennsylvania have been

¹ No one other than the *amicus* or its counsel authored or paid for the preparation of this *amicus curiae* brief, in whole or in part.

subjected to the substantial power exercised by AG Shapiro under the Investigating Grand Jury Act. As a result, the reputations of scores of clergy have been besmirched by the widespread publication of unsubstantiated statements in a report that will never be adjudicated.

This matter is before the Court because some clergy had the courage to defend their constitutional right to reputation. But those clergy comprise a small minority of the three-hundred individuals identified in the grand jury report. The vast majority of the unindicted persons are either dead, lacked the resources to defend themselves, or were bullied into accepting AG Shapiro's trial-by-media tactics. The Catholic League submits this brief in support of the Catholic Church and of those lay and religious persons identified in the report who could not defend themselves.

INTRODUCTION

Due process is the quintessential mechanism through which society finds truth. The Attorney General ought to reinforce this precept and adhere to the notion that due process is the path, not an impediment, to finding the truth. Here, however, AG Shapiro exploited flaws in the grand jury process to circumvent due process and reach preordained results contrary to the rule of law.

The deeply flawed Investigating Grand Jury Act (the “Act”) fails to provide meaningful due process protections to individuals accused of wrongdoing. Despite having a constitution that indisputably protects the fundamental right to reputation, Pennsylvania stands in stark contrast to nearly every other state by allowing the publication of investigative grand jury reports concerning unindicted private individuals without first affording those individuals a meaningful opportunity to be heard. A person criminally charged with sexually abusing a child has the right to defend against such charges and obtain an adjudication of guilt or innocence. But the three-hundred people named in Report I of the 40th Statewide Investigating Grand Jury (the “Report”) have no recourse regarding the salacious statements contained therein.

The Act’s lack of due process protections invites abuse. That abuse includes the targeted investigation of decades-old conduct in all eight Roman Catholic Dioceses in Pennsylvania over the course of three grand jury investigations. No

other religious or secular organizations have been subject to such investigations under the Act. Such government-sanctioned religion-based targeting is alarming for many reasons, foremost because it violates the rights of Catholics under the Pennsylvania and United States Constitutions.

That abuse also includes the vociferous and repeated public statements by AG Shapiro, who proclaimed the untested contents of the Report as “truth” and berated anyone who challenged the Report’s many inaccuracies. AG Shapiro’s public statements have heightened public condemnation—not only of the individuals singled out in the Report, but of all clergy, and even the Catholic Church itself. Church property has been vandalized. Priests with no connection to the Report have been assaulted in apparent retribution “for all the little kids.” Although the Report acknowledges that the Dioceses have made positive “institutional reform” and that the vast majority of the allegations involve decades-old conduct, trust in the Catholic Church and its leaders is at an all-time low.

In sum, AG Shapiro has exploited the lack of protection of individuals’ constitutional right to reputation inherent in the flawed investigating grand jury system. This Court must seize this unique opportunity to put an end to it.

ARGUMENT

This is no ordinary grand jury report. This Court has observed that the Report “is not generally couched in conventional ‘investigatory’ terms, such as by allusion to the character and quality of the evidence reviewed according the application of a probable cause standard.” *See In re 40th Statewide Investigating Grand Jury*, Nos. 75, *et al.*, 106 WM 2018 (Pa. July 27, 2018) (“Slip. Op.”) at p. 3. Instead, as this Court stated, the Report engages in the “targeted condemnation of named individuals,” despite the fact such “is not inherent in the production of a grand jury report.” *Id.* “[G]rand jury reports of this sort foster the most substantial controversies, because they amplify the tension between the grand jury’s reporting function and the constitutional rights of the individuals who are impugned in the report.” *Id.* at 4.

The Court’s observations are exceptionally important here because AG Shapiro has capitalized on flaws in the Act to malign the Catholic Church for political gain rather than for any legitimate investigatory or prosecutorial purpose. This is evident from AG Shapiro’s conduct and statements both before and after the release of the Report. The resultant reputational harm to the Catholic Church and the hundreds of clergy is manifest and severe. No remedy is available now to completely ameliorate this harm, but this Court can prevent further damage by mandating the minimal due process protections advocated by the petitioning clergy

group and setting clear parameters regarding the use of the Investigating Grand Jury Act to prevent future abuses.

I. The Grand Jury Report Was Used for an Improper Purpose.

An investigating grand jury may issue an “investigating grand jury report” detailing its findings related to organized crime or public corruption. 42 Pa. C.S. § 4542. This Court recognized the potential for abuse accompanying grand jury proceedings and the importance of judicial oversight, noting that “[t]he very power of the grand jury, and the secrecy in which it must operate, call for a strong judicial hand in supervising the proceedings.” *In the Dauphin Cty. Fourth Investigating Grand Jury*, 19 A.3d 491, 503 (Pa. 2011).

Likewise, upon enacting the Act, the Pennsylvania Legislature expressly recognized the danger that a prosecutor might misuse a grand jury investigation as a “political vehicle” to “embarrass” and “discredit” people. See PA 162d Gen. Assembly, Sess. of 1978, Legis. J., Vol. 1, No. 44 at 3166 (Sept. 21, 1978); *see also id.* at No. 50 at 3740 (Nov. 14, 1978). Such potential abuses improperly stray from the Act’s stated purpose of combatting organized crime and public corruption. See 42 Pa. C.S. § 4544(a).

The dangers presaged by both the Legislature and this Court have surfaced in this case.

A. *The Grand Jury Exceeded Its Jurisdiction.*

The Act authorizes the Attorney General to convene a multi-county investigating grand jury only where the grand jury is “necessary because of organized crime or public corruption.” 42 Pa. C.S. § 4544(a). This limitation is central to the statute’s purpose. *See* 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) (describing the statute as the “centerpiece” of the legislature’s efforts to combat “official corruption” and “organized crime”). The grand jury’s investigation and Report exceed the scope permitted by Pennsylvania Law because the Report does not address public corruption, nor is the Catholic Church engaged in organized crime.

“Organized crime” is defined under the Act as “[t]he unlawful activity of an association trafficking in illegal goods or services . . . or any continuing criminal conspiracy or unlawful practice which has as its objective: (1) large economic gain through fraudulent or coercive practices; or (2) improper governmental influence.” 42 Pa. C.S. § 4542. The Report implicates neither.

Similarly, “public corruption” is defined as “unlawful activity under color of or in connection with any public office” *Id.* Because no corruption of a public official or office is addressed by the Report, public corruption could not be the impetus for the grand jury here.

Because neither of these jurisdictional prerequisites are present, the grand jury process was constitutionally infirm at the outset. That flawed starting point enabled AG Shapiro to utilize the grand jury process not as a legitimate investigative tool, but as a political weapon to denigrate the Catholic Church.

B. *The Grand Jury Report Did Not Aim to Inform the Public, It Sought to Denigrate the Catholic Church.*

This Court has acknowledged that the Report was not “designed to address general welfare concerns,” but has a “primary objective . . . to publicly censure the conduct of specific individuals.” Slip. Op. at 21. This Court charitably commented that “it is difficult to understand why an attorney for the Commonwealth would not wish to present such testimony from living individuals, for the benefit of lay grand jurors who have plainly set out to find the truth and reveal it to the public.” *Id.* AG Shapiro’s approach is less difficult to understand considering his past conduct directed toward the Church.

This is not the first time AG Shapiro has used his office to single-out the Catholic Church. In *Zubik v. Burwell*, 136 S. Ct. 1557 (U.S. 2016), AG Shapiro sued the President of the United States over the obligation of religious employers to provide contraception and abortifacient coverage for employees. . AG Shapiro sought to overturn the Executive Order that affected mostly Catholic institutions, and he vigorously opposed the efforts of the Little Sisters of the Poor to intervene, despite their direct interest in the subject matter of the case and the impact they

would feel from the outcome. Ultimately, the U.S. Court of Appeals for the Third Circuit rejected AG Shapiro’s efforts to keep the Little Sisters of the Poor from having their voices heard. *Pennsylvania v. President of the United States*, 888 F.3d 52 (3d Cir. 2018).

Thus, it is unsurprising that the *investigating* grand jury noted that “this report is our only recourse.” Report at 2. A proper investigating grand jury, of course, does not need—nor should it seek—recourse. However, that paradigm changes drastically when an attorney general who has been spurned in prior litigation against the Church dedicates two years and countless resources to persuading the grand jury that it does, indeed, require “recourse.”

C. *The Report Refused to Let Facts Get in the Way of the Narrative.*

Truth-finding was not priority here. The Report is replete with demonstrated factual errors—all known to AG Shapiro—that evince a focus on crafting a denigrating narrative of the Catholic Church rather than seeking truth.

As the chief law enforcement officer in Pennsylvania, the Attorney General has special responsibilities to the citizens of this Commonwealth and the Pennsylvania judicial system. All prosecutors are required to act as “ministers of justice,” upholding the rule of law and not seeking merely to obtain convictions. *See* PA. R. PROF. CONDUCT 3.8 cmt 1; *see also* PA. CONST. art. VI, § 3. Specific ethical rules mandate that prosecutors refrain from actions or commentary that

hinder the administration of justice. No attorney in Pennsylvania is permitted to “engage in conduct that is prejudicial to the administration of justice.” PA. R. PROF. CONDUCT 8.4(d).

AG Shapiro published the Report knowing it contained falsehoods. For example, the Report highlights a “circle of secrecy,” stating:

We didn’t come up with that phrase on our own, and neither did the FBI. We got it from Bishop Wuerl of Pittsburgh now, Cardinal of Washington D.C. in one of the documents we reviewed; those were his own words for the Church’s child sex abuse cover-up.

Report at 299. But Cardinal Wuerl never wrote or used the term. *See* Resp. of the Catholic Diocese of Pittsburgh to the Report at 230–31. Before the Report was published, AG Shapiro knew the Report misattributed and misconstrued the origin and use of the term “circle of secrecy.”² But AG Shapiro made no effort to redact or correct this portion of the report.

Similarly, during his press conference on August 14, 2018, AG Shapiro discussed the presentment issued against Father David Poulson. At the press conference, AG Shapiro stated that Father Poulson was charged with “sexually abusing one boy for eight years starting when he was just eight years old.”³ AG Shapiro then falsely claimed “the bishop at the time, [Bishop Emeritus] Donald

² Archdiocese of Washington, *Correcting What the PA Attorney General Would Not*, Aug. 14, 2018, at <https://adw.org/news/correcting-what-the-pa-attorney-general-would-not>.

³ PennLive.com, *Grand Jury Report on Clergy Sex Abuse: Full Press Conference Video*, YOUTUBE.COM, at <https://www.youtube.com/watch?v=ysw4-B8-SKk> [at 16:40] (last visited September 19, 2018).

Trautman, knew all about this abuse and Trautman covered it up.”⁴ But the Commonwealth’s presentment makes no allegation that Bishop Trautman had any knowledge of this abuse nor does it suggest that Bishop Trautman ever attempted to cover up any abuse.

There are other flaws in the Report that the Attorney General knowingly chose to ignore. Included in the Report’s list of “predator priests” is Reverend John Brueckner. The Report notes only that in 2002, a woman called the Diocese of Greensburg to report that her husband allegedly suffered abuse by a priest from St. Joseph “sometime between the years of 1947 and 1951.” Report at 598. The woman could not recall the name of the priest. Diocesan records reflect that Reverend Brueckner was one of two priests assigned to St. Joseph during that time. *Id.* Solely based on this speculative account, the Report includes Father Brueckner among the “predator priests.” Reverend Brueckner can never respond to the allegations; he died 58 years ago.⁵

Further, the Report purports to have “uncovered” evidence of abuse. But this characterization is also misleading, as most of the information contained in the Report was already public—often reported by the Church itself pursuant to diocesan policy. While not perfect, the Church has constantly sought to improve

⁴ *Id.*

⁵ Dennis Roddy, *Shapiro’s Shoddy Work on Grand Jury Report Leaves More Questions Than Answers*, PENNLIVE, Aug. 16, 2018, at https://www.pennlive.com/opinion/2018/08/shapiros_shodd_work_on_grand.html (last visited Sept. 19, 2018).

its handling of allegations and has achieved successful results. Indeed, in the Diocese of Pittsburgh, over 90% of the abuse alleged in the Report occurred prior to 1990. By repackaging already-known information into one report and characterizing it as “new,” AG Shapiro has portrayed the Church in a false light and sparked unwarranted condemnation suiting his political ends. Contrary to the Report’s implication, the Church today is not the Church of 70 years ago. But this distinction is immaterial to AG Shapiro as he has not used the grand jury process to seek either justice or truth.

II. AG Shapiro Has Improperly Wielded the Grand Jury Report.

A. *AG Shapiro Improperly Used the Grand Jury Report to Adjudicate the Alleged Guilt of Those It Named.*

To this Court, AG Shapiro has admitted that “the report is not a judicial adjudication of wrongdoing, but rather the opinion of lay jurors.”⁶ Grand juries do not aim at adjudicating truth; they are not designed to do so. They are “not bound by the rules of evidence that normally protect the publicly accused from baseless or unduly prejudicial information.” *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451, 1463 (D. Colo. 1993). They “can hear any rumor, tip, hearsay, or innuendo it wishes, in secret, with no opportunity for cross-examination.” *Id.* And they are “not required to hear or consider evidence which would exonerate a target of an investigation.” *Id.*

⁶ Redacted Br. for Respond., July 13, 2018, p. 18 (emphasis added).

Contrary to his position in this Court, AG Shapiro has championed the Report as incontrovertible truth in the press. In doing so, he has inappropriately amplified the condemnation of unindicted individuals named in the Report. *See United States v. Dioguardi*, 20 F.R.D. 33, 34 (S.D.N.Y. 1956) (“Trial by newspaper . . . is to be regretted and condemned.”).

The statements of prosecutors are held to a higher standard when commenting on official matters because they carry the imprimatur of the Commonwealth. *See Att’y Grievance Comm’n of Md. v. Gansler*, 835 A.2d 548, 572 (Md. 2003) (“[A] prosecutor’s opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public’s eye.”). Indeed, under the Pennsylvania Rules of Professional Conduct, the prosecutor in a criminal case shall:

except for statements that are not necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making

PA. R. PROF. CONDUCT 3.8(e) (emphasis added).

Additionally, under Rule 8.4(d) of the Rules of Professional Conduct, AG Shapiro, like all Pennsylvania attorneys, is prohibited from engaging “in conduct that is prejudicial to the administration of justice.”

Beyond the ethical obligations applicable to prosecutors, the Pennsylvania Constitution enshrines the fundamental right to reputation for all citizens, including those targeted in the Report. *See* PA. CONST. art. I, § 1; *see also* Slip. Op. at 11 (identifying the interest in reputation as a right on the “highest plane”) (quoting *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389, 395 n.7 (Pa. 2007)). As this Court recently recognized, “targeted condemnation of named individuals is not inherent in the production of a grand jury report.” Slip. Op. at 2. Nor should “a man . . . be subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum.” *Id.* at 7 (quoting *Application of United Elec. Radio & Mach. Workers of Am.*, 111 F. Supp. 858, 867 (S.D.N.Y. 1953)). Ultimately, “[a]lthough there are important, even compelling reasons for allowing a grand jury to bring the misconduct and malfeasance of specific public officials to light, this beneficial aspect of grand jury reporting must give way to the need for due process and fairness to the individual.” *Id.* at 7.

Given his ethical obligations and the constitutional rights of the accused, AG Shapiro’s numerous public statements regarding the Report are troubling. He has:

- mischaracterized the contents of the Report and the process by which it was generated, providing the public with the false impression that the contents of

the Report are established fact and that those named in the Report are guilty of crimes;

- made generalized statements regarding conduct supposedly detailed in the Report, including the existence of an organized and wide-ranging “cover-up,” despite the absence of facts supporting such a conclusion;
- attacked the credibility of specific individuals—including Cardinal Wuerl and Bishops Zubik and Trautman—who responded to inaccurate or disputed conclusions in the Report, and to the inaccurate statements made by AG Shapiro;
- publicly pressured church officials and leaders to accept the entire 900 pages of the Report as “truth,” and to publicly endorse the implementation of the Report’s recommendations;
- publicly appealed to the head of the global Catholic Church to intervene in legitimate, good faith legal proceedings and direct subordinate individuals to forego the defense of their constitutional rights;
- repeatedly denigrated those petitioners who have sought to exercise their legal rights through use of the judicial system, labeling them as participants in an ongoing “cover-up” of alleged abuse; and
- criticized this Court for temporarily delaying the release of the Report while petitioners litigated to protect their constitutional rights.

These are not statements made in legal filings. Rather, AG Shapiro broadcasted these misstatements widely via local and national media and social media to ensure the widest possible audience. In light of the completion of the investigation, the release of Report, the ethical requirements applicable to his office, and this Court’s admonition regarding the “targeted condemnation of named individuals,” it is difficult to imagine how AG Shapiro’s statements have any

legitimate law enforcement purpose. Instead, they serve the dual purposes of “heightening public condemnation of the accused” and casting doubt on the Court’s attempt to administrate justice—precisely what the Rules of Professional Conduct prohibit. *See* PA. R. PROF. CONDUCT 3.8(e); *see also* *Dioguardi*, 20 F.R.D. at 34 (“Trial by newspaper . . . is to be regretted and condemned”).

AG Shapiro has asserted to this Court that the citizens of Pennsylvania be permitted “to read the grand jury’s report—along with the responses to it—and draw their own conclusions.” *Resp. Br.* at 58. But AG Shapiro has already deprived the public of the opportunity to do so, capitalizing on the reality that “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).

AG Shapiro has hijacked the grand jury process by widely publicizing the Report’s contents as established, proven fact. In a bid to garner headlines, AG Shapiro has intentionally cast an irrepressible pall of guilt on hundreds of unindicted individuals and the Church itself without regard to their reputational rights or due process.

B. *AG Shapiro Has Attacked Those Asserting Their Legal Rights.*

Notwithstanding his duty as a “minister of justice,” AG Shapiro has repeatedly and publicly pressured those named in the Report to abandon their lawful attempts to protect their constitutional rights.

AG Shapiro publicly addressed dioceses that initially opposed the release of the Report, stating that “[t]he 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.”⁷ He also made public statements about the individuals asserting their constitutional rights. For example, AG Shapiro 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.”⁸

AG Shapiro also publicly pressured those asserting their legal rights to forgo defending their constitutional right to reputation. On June 29, 2018, AG Shapiro tweeted 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

⁷ *Statement of Attorney General Josh Shapiro on Sexual Abuse Investigation Within Catholic Church*, Pennsylvania Office of Attorney General (May 21, 2018), <https://www.attorneygeneral.gov/taking-action/statements/statement-of-attorney-general-josh-shapiro-on-sexual-abuse-investigation-within-catholic-church/> (emphasis added).

⁸ Angela Coulombis & Liz Navratil, *Priests Oppose Release of Report Current, Retired Clergy Members Argue in Court that Findings Are Inaccurate, Would Harm Reputations*, MORNING CALL, July 6, 2018.

victims of sexual abuse within the Church.”⁹ Again, on August 2, 2018, AG Shapiro tweeted “[a] redacted report is not a full report. Every name that is redacted, every incident of child rape that is blacked out revictimizes the victims and furthers the cover up by the Catholic Church.”¹⁰ AG Shapiro persisted in this public intimidation despite the fact that the basis of the challenges was to prevent the highly prejudicial disclosure of the Report’s inaccurate labeling of innocent people as pedophiles. Even this Court was a target of AG Shapiro’s public bravado. He openly dared this Court not to “silence victims.”¹¹

As with the Attorney General’s other statements, the media adopted and amplified this narrative, resulting in attacks on the independence of this Court, including:

- “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.”¹²

⁹ *Attorney General Josh Shapiro Will Take Action to Make Grand Jury Report Public*, Pennsylvania Office of Attorney General, June 29, 2018, *available at* <https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-will-take-action-to-make-grand-jury-report-public/>.

¹⁰ Josh Shapiro, @JoshShapiroPA, Twitter (Aug. 2, 2018, 9:42 A.M.), <https://twitter.com/JoshShapiroPA/status/1025059198126747648>.

¹¹ AG Josh Shapiro, @PAAttorneyGen, Twitter (June 20, 2018, 1:34 P.M.), <https://twitter.com/PAAttorneyGen/status/100953488251790721>.

¹² PennLive Editorial Board, *The Pa. Supreme Court Has Denied Church Abuse Victims a Voice*, PATRIOT-NEWS, June 22, 2018 (emphasis added).

- “The Supreme Court of Pennsylvania must step aside and allow the truth to come forward.”¹³

C. *AG Shapiro’s Extrajudicial Public Comments Have Substantially Heightened Public Condemnation of the Persons Identified in the Report.*

1. AG Shapiro’s Questionable Conduct Prior to the Report’s Release.

Prior to releasing the Report on August 14, 2018, AG Shapiro made numerous prejudicial comments regarding its findings.

AG Shapiro leaked a steady stream of the details from the Report prior to its release. He tweeted that the Church had a “playbook” about handling child sexual abuse, including to “fight, deny, and delay,” and that he felt the “truth must come out if the church and its victims can ever move past this sordid scandal.”¹⁴ He went on to describe the contents of the yet-to-be released Report as “truth” after holding a public meeting with victims.¹⁵

Further, AG Shapiro made several statements discouraging individuals from asserting their legal rights and accusing those who did of continuing a “cover-up” of alleged abuse. On July 25, 2018, AG Shapiro wrote a letter advising the Pope

¹³ Editorial, *Victims Deserve Release of Dioceses Reports Without Further Delay*, TRIBUNE-DEMOCRAT, June 24, 2018 (emphasis added).

¹⁴ Josh Shapiro, @JoshShapiroAG, Twitter (July 10, 2018, 5:38 A.M.), <https://twitter.com/JoshShapiroPA/status/1016663057769082880>.

¹⁵ Ivey DeJesus, *Attorney General Shapiro Meets the Victims of Clergy Sex Abuse*, THE PATRIOT-NEWS, June 28, 2019 (“I met today with a group of brave, strong people who have experienced terrible trauma—sexual abuse at the hands of priests within the Catholic Church in Pennsylvania . . . I listened to their truth.”).

that “anonymous petitioners implicated in this report went to court to stop me and silence victims.” AG Shapiro then called on the Pope to “direct church leaders to ... abandon their destructive efforts to silence the survivors,” and drop their legal challenges. Such words are chilling from a constitutional perspective. They are chilling from any member of the bar. But such words are particularly chilling when uttered by the chief prosecutor of the Commonwealth. Rather than championing and defending vested constitutional protections, AG Shapiro has advocated leaving such rights behind lest they become inconvenient to his public relations onslaught against the Catholic Church.

AG Shapiro represented the Report’s findings as fact, saying a “comprehensive investigation by the Office of Attorney General found widespread sexual abuse of children and a systemic cover up by leaders of the Catholic Church.”¹⁶ He further described the Report two weeks before its release in a tweet saying the Report detailed “widespread sexual abuse and cover-up within the Catholic Church by more than 300 priests.”¹⁷ AG Shapiro detailed not only the findings, but identified the number of accused priests, all while legal challenges to the Report were pending.

¹⁶ Josh Shapiro’s July 25, 2018, letter to Pope Francis, *available at* <https://www.attorneygeneral.gov/wp-content/uploads/2018/07/2018-07-25-Letter-for-His-Holiness-Pope-Francis.pdf> (last visited Sept. 19, 2018).

¹⁷ AG Josh Shapiro, @PAAttorneyGen, Twitter (Aug. 1, 2018, 8:31 A.M.), <https://twitter.com/PAAttorneyGen/status/1024679082561363968>.

Tellingly, the Pittsburgh Post-Gazette commented two days before the release that “for a report that’s under seal, a lot is actually known about it already.”¹⁸

2. AG Shapiro’s Press Conference Statements Mischaracterized the Report.

On August 14, 2018, AG Shapiro held a news conference to announce the Report’s publication. The conference was scheduled to start at 2:01 p.m., one minute after the public release of the Report. The conference was broadcast on cable and news networks. It was also streamed live on Facebook, Twitter, and YouTube. The stage featured a new Attorney General seal¹⁹ and seventeen individuals sitting in two rows on either side of the Attorney General and his deputies.

¹⁸ Peter Smith, *GRAND JURY INVESTIGATION MARKED BY HARROWING TESTIMONY, DISPUTES AND ONE MAMMOTH REPORT*, PITTSBURGH POST-GAZETTE, Aug. 12, 2018.

¹⁹ Instead of reading “Office of Attorney General,” AG Shapiro fashioned a new seal that literally put him above the Commonwealth that he serves.



The conference started with a video splicing short sentences of three victims together for effect. Those victims then claimed the Church “covered it up.” Multiple media outlets used portions of this video and the presentation that followed in their coverage.

During the conference, AG Shapiro again held the Report’s findings out as established fact rather than the “opinion of lay jurors,” as he represented to this Court a month prior. AG Shapiro stated “[t]he abuse did happen,” and purported to present a “full picture of what transpired in the shadows over the decades.” Further, he represented that each redaction is “an incomplete story [of abuse] . . . that deserves to be told,” purposefully ignoring the fact that those redacted statements were being challenged as inaccurate and posed a grave risk of unwarranted harm to the individuals referenced.

Further, he unequivocally claimed that “[t]he cover-up made it impossible to achieve justice for the victims.” AG Shapiro failed to acknowledge that many allegations were previously reported to the civil authorities by the Dioceses, and he did not explain how a “cover-up” could exist while allegations were simultaneously being reported. He failed to discuss the numerous actions taken by the Dioceses to strengthen their response to allegations of abuse, including reporting allegations, removing priests from ministry, defrocking priests, and removing many against whom the allegations were never conclusively

substantiated. Instead, AG Shapiro used the Report to begin a public attack focused on the Catholic Church based upon non-specific allegations of improper conduct that cannot be refuted or challenged in a court of law.

During the same press conference, AG Shapiro again publicly addressed the individuals asserting their legal rights to challenge the Report. He said anyone challenging any portion of the Report's accuracy "wanted to cover-up the cover-up." He repeatedly described their defense of their constitutional rights and the petitioners themselves as cowards, saying "these petitioners still don't have the courage to tell the public who they are" and that they "don't have the courage to come forward and identify themselves." When answering press questions related to Petitioners' due process challenge, he questioned the veracity of the Petitioners, sarcastically telling the public to "consider the source."

3. AG Shapiro's Conduct After the Release of the Report Has Further Amplified the Condemnation of Those Named in the Report.

Following the release of the Report, AG Shapiro continued to assert that the contents of the Report were indisputable fact. He described the allegations in the Report as "truth," proclaiming that "[t]he time for hiding their truth has ended."²⁰ On August 24, he said, "Our battle wages on against corrupt organizations ... [t]he

²⁰ AG Josh Shapiro, @PAAttorneyGen, Twitter, (Aug. 16, 2018, 2:45 P.M.), <https://twitter.com/PAAttorneyGen/status/1030208889516711937>.

heinous crimes & cowardly cover-up within the Church ... who prioritize themselves over the safety & welfare of those they abused.”²¹ Further, he tweeted that he hoped “Church leaders in Pennsylvania will cease their denials and deflections and now fully support the Grand Jury’s recommendations.”²² AG Shapiro did not identify what denials or deflections to which he referred.

Perhaps no statement embodies AG Shapiro’s true intent to denigrate an entire religion as opposed to seeking truth than one made during his August 28, 2018, national television interviews. AG Shapiro made the sensational claim—without citing any evidence—that the Vatican participated in a cover-up. He did not cite a specific case, identify a single sentence, or point to a section of the Report that contained any such finding, yet publicly claimed that “[t]here are specific examples where the Vatican knew of this abuse and they were involved in the cover-up.”²³

AG Shapiro’s repeated and unsubstantiated claims serve no legitimate truth-finding purpose. Rather, the cumulative effect of such unnecessary and inflammatory rhetoric is increased public condemnation of an entire religious faith.

²¹ AG Josh Shapiro, @PAAttorneyGen, Twitter, (Aug. 24, 2018, 10:01 A.M.), <https://twitter.com/PAAttorneyGen/status/1033036527645990913>.

²² Josh Shapiro, @JoshShapiroPA, Twitter (Aug. 20, 2018, 9:18 A.M.), <https://twitter.com/JoshShapiroPA/status/1031576317014224897>.

²³ Daveen Rae Kurutz, *AG Shapiro: Bishop David Zubik Not Telling the Truth*, THE TIMES, Aug. 28, 2018, available at <http://www.timesonline.com/news/20180828/ag-josh-shapiro-bishop-david-zubik-not-telling-truth>.

III. AG Shapiro’s Statements Relating to This Improper Report Have Severely Infringed the Catholic Church’s Reputational Rights Without Due Process.

A. The Catholic Church Enjoys a Constitutional Right to Reputation.

Pennsylvania, unlike most states, recognizes a constitutional right to reputation. *See* PA. CONST. art. I, § 1; *accord Simon v. Commonwealth*, 659 A.2d 631 (Pa. Commw. 1995). Settled precedent establishes that organizations likewise have the same “inherent and indefeasible rights.” This Court unanimously held that a drug company’s property rights under Article I, § 1 were violated by the Pennsylvania Ice Cream Law. *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833 (Pa. 1955). Likewise, this Court has held that a business’s right to free expression under Article I, § 7 of the Pennsylvania Constitution was violated by a public indecency ordinance. *Pap’s A.M. v. Erie*, 812 A.2d 591, 613 (Pa. 2002); *see also Nelson v. Garland*, 187 A. 316, 320 (Pa. Super. 1936) (finding that the City of Pittsburgh’s due process rights under Article I, § 9 of the Pennsylvania Constitution were violated by a statute). This Court has never hesitated to afford corporations and other organizations the constitutional right to reputation guaranteed by the Pennsylvania Constitution. *Cf. In re Chosen Friends Castle No. 33, Knights of the Golden Eagle of Pa.*, 20 A.2d 237, 241 (Pa. 1941) (“A corporation exists as an objectively real entity and its property is as much within the protection of the law as an individual’s property.”).

B. *The Report and AG Shapiro’s Publicity Campaign Have Wrongly Injured the Church’s Right to Reputation.*

While in some instances, “reputational harm in isolation may appear abstract,” *Schanne v. Addis*, 121 A.3d 942, 946 n.1 (Pa. 2015), such is not the case here. “There is no more deplorable badge of infamy a person can wear than that of being a child abuser.” *Jackson v. Marshall*, 454 S.E.2d 23, 27 (Va. Ct. App. 1995).

No one can seriously dispute the severe reputational burden inherent in the publication of a 900-page Report detailing lurid allegations of child sexual abuse against persons who will never have an opportunity to adjudicate their guilt or innocence. The consequences of the release of the Report and AG Shapiro’s fanning of the flames of contempt for the Catholic Church have been acute. These include:

- Vandalism – The night before the first day of school, Cardinal Wuerl’s name on the North Catholic High School monument was spray-painted red.²⁴
- Violence – In Indiana, a Catholic priest was assaulted in a sacristy after he had just finished praying at the altar. The assailant slammed the 64 year-old’s head against the floor while stating: “This is for all the little kids.”²⁵

²⁴ Marcie Cipriani, *Sign at Cardinal Wuerl North Catholic High School Vandalized*, WTAE, Aug. 20, 2018, available at <https://www.wtae.com/article/sign-at-cardinal-wuerl-north-catholic-high-school-vandalized/22772935>.

²⁵ Meagan Flynn, *Indiana Catholic Priest Assaulted in Church by Man Who Said, “This Is for all the Little Kids,”* WASHINGTON POST Aug. 23, 2018, available at <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/23/indiana-catholic-priest->

- Protests – Dozens of protestors have organized outside churches and even clergy’s residences, calling for resignations.²⁶
- Additional Catholic-Targeted Investigations – Since the release of the Report, attorneys-general in at least six other states—New York, New Jersey, Illinois, Missouri, Nebraska, and New Mexico—have announced that they will investigate sex abuse by Catholic priests in their states.²⁷ Like Pennsylvania, none of these states have made any effort to convene grand juries to investigate any other secular or religious institution.

These harms are symptomatic of the widespread condemnation for the Catholic Church that AG Shapiro has generated by his statements relating to the Report. All of this was made possible by AG Shapiro’s exploitation of the lack of due process protections within the Act. By conducting an investigation that spanned 70 years, and censuring dozens (if not hundreds) of dead priests who are unable to defend themselves or respond to the Report, AG Shapiro ensured the widespread publication of the Report without meaningful rebuttal.

assaulted-in-church-by-man-who-said-this-is-for-all-the-little-kids/?noredirect=on&utm_term=.9eb348dfc4f7.

²⁶ Elizabeth Eisenstadt Evans, “*Time’s Up*”: Catholics Gather in Philadelphia to Protest Clergy Sex Abuse, NATIONAL CATHOLIC REPORTER, Sept. 11, 2018, available at <https://www.ncronline.org/news/accountability/times-catholics-gather-philadelphia-protest-clergy-sex-abus>; Julie Zauzmer and Michelle Boorstein, *Calls for Cardinal Wuerl’s Resignation Build After Archbishop’s Accusing Letter*, WASHINGTON POST, Aug. 28, 2018, available at https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/28/calls-for-cardinal-wuerls-resignation-build-on-tuesday-after-archbishops-accusing-letter/?utm_term=.2896d5834ec9.

²⁷ Sharon Otterman and Laurie Goodstein, *Stirred by Sexual Abuse Report, States Take on Catholic Church*, N.Y. TIMES, Sept. 6, 2018, available at <https://www.nytimes.com/2018/09/06/nyregion/catholic-sex-abuse.html> (last visited Sept. 19, 2018).

C. *AG Shapiro’s Conduct Is Even More Troubling Because He Has Targeted a Single Religion.*

The Free Exercise Clause, made applicable to the states by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST., amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 300–04 (1940). The government may not “impose special disabilities on the basis of religious views or religious status.” *Id.*

Moreover, the Free Exercise Clause mandates government neutrality toward religion. *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 165 (3d Cir. 2002); *Employment Div. v. Smith*, 494 U.S. at 893 (1990); accord *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that the decision to prosecute may not be “deliberately based upon an unjustifiable standard such as . . . religion”). The use of the investigating grand jury’s reporting function to publicly attack the Catholic Church and no other religion is not neutral because it targets a specific religious group. See *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (invalidating law targeting religious group); see also *Parker v. Hurley*, 514 F.3d 87, 96 (1st Cir. 2008) (requiring “a compelling justification for any law that targets religious groups”). If the government targets a religious group in prosecution, but fails to prohibit similar nonreligious conduct, the government’s actions are not neutral or generally applicable. See *id.* at 543; *Tenaflly*, 309 F.3d at

151, 168 (holding that the Borough’s selective, discretionary enforcement of its ordinance violated the Free Exercise Clause).

But “[f]acial neutrality is not determinative.” *Lukumi*, 508 U.S. at 534 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”). Nor must a court determine whether the government was motivated by ill will or animus. *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015) (“courts have repeatedly rejected the notion that [the Free Exercise Clause] ‘is . . . confined to actions based on animus’”) (citing Laurence H. Tribe, *American Constitutional Law* §§ 5-16, at 956 (3d ed. 2000)); *Shrum v. City of Coweta, Oklahoma*, 449 F.3d 1132, 1145 (10th Cir. 2006). Here the application was not neutral, it was another step in a pattern of singling-out of Catholicism by AG Shapiro acting under the mantle of state color.²⁸

IV. AG Shapiro’s Abuses of the Act Require a Remedy.

To the public, AG Shapiro has championed the Report as “truth,” while acknowledging to the Court that the Report merely contains opinions of the grand jury. AG Shapiro, relying on the Report, has publicly attacked the persons named in it, and, by extension, the Catholic Faith. Now, that constitutionally protected

²⁸ The Attorney General’s application (i.e., improper targeting and public shaming) is also not generally applicable for the same reasons it is not neutral. The two are interrelated. *Lukumi*, 508 U.S. at 521 (“Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.”).

Faith stands convicted in a trial by the media, stripped of the constitutional right to reputation by AG Shapiro's use of a constitutionally infirm grand jury process.

The Catholic League supports the relief requested by the Petitioners: minimal due process protections for persons identified in the Report—as is required in nearly every other state that permits the publication of grand jury reports—and acceptance of the redacted report as final. Given the “incendiary” subject matter of the Report and “substantially heightened” “stakes for individuals reproached therein,” this is the minimum relief necessary to protect the constitutional right to reputation enjoyed by all citizens of Pennsylvania.

But this is not enough. As discussed *supra*, insofar as this investigation involved neither public corruption nor organized crime, the investigation should never have been commenced in the first place. *See* 42 Pa. C.S. § 4544. To prevent further abuses of the Act by the Attorney General, the Catholic League urges this Court to establish clear parameters circumscribing the bases for convening multicounty investigating grand juries, their purpose, the content of the resulting reports, the gatekeeping role of the supervising judge before issuance, and the proper conduct of the Attorney General after release.

CONCLUSION

The troubling constitutional infirmities discussed above compel prompt remedial action by this Court. This Court alone has both the authority and present opportunity to counteract the resulting constitutional deprivations and restore minimum due process to the grand jury procedure. Specifically, the Catholic League requests that the Court adopt the Interim Report as the Final Report or, in the alternative: (1) require the Supervising Judge to offer the option of a pre-deprivation hearing for each individual named in the Report; (2) afford these individuals the opportunity to present evidence in their defense; and (3) strike any portions of the Report that are not supported by the evidentiary record created at the pre-deprivation hearing. It now falls to the Court to uphold the rule of law. In the absence of such action, due process and the constitutional right to reputation will remain at grave risk in Pennsylvania.

Dated: September 21, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 531(b)(3) of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief of *Amicus Curiae* The Catholic League for Religious and Civil Rights complies with the applicable word count limit. This certificate is based on the word count of the word processing system used to prepare the brief.

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I further certify that this filing 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.

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