

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,  
By LETITIA JAMES, Attorney General of the  
State of New York,

Index No.

Plaintiff,

-against-

DIOCESE OF BUFFALO, RICHARD J. MALONE,  
EDWARD M. GROSZ, and EDWARD B.  
SCHARFENBERGER, in his capacity as Apostolic  
Administrator for the Diocese of Buffalo,

Defendants.

**MEMORANDUM OF LAW  
IN SUPPORT OF THE ATTORNEY GENERAL'S  
MOTION FOR AUTHORIZATION TO  
IDENTIFY CREDIBLY-ACCUSED PRIESTS**

**LETITIA JAMES**

ATTORNEY GENERAL OF THE STATE OF NEW YORK

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## INTRODUCTION

The Attorney General's Complaint in this action confronts a nearly two decade-long failure by the Diocese of Buffalo (the "Diocesan Corporation" or the "Diocese") to comply with standards established by the U.S. Conference of Catholic Bishops ("USCCB") to address and prevent the sexual abuse of minors. Among other things, this failure denied the Diocese's parishioners and the public at large the transparency and accountability for the problem of clergy sexual abuse that the Diocese had promised when it adopted those standards in 2002. The Complaint names as defendants the Diocese and the two most senior leaders who were responsible for implementing its protective policies, Bishop Emeritus Richard J. Malone and former Auxiliary Bishop Edward Grosz. The Complaint alleges that the defendants evaded key provisions of the Diocese's publicly-stated standards and ignored the Diocesan Corporation's own requirements for the investigation, review, and remediation of alleged sexual abuse by Diocesan priests, in direct defiance of the USCCB's public commitment to reform. These failures are illustrated in the Complaint through close review of the Defendants' response to allegations of misconduct by twenty-five individual priests. Twenty-three of the priests discussed in the Complaint have been publicly identified in the Diocese's own published list of credibly accused priests.

The Attorney General brings this motion simultaneously with the filing of her Complaint to obtain a ruling at the outset of this litigation permitting the identification by name of those accused priests who are already publicly identified by the Diocese as credibly accused of improper sexual conduct. Pending such a determination, the Attorney General has taken the precaution of referring to these priests by pseudonyms in the Complaint. The Attorney General believes that disclosure of the names of the credibly-accused priests is necessary to a full, fair

and transparent presentation of evidence and that no legal basis exists to conceal their identities in this litigation. However, in recognition of the interests of the non-party priests, the Attorney General proposes that the Court hold a hearing to consider objections to the identification by name in the Complaint of the twenty-three priests discussed therein that have already been publicly identified as credibly accused of sexual abuse. To complete this review, the Attorney General proposes a procedure similar to the approach crafted by a Pennsylvania court that examined concerns raised during the 2018 publication of a Pennsylvania grand jury report on clergy sexual abuse. Here, as in Pennsylvania, hearing and review of the Attorney General's proposed disclosure will balance the rights and interests of the State, the victims, and the public with the rights and interests of individual priests who might be affected by personal identification in the Attorney General's pleading and in the litigation to follow. For the reasons discussed below, the Attorney General believes that the relief requested by this motion is in the public interest and consistent with well-established principles of judicial transparency in New York law.

### **FACTUAL BACKGROUND**

The Attorney General serves as the principal regulator of New York nonprofit corporations, including entities that elect to incorporate under the provisions of the Religious Corporations Law ("RCL"). Through this role, the Attorney General bears a unique authority and responsibility to enforce civil standards in New York law that require the Diocese of Buffalo to adequately address institutional harms of the scale and magnitude of the clergy sex abuse crisis.

In September 2018, the Attorney General commenced an investigation of the Diocese's response to the sexual abuse crisis that sought to ensure compliance with the standards of care and fiduciary loyalty that apply to all New York charities, including the Diocesan Corporation

and its leadership. The Investigation examined thousands of pages of business records produced by the Diocese and included sworn examination testimony by Bishop Emeritus Malone and the senior staff leader who reported to him, former Auxiliary Bishop Grosz. The information drawn from those efforts confirmed an astonishing failure to properly address allegations of clergy sexual misconduct against children despite clear — and publicly-touted — standards adopted by the Diocesan Corporation to protect children.

The Complaint in this action illustrates the specific actions and inaction by the defendants that violated multiple provisions of the Not-for-Profit Corporation Law (“N-PCL”) and Estates, Powers and Trusts Law (“EPTL”) through a review of individual priest personnel records taken directly from Diocese files. Because the Attorney General brings her claims to obtain remedial and injunctive relief against the Diocese as an institution and two of its former bishops as fiduciaries charged with ensuring its proper administration, the Complaint focuses exclusively on the existence of abuse allegations and their treatment by the Diocese. For reasons reviewed at length in the Complaint, the Attorney General contends that the nature of the allegations of abuse made to the Diocese and the responses recorded in its own files establish that the defendants failed to satisfy their obligations under New York law.

Central to the Complaint’s presentation is a detailed examination of how the defendants acted or failed to act in response to allegations raised against twenty-five individual accused priests who are not named as defendants.<sup>1</sup> These case histories are based on information that the Attorney General obtained from a review of files maintained by the Diocese, which document in

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<sup>1</sup> The Complaint does not name the individual priests as defendants because this action is brought by the Attorney General in her capacity as the regulator of charities and not-for-profit organizations in New York. The Attorney General asserts claims that focus on failures by the Diocese and its leaders to meet their obligations under New York law in responding to the sexual abuse allegations, not on the individual alleged perpetrators of such abuse.

detail the degree to which senior Diocesan staff knew of and abided specific accusations levied against individual priests. The case histories demonstrate how the Diocese systematically circumvented its own policies and procedures for addressing allegations of improper sexual conduct. These practices operated to conceal the identities of accused priests in the Diocese and the actual nature and scope of the allegations against them. The Diocese's practices also failed to support and validate the experiences and testimony of those complainants who came forward in reliance upon the Diocese's announced concern for victims and its promise to comply with USCCB policy.

In March 2018, the Diocese released for the first time a list of individual priests, living and deceased, who were alleged to have sexually abused a minor. The Diocese has expanded the list three times. As of November 2019, the last updated list, the Diocese had identified seventy-eight priests by name as "Diocesan Priests with Substantiated Allegations of Abuse of a Minor," and provided basic biographic details in its list such as date of birth, whether the priest was the subject of multiple (but unenumerated) allegations, and the priest's "status," such as "removed from ministry," or "case to be sent to Rome." *See* List of all diocesan and extern priests with substantiated allegations of sexual abuse of a minor or vulnerable adult, *available at* [https://www.buffalodiocese.org/documents//Diocesan\\_Substantiate\\_11-5-19.pdf](https://www.buffalodiocese.org/documents//Diocesan_Substantiate_11-5-19.pdf) (last accessed on November 16, 2020).

According to the Diocese's website, the designation of abuse allegations as "substantiated" means that one or more of the following criteria has been met:

1. the accused priest has admitted the allegation(s) against him;
2. the Diocese's Independent Review Board found the allegation(s) to be credible and substantiated following an internal investigation by an independent

- professional investigator;
3. the allegation(s) was/ were corroborated by witnesses, additional victims, documents, emails, photos, texts, or by another source such as law enforcement;
  4. the accused was convicted of a crime in connection with the allegation(s); or
  5. the accused had been laicized or permanently removed from ministry as a result of the allegation(s).

*See id.* Deceased priests are included on the list only where they were the subject of more than one allegation. *Id.* The Diocese's public disclosures do not provide any details regarding the nature of allegations asserted against identified priests, the basis for the Diocese's determination that those allegations were substantiated or when the Diocese made that determination.

The twenty-three priests that the Attorney General proposes to identify by name in her Complaint are each included on the Diocese's public list of credibly-accused. Many of the priests have also been separately identified in public statements by their victims or the media. Six of the priests discussed in the Complaint are deceased. The Attorney General has not independently investigated the conduct that these men are accused of and states explicitly in the Complaint that: "The allegations in this pleading should in no way should be interpreted as *finding* that these priests sexually abused minors. Under the U.S. Constitution, those accused of crimes are entitled to due process and a presumption of innocence." Compl. at 20 n.9. The Attorney General has not identified, and does not propose to name, two priests discussed in the Complaint who are not included in the Diocese's published list.

Disclosure of the names of priests and details concerning their alleged sexual abuse presents a specific evidentiary issue for consideration by this Court. The Attorney General's information about alleged sexual abuse of children by priests has been obtained primarily from



the Diocese in the form of Diocesan records and testimony by Diocesan leaders. As the Complaint alleges in detail, the Diocese failed in its responsibilities to conduct thorough and appropriate investigations of allegations of sexual abuse. These failures of process and investigation resulted in lengthy delays, a failure to make factual determinations, and failure to refer priests credibly accused of sexual abuse to Rome for laicization. These failures could also affect the trustworthiness of the factual determinations and decisions that the Diocese did make.

### ARGUMENT

New York law recognizes a “broad presumption that the public is entitled to access to judicial proceedings and court records.” *Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep’t 2010). “Especially when issues of major public importance are involved, the interests of the public as well as the press in access to court records ‘weigh heavily[.]’” *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 8 (1st Dep’t 2000). New York courts have applied these principles to prohibit sealing court records on the basis of potential embarrassment or damage to reputation alone, *e.g.*, *Mosallem*, 76 A.D.3d. at 351-52, and to require a specific showing of plausible and actual harm where one party to a litigation requests anonymity, *see GCVAWCG-DOE v. Roman Catholic Archdiocese of New York*, No. 56145/2020, 69 Misc.3d 648, 2020 WL 5083559, at \*3 (Sup. Ct. Westchester Cty. Aug. 27, 2020).

The Complaint in this action addresses issues of profound public importance that have already received significant public attention throughout the State. The Diocese has publicly identified each of the accused priests that the Attorney General proposes to name in the Complaint and has publicly reported that many of those priests either have been or will be referred to the Vatican for potential canonical trial of their alleged conduct. New York’s standards for judicial transparency require that publicly-available information regarding the

identity of accused priests known to the defendants be fully incorporated into the Complaint and this litigation.

**A. Identification of the Accused Priests by Name Will Ensure Transparency and Serve the Interests of the Public and the Abuse Complainants.**

The Attorney General's claims in this action seek, in part, to ensure a full and frank examination of the Diocese's past failure to exercise reasonable care in investigating and responding to allegations of sexual abuse. After nearly twenty years of the Diocese's continued failure to address and resolve allegations of abuse, or to provide public validation to individual complainants brave enough to come forward, only full transparency in this action concerning the Diocese's treatment of specific priests and allegations will permit complete consideration of the institutional conduct that the Complaint seeks to address. Proof of that conduct must be both general and specific; general as to the policies and procedures of the Diocese, and specific as to how those policies and procedures were applied in the case of each accused priest.

Disclosure of the names of credibly accused priests, and the details of their alleged conduct, is necessary to ensure public transparency as this case proceeds — in discovery, in pretrial filings, and at trial. The details of the complaints and information that were presented to the defendants for review, and the investigation undertaken to determine the accuracy of allegations of sexual abuse of minors, are critical to a full understanding of those failures and to careful consideration of the Attorney General's requested relief. The Diocese itself has already acknowledged the need for such candor, characterizing its own decision to disclose the names of credibly-accused priests as a process undertaken "to honor [its] charge of transparency" and to bring "healing, support, and some measure of closure to survivors of abuse."<sup>2</sup>

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<sup>2</sup> Diocesan statement on recent media reports about sexual abuse in the Church, *available at* <https://www.buffalodiocese.org/media-reports-statement> (last visited November 16, 2020).

Citing the actual names of already-identified alleged abusers, together with the facts surrounding those allegations, is also important to the priests' alleged victims. It provides validation to complainants who have already come forward. Disclosure is also likely to encourage other complainants to provide additional evidence concerning both the priests' conduct and the Diocese's response when presented with complaints. As the Church and experts have observed, most sexual abuse of children by priests is not reported out of shame, fear or guilt.<sup>3</sup> A complainant's willingness to come forward is increased if the allegations of other alleged victims have been validated through investigation and public action. *See, e.g.,* Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 Brooklyn L. Rev. 397, 405 (2014) (describing a "waterfall of disclosures that never would have happened" without legislation in Minnesota to permit previously time-barred civil claims). Beyond facilitating the litigation process, significant therapeutic and restorative value can be achieved for complainants through public disclosure and reporting.

**B. The Court Should Provide the Accused Priests with Notice and the Opportunity to Assert Any Legal Objections to Disclosure.**

In evaluating the Attorney General's proposed disclosure, the Court must strike a balance between the public interest in a Complaint that fully discloses the details of alleged abuse reported to the Diocese and the interests of individual priests that the Diocese has publicly

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<sup>3</sup> *See* Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 Cardozo L. Rev. 225, 227 (2007) ("*Institutional Cover-Up*") (citing statistics that show approximately 90% of child abuse victims will not come forward); *see also* USCCB *Statement by the Bishops' Committees on Women in Society and in the Church and Marriage and Family*, Walk in the Light: A Pastoral Response to Child Sex Abuse, at "One Scenario of Abuse" (1995) ("Sometimes there is a threat of punishment or injury to others if the child tells anyone. Then, when feelings of shame and guilt surface, children are isolated. They are too terrified to seek help. Revealing a 'family secret' to the outside world is unthinkable."), available at <https://www.usccb.org/committees/laity-marriage-family-life-youth/walk-light-pastoral-response-child-sexual-abuse>. Even where individual victims attempt to report abuse, those attempts are often discouraged by parents and church leaders. *Institutional Cover-Up*, at 228-29.

identified as credibly-accused. The procedure proposed by this motion would provide a fair process for the priests to challenge their identification by name while recognizing the profound public importance of the events and decisions described in the Complaint, including the Diocese's systematic effort to evade publicly-stated Church standards for the investigation and prevention of abuse.

*Matthews v. Eldridge*, 424 U.S. 319 (1976), sets forth a useful three-part analysis for evaluating whether sufficient protections have been provided prior to the deprivation of a constitutionally-protected individual interest. That analysis considers:

1. The private interest affected by government action;
2. The risk of an erroneous deprivation of rights, together with the value of additional safeguards; and
3. The state interest involved.

424 U.S. at 335. The Attorney General asks this Court to adopt a procedure which will allow the parties, advocates for survivors of sexual abuse by priests, priests accused of sexual abuse, the Attorney General, and this Court to consider a disclosure solution which would satisfy the requirements of this litigation and the *Matthews v. Eldridge* standard, if applicable.

The Attorney General makes her request informed by the Supreme Court of Pennsylvania's decision in *In re Fortieth Statewide Investigative Grand Jury (II)*, 197 A.3d 712 (Pa. 2018), which addressed privacy and reputational concerns in connection with a public report that described allegations of clergy abuse across six Pennsylvania dioceses. In 2018, a grand jury convened by the Pennsylvania Attorney General issued a report pursuant to Pennsylvania's Investigating Grand Jury Act that named more than 300 clergy members as abusive "predator priests." The report presented individual profiles for each of the accused priests, including their

assignment history and a detailed summary of their alleged misconduct, but did not present any allegations for criminal prosecution. Most of the priests identified in the report had never been prosecuted for their alleged crimes and — unlike in the Attorney General’s Complaint — many had never been publicly identified as the subject of abuse complaints. A small subset of eleven priests named in the report sought permanent redaction of their names, citing a fundamental right to “personal reputation,” a right recognized under the Pennsylvania state constitution, and arguing that the State’s accusation of criminal conduct in a grand jury report without any accompanying criminal charge and without a hearing prior to being so named caused grievous injury to their reputation and inadequate process through which to counter the report’s allegations. The Pennsylvania Supreme Court concluded that the grand jury’s report should be permanently redacted to remove the names of the objecting priests because there was “a substantial risk that [the priests’] reputations will be irreparably and illegitimately impugned.” *In re Fortieth Statewide Investigative Grand Jury (II)*, 197 A.2d at 724. The Court acknowledged that its decision would be “unsatisfying to the public and to the victims of the abuse,” but it concluded that the Investigating Grand Jury Act had failed to secure the due process rights for objecting priests required by Pennsylvania’s Constitution. *Id.*

The circumstances in this action differ in several significant ways from the Pennsylvania case. First, the New York Constitution does not afford a “fundamental constitutional entitlement” to reputation, as the Pennsylvania Constitution does; the Pennsylvania court found damage to a priest’s reputation alone sufficed to make out a claim for the violation of that right. *See In re Fortieth Statewide Investigating Grand Jury (I)*, 190 A.3d 560, 575 (Pa. 2018). Second, the legal proceeding here is materially different from the grand jury proceeding in Pennsylvania, which was subject to particular statutory requirements under that state’s law; the

Attorney General's civil claims in this action do not rely on or include a grand jury report of findings against priests absent charges and a proceeding. *Id.* at 568-71. Third, the Attorney General does not present her allegations in a criminal context or in the form of an indictment. Fourth, the Attorney General proposes to name only those priests in the Complaint who have been identified by the Diocese on its published list of credibly-accused priests. Last, and most important, the Attorney General is proposing a process *in advance of disclosure* to address whether any accused priests discussed in the Complaint have a legal basis for protecting their identity, by giving them an opportunity to be heard *before* they are identified.

### **REQUESTED RELIEF**

The Attorney General's Complaint in this action includes close review of a deeply troubling failure to address allegations of misconduct by twenty-three priests that the Diocese of Buffalo now publicly identifies as credibly accused of sexual abuse. Recognizing that the inclusion of even already-published names in a complaint filed on behalf of the State of New York, together with details of alleged misconduct that have never previously been disclosed, represents publication of a different form, the Attorney General has taken the precaution of temporarily shielding the names of those priests through the use of pseudonyms.

By this motion, the Attorney General seeks leave to file the Complaint in a form that includes the actual names of the twenty-three already-identified priests that it discusses, which will ensure the judicial transparency required by New York law and help bring about healing and closure for abuse complainants. To protect the rights and interests of the priests who would be identified if this motion is granted, the Attorney General respectfully asks this Court to:

- (i) convene a hearing, or such other process as the Court deems appropriate, to determine whether the names of twenty-three priests discussed in the

Attorney General's Complaint may be publicly disclosed in this context;

- (ii) provide notice of the hearing or such process to any affected priest or interested member of the public and require any person who objects to the Attorney General's proposed disclosure to come forward and identify why a legal basis exists to prohibit such disclosure;
- (iii) issue an order upon completion of such hearing or process that authorizes disclosure in this litigation of the name of any priest already identified by the Diocese as credibly accused of abuse, including without limitation in the Complaint, subsequent pleadings and proceedings; and
- (iv) grant such other and further relief as the Court deems just and proper.

The Attorney General is prepared to present a more detailed proposal to the Court for the notice, submission and hearing process at the Court's direction.

Dated: November 23, 2020  
New York, New York

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