

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY COUNTY

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Docket No. 1469 C.D. 2021

v.

BRITTANY HAILER AND
PITTSBURGH CURRENT,
Appellants

BRIEF OF *AMICI CURIAE* PENNSYLVANIA NEWSMEDIA
ASSOCIATION AND THE CORNELL LAW SCHOOL FIRST
AMENDMENT CLINIC
IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE..... 1

FACTS AND PROCEDURAL HISTORY 2

ARGUMENT 2

I. Lower Court’s Interpretation of Section 1252-B to Cut Off Access to Two Counties’ Autopsy Records to the Press and the Public at Large Contradicts Legislature’s Intent by Disfavoring the Public Interest 3

 A. Lower Court’s Interpretation Stymies Accountability Reporting on, and Erodes Public Trust in, Medical Examiner Offices 5

 B. Lower Court’s Interpretation Jeopardizes State-by-State and County-by-County Comparisons of Medical Examiner and Coroner Offices..... 8

 C. Lower Court’s Interpretation Flouts Access Norms of Requester Neutrality and Motive Immateriality by Sanctioning Ad Hoc Access Determinations 11

II. Even if the Lower Court is Correct That a Requestor Must Demonstrate a Proper Motive to Access Autopsy Records, Media Appellants Have Already Done So..... 13

CONCLUSION 17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allegheny County v. Hailer</i> , No. SA21-000108 (C.P. Allegheny Cnty. Dec. 1, 2021)	<i>passim</i>
<i>Campus Commc'ns, Inc. v. Earnhardt</i> , 821 So. 2d 388 (Fla. Dist. Ct. App. 2002)	5
<i>Com. v. Diakatos</i> , 708 A.2d 510 (Pa. Super. Ct. 1998)	3
<i>Denver Pub. Co. v. Dreyfus</i> , 520 P.2d 104 (1974)	12
<i>Hunsicker v. Pennsylvania State Police</i> , 93 A.3d 911 (Pa. Commw. Ct. 2014)	11-12
<i>Pennsylvania Dep't of Educ. v. Bagwell</i> , 114 A.3d 1113 (Pa. Commw. Ct. 2015)...	3
<i>Pennsylvania Liquor Control Bd. v. Burns</i> , No. 1159 C.D. 2019, 2020 WL 3256836 (Pa. Commw. Ct. June 16, 2020)	3
<i>People v. Dungo</i> , 286 P.3d 442 (2012)	6
<i>SWB Yankees LLC v. Wintermantel</i> , 45 A.3d 1029 (2012)	3
Statutes	
1 Pa. Stat. and Cons. Stat. Ann. § 1922	3-4
16 P.S. § 1252-B	<i>passim</i>
Other Authorities	
Final Report of the Independent Investigation into the City of Philadelphia’s Possession of Human Remains of Victims of the 1985 Bombing of the MOVE Organization: Part Three of Three (June 3, 2022), <i>available at</i> https://www.phila.gov/media/20220609141446	5-6
Austin Sarat, <i>Failures in Tennessee and Oklahoma offer new evidence of America’s execution problems</i> , THE HILL (Jun. 8, 2022), https://thehill.com/opinion/criminal-justice/3515619-failures-in-tennessee-and- oklahoma-offer-new-evidence-of-americas-execution-p	10

Autopsy Photos Are Often Used to Refute Official Conclusions, News Media & The Law (Spring 2001), <https://www.rcfp.org/journals/the-news-media-and-the-law-spring-2001/autopsy-photos-are-often-us/> 13-14

Brittany Hailer, *Lack of transparency, oversight has officials, families questioning Allegheny County jail deaths*, PENNSYLVANIA CAPITAL STAR (Mar. 16, 2022), <https://www.penncapital-star.com/criminal-justice/lack-of-transparency-oversight-has-officials-fa> 16

Charlie Wolfson, *Allegheny County paid \$29.2 million in overtime in 2020, mostly to nursing home and jail employees*, PUBLICSOURCE (Jul. 1, 2021), <https://www.publicsource.org/allegheny-county-salaries-2020-fitzgerald-kane-centers-jail-tax/> 5

Cyril Wecht Will Not Become Allegheny County Medical Examiner, CBS NEWS (Feb. 27, 2012), <https://www.cbsnews.com/pittsburgh/news/cyril-wecht-will-not-become-allegheny-county-medical-examiner/> 7

Erika Hayasaki, *The Police Called It an Accident. She Turned to 1-800-Autopsy*, N.Y. Times (Jul. 8, 2021), <https://www.nytimes.com/2021/07/08/magazine/the-police-called-it-an-accident-she-turned-to-1-800-autopsy.html> 9

Joshua Vaughn, *Most deaths in Pa. jails went unreported despite rules: 'It is appalling'*, PennLive (Feb. 9, 2022), <https://www.pennlive.com/news/2022/02/most-deaths-in-pa-jails-went-unreported-despite-rules-it-is-appalling.html> 16

Kare 11 journalists honored with Peabody Award for 'PRONE' series coverage, Kare (last visited Jul. 19, 2022), <https://www.kare11.com/article/about-us/kare-11-2022-peabody-award-prone-series/89-900494d8-cbac-4bc0-9123-087aa1e6f73d#:~:text=Investigative%20> 10-11

Krista Kjellman Schmidt, *Post Mortem: About Our Autopsy Data*, PROPUBLICA (Feb. 1, 2011), <https://www.propublica.org/article/about-our-autopsy-data> 9

Leah Wang & Wendy Sawyer, *New data: State prisons are increasingly deadly places*, PRISONPOLICY INITIATIVE (Jun. 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ 16

Leah Wang, *Rise in jail deaths is especially troubling as jail populations become more rural and more female*, Prison Policy Initiative (Jun. 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/jail_mortality/ 16

New Deadly Form Of Fentanyl Is On The Streets In Allegheny County, CBS News Pittsburgh (Nov. 9, 2021), WPXI, <https://www.cbsnews.com/pittsburgh/news/para-fluorofentanyl-heroin-new-drug-allegheny-county/> 8

Noah Cadwell et al., *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, NPR (Sept. 21, 2020),

https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection	10
Rick Earle, <i>Major Changes in the Allegheny County Medical Examiner’s Office After Target 11 Investigation</i> (Feb. 28, 2022), https://www.wpxi.com/news/investigates/major-changes-allegheeny-county-medical-examiners-office-after-target-11-investigation/GTHKM2	7-8
Pa. Gen. Assemb., Act 154 of 2018 (SB 1005, PN 2026) Section-by-Section Commentary (Oct. 24, 2018)	4
PennLive Editorial Board, <i>Access Denied? Carbone, Crawford, Laughman, Gladden -- Their Names Reveal Why Coroner's Info is a Must</i> , The Patriot-News (Nov. 26, 2010), https://www.pennlive.com/editorials/2010/11/access_denied_carbone_crawford.html	14
<i>Post Mortem: Death Investigation in America</i> , PROPUBLICA (last visited Jul. 19, 2022), https://www.propublica.org/series/post-mortem	9
Sara Ganim, <i>Panel suggests DNA testing, recorded interrogations to reduce wrongful convictions in Pennsylvania</i> , PennLive (Sept. 21, 2011), https://www.pennlive.com/midstate/2011/09/panel_suggests_dna_testing_rec.html	15
Sean D. Hamill, <i>Pathologist Accused of Profiting From Office</i> , N.Y. TIMES (Jan. 28, 2008), https://www.nytimes.com/2008/01/28/us/28wecht.html	7
Star Editorial Board, <i>New evidence obtained by the Star shows investigation of the Sherman murders was bungled from the start</i> , Toronto Star (Jun. 16, 2022), https://www.thestar.com/opinion/editorials/2022/06/16/new-evidence-obtained-by-the-star-shows-the	14
<i>The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms</i> , 59 Ark. L. Rev. 555 (2006).....	11-12
The Editorial Board, <i>It’s time to complete the overhaul of the Medical Examiner’s Office</i> , The Philadelphia Inquirer (Jun. 17, 2022), https://www.inquirer.com/opinion/editorials/philadelphia-medical-examiners-office-overhaul-move-victims-20220617.html	6-7
<i>WBUR Investigative Reporting Leads to Exoneration in Murder Trial</i> , WBUR (Jul. 8, 2019), https://www.wbur.org/inside/2019/07/08/wbur-investigative-reporting-leads-to-exoneration-in-murder-trial-2	15
Ximene Conde, <i>How the Philly Medical Examiner’s Office desecrated MOVE victims’ remains for 36 years</i> , WITF (Jun. 3, 2021), https://www.witf.org/2021/06/03/how-the-philly-medical-examiners-office-desecrated-move-victims-remains-for-36-years/	6

INTEREST OF THE AMICI CURIAE

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania nonprofit member corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of more than three hundred (300) daily and weekly newspapers, digital publications and other media organizations across the Commonwealth of Pennsylvania in ensuring that the press can gather information and report to the public. A significant part of the Association's mission is to defend the media’s statutory rights of access to public records in Pennsylvania.

PNA is joined by the Cornell Law School First Amendment Clinic (“Cornell”), which is housed within Cornell Law School and Cornell University. The Clinic’s Local Journalism Project provides pro bono legal representation, *amicus curiae* support, and counseling to aid news outlets, journalists, and other newsgatherers in their vital function of reporting important news and information to their communities. The Local Journalism Project devotes significant resources to assisting journalists in their investigative efforts to hold government accountable, including through representing clients in public records and court access lawsuits.

This case raises important issues regarding public access to autopsy records under Pennsylvania’s Coroner’s Act. The decision below is contrary to both the letter and intent of the law and will have far-reaching and severe consequences for

the public's ability to understand and scrutinize decisions made by appointed medical examiners.

The PNA and Cornell wish to participate in this matter both to emphasize the important access issues raised by this case and to stress the policy considerations that mandate an interpretation of the Coroner's Act to safeguard the public's right to access autopsy records. Pursuant to Pa. R.A.P. 531(b)(2), Amici certify that no other person or entity other than Amici, their members, or counsel paid in whole or in part for the preparation of this brief, nor authored this brief in whole or in part.

FACTS AND PROCEDURAL HISTORY

Amici Curiae adopt and incorporate by reference the Facts and Procedural History in the Brief of Appellants Brittany Hailer and Pittsburgh Current ("Media Appellants") as if set forth fully herein.

ARGUMENT

Amici agree with Media Appellants that Section 1252-B of the Coroner's Act requires that autopsy and toxicology reports be provided to any requester, regardless of identity or motive, for a fee, for all the reasons described in Media Appellants' brief. *Amici* write separately to make the following two points supporting access here: (1) the lower court's interpretation, contrary to the legislature's intent, disfavors the public interest; and (2) even if the lower court is correct that a requester

must demonstrate a proper motive to access the requested records, Media Appellants have already demonstrated that they qualify.

I. Lower Court’s Interpretation of Section 1252-B to Cut Off Access to Two Counties’ Autopsy Records to the Press and the Public at Large Contradicts Legislature’s Intent by Disfavoring the Public Interest

When interpreting a statute, it is presumed that the legislature did “not intend a result that is . . . unreasonable.” 1 Pa. Stat. and Cons. Stat. Ann. § 1922(1). In this regard, courts “are permitted to examine the practical consequences of a particular interpretation.” *Com. v. Diakatos*, 708 A.2d 510, 512 (Pa. Super. Ct. 1998) (citations omitted). The practical consequence of the lower court’s interpretation of Section 1252-B of the Coroner’s Act, 16 P.S. § 1252-B, to foreclose records requests from “anybody with a good cause seeking information about a death,” *Allegheny County v. Hailer*, No. SA21-000108, at 4 (C.P. Allegheny Cnty. Dec. 1, 2021) (attached as Ex. A), is to abruptly cut off access to autopsy records in the state’s two most populous counties—Allegheny and Philadelphia—to the media and the general public. The lower court’s “interpretation runs counter to the presumption that the legislature intends to favor the public interest, in this case by promoting access to government information that will empower citizens to hold [appointed medical examiners] accountable for their actions.” *Pennsylvania Liquor Control Bd. v. Burns*, No. 1159 C.D. 2019, 2020 WL 3256836, at *8 (Pa. Commw. Ct. June 16, 2020) (citing 1 Pa. Stat. and Cons. Stat. Ann. § 1922; *SWB Yankees LLC v.*

Wintermantel, 45 A.3d 1029, 1042 (2012); *Pennsylvania Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Commw. Ct. 2015)). This cannot be the law.

The lower court rested its decision disfavoring the public interest on a “narrow[]” interpretation of the 2018 amendments to the Coroner’s Statute that limits access to autopsy, toxicology and other reports to only those who “qualify as a ‘nongovernmental agenc[y]’ seeking ‘to determine liability for the death of the deceased’” or investigate an insurance policy claim. *Hailer*, No. SA21-000108, at 3-4. Media Appellants’ purpose in requesting the autopsy records did not meet the liability requirement, according to the lower court, because seeking to determine whether jail conditions contributed to an inmate’s death and uncovering systemic inequities did not “directly implicat[e]” “the legal process” typically involved in determining liability. *Id.* at 4. But the lower court’s decision ignored Media Appellants’ argument below that the legislature in no way intended the amended statute to limit access to records requested under the Section 1252-B fee provision. To the contrary, the legislature expressly “removed a new subsection which would have specified that the section should not be construed as authorizing disclosure” of these records to keep this provision “analogous to [the former Coroner’s Act], except that the fees for reports have been increased.” Pa. Gen. Assemb., Act 154 of 2018 (SB 1005, PN 2026) Section-by-Section Commentary (Oct. 24, 2018), at 14.

By denying the media access to autopsy records in Allegheny and Philadelphia counties, the lower court’s interpretation disfavors the public interest in at least three ways: the decision (1) stymies much needed accountability reporting on county medical examiner offices that have been plagued by recent scandals; (2) jeopardizes state-by-state and county-by-county comparisons of medical examiner and coroner offices by the media and nongovernmental agencies; and (3) flouts access norms of requester neutrality and motive immateriality by vesting broad discretion in medical examiners to determine who can access the reports.

A. Lower Court’s Interpretation Stymies Accountability Reporting on, and Erodes Public Trust in, Medical Examiner Offices

Public access to autopsy records enhances trust in the state’s publicly elected coroners and appointed medical examiners, which the public has “a great interest” in monitoring. *See, e.g., Campus Commc'ns, Inc. v. Earnhardt*, 821 So. 2d 388, 401 (Fla. Dist. Ct. App. 2002) (“[T]he public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion”). Top roles in the medical examiner offices in Allegheny and Philadelphia counties are some of the highest paid public positions in their respective counties, with the death investigations they oversee serving many important purposes.¹ Autopsy reports can help “satisfy the public’s interest in

¹ *See, e.g., Charlie Wolfson, Allegheny County paid \$29.2 million in overtime in 2020, mostly to nursing home and jail employees*, PUBLICSOURCE (Jul. 1, 2021),

knowing the cause of death, particularly when (as here) the death was reported in the local media[,]” “determin[e] whether to file an action for wrongful death[,]” and “provide answers to grieving family members.” *People v. Dungo*, 286 P.3d 442, 450 (2012), *as modified on denial of reh'g* (Dec. 12, 2012).

Both the Philadelphia and Allegheny County Medical Examiner Offices have come under increasing scrutiny in recent years, which further demonstrates the need for their autopsy records to be open to the public. With respect to the Philadelphia Office, *The Philadelphia Inquirer* published a scathing editorial just last month calling on the city’s mayor to “complete the task of overhauling the Medical Examiner’s Office” following “the city’s outrageous mishandling of the remains of victims of the 1985 MOVE bombing, which sat in a box in the Medical Examiner’s Office for years.”² The 1985 bombing in West Philadelphia after a police standoff with members of the Black liberation group MOVE killed 11 people, five of them

<https://www.publicsource.org/allegheny-county-salaries-2020-fitzgerald-kane-centers-jail-tax/> (“The top earner, including overtime and bonuses, in 2020 was Dr. Karl Williams, the chief medical examiner”) (\$219,864); Final Report of the Independent Investigation into the City of Philadelphia’s Possession of Human Remains of Victims of the 1985 Bombing of the MOVE Organization: Part Three of Three (June 3, 2022), at 10, *available* at <https://www.phila.gov/media/20220609141446/move-investigation-report-20220609.pdf>.

² The Editorial Board, *It’s time to complete the overhaul of the Medical Examiner’s Office*, *The PHILADELPHIA INQUIRER* (Jun. 17, 2022), <https://www.inquirer.com/opinion/editorials/philadelphia-medical-examiners-office-overhaul-move-victims-20220617.html>.

children, and “remains one of the largest stains on Philadelphia history.”³ The *Inquirer* cited an independent investigation that concluded last month for its critical assessment of the Medical Examiner Office as “awash in widespread systemic problems[,]” including inadequate recordkeeping, a staffing shortage, and a lack of written policies.⁴

Allegheny’s Medical Examiner’s Office likewise faced criticism when its longtime Medical Examiner was indicted over a decade ago on charges that he “used his office to benefit himself[,]” including being “accused of trading unclaimed cadavers to Carlow College in Pittsburgh for use of space to conduct his private autopsies” for his private forensic pathology business.⁵ He “was forced to resign after federal agents seized records from his office[,]” leading to his indictment.⁶ “[A]fter a hung jury, a mistrial, most of the charges thrown out by a judge and the remaining ones dropped,” he still unsuccessfully sought to be reinstated.⁷

³ Ximene Conde, *How the Philly Medical Examiner’s Office desecrated MOVE victims’ remains for 36 years*, WITF (Jun. 3, 2021), <https://www.witf.org/2021/06/03/how-the-philly-medical-examiners-office-desecrated-move-victims-remains-for-36-years/>.

⁴ *See supra* at note 2; Final Report of the Independent Investigation into the City of Philadelphia’s Possession of Human Remains of Victims of the 1985 Bombing of the MOVE Organization: Part Three of Three (June 3, 2022), at 1-3, 11-79, available at <https://www.phila.gov/media/20220609141446/move-investigation-report-20220609.pdf>.

⁵ Sean D. Hamill, *Pathologist Accused of Profiting From Office*, N.Y. TIMES (Jan. 28, 2008), <https://www.nytimes.com/2008/01/28/us/28wecht.html>.

⁶ *Cyril Wecht Will Not Become Allegheny County Medical Examiner*, CBS NEWS (Feb. 27, 2012), <https://www.cbsnews.com/pittsburgh/news/cyril-wecht-will-not-become-allegheny-county-medical-examiner/>.

⁷ *Id.*

More recently, a news investigation “exposed delays and other issues involving notification of death certificates and autopsy reports” at the Allegheny Office.⁸ Pittsburgh TV station *Target 11* launched an investigation after a couple reached out to report that the Medical Examiner’s Office would take at least five months to release the results of their daughter’s autopsy and toxicology reports following her fentanyl overdose.⁹ To them, “the delay could be a matter of life or death” as fentanyl overdoses surge in Pittsburgh.¹⁰

Interpreting the law here to favor the public interest mandates that public access be provided to autopsy records going forward to hold these public officials accountable and ensure that tax dollars are being properly spent.

B. Lower Court’s Interpretation Jeopardizes State-by-State and County-by-County Comparisons of Medical Examiner and Coroner Offices

Journalists often seek public records from a wide swath of states or counties to investigate issues on a larger scale and to compare practices across states and regions. The lower court’s interpretation has already created gaps in reporting on

⁸ Rick Earle, *Major Changes in the Allegheny County Medical Examiner’s Office After Target 11 Investigation* (Feb. 28, 2022), <https://www.wpxi.com/news/investigates/major-changes-allegheny-county-medical-examiners-office-after-target-11-investigation/GTHKM275SJA6XLTBU4E6YZZC5U/>.

⁹ *Id.*

¹⁰ *New Deadly Form Of Fentanyl Is On The Streets In Allegheny County*, CBS NEWS PITTSBURGH (Nov. 9, 2021), WPXI, <https://www.cbsnews.com/pittsburgh/news/para-fluorofentanyl-heroin-new-drug-allegheny-county/>.

individual death investigations and, if affirmed, will deprive the public of a fulsome picture of the industry in Pennsylvania and across the United States going forward.

Access to autopsy data in states around the country served as the cornerstone for a groundbreaking joint “year-long investigation into the nation’s 2,300 coroner and medical examiner offices” conducted around a decade ago by news outlets *ProPublica*, PBS “*Frontline*” and *NPR*.¹¹ Reporters relied in part on data they received from Allegheny, Philadelphia, and dozens of other large medical examiner and coroner systems to “uncover[] a deeply dysfunctional system that quite literally buries its mistakes.”¹² *ProPublica*’s analysis found that a number of medical examiners and coroners conducted far fewer autopsies a year than would be expected given the rates of unintentional deaths and homicides in their coverage areas.¹³ Allegheny, for example, had an autopsy rate from 2004 to 2007 that was a third to a quarter lower than expected, and Philadelphia had an autopsy rate that was 30 to 44 percent lower than expected during the same timeframe.¹⁴ Systemic issues in the

¹¹ *Post Mortem: Death Investigation in America*, PROPUBLICA (last visited Jul. 19, 2022), <https://www.propublica.org/series/post-mortem>; Krista Kjellman Schmidt, *Post Mortem: About Our Autopsy Data*, PROPUBLICA (Feb. 1, 2011), <https://www.propublica.org/article/about-our-autopsy-data>.

¹² *Post Mortem: Death Investigation in America*, PROPUBLICA (last visited Jul. 19, 2022), <https://www.propublica.org/series/post-mortem>; Krista Kjellman Schmidt, *Post Mortem: About Our Autopsy Data*, PROPUBLICA (Feb. 1, 2011), <https://www.propublica.org/article/about-our-autopsy-data>.

¹³ Krista Kjellman Schmidt, *Post Mortem: About Our Autopsy Data*, PROPUBLICA (Feb. 1, 2011), <https://www.propublica.org/article/about-our-autopsy-data>.

¹⁴ *Id.*

nationwide patchwork of death investigation systems continue to be investigated by news outlets in the years since then, with the *New York Times* last year reporting on the “shortage of certified forensic pathologists in this country” and the “plummet[ing]” rate of autopsies ordered in hospital deaths not deemed suspicious.¹⁵

NPR recently sought over 200 autopsy reports of inmates executed in nine states between 1990 and 2019 in a public records investigation that called into question the continued use of lethal injection as an execution method.¹⁶ The investigation demonstrated that the vast majority of these inmates executed through lethal injection suffered from pulmonary edema, which can result in the feeling of suffocation or drowning as their lungs fill with fluid.¹⁷ A recent op-ed in *The Hill* cited *NPR*’s investigation as support in arguing against states’ continued reliance on lethal injection.¹⁸

Autopsy records obtained by investigative journalists also featured prominently in an investigation Minneapolis and Denver TV stations conducted recently concerning the police practice of restraining suspects on their stomachs for

¹⁵ Erika Hayasaki, *The Police Called It an Accident. She Turned to 1-800-Autopsy*, N.Y. TIMES (Jul. 8, 2021), <https://www.nytimes.com/2021/07/08/magazine/the-police-called-it-an-accident-she-turned-to-1-800-autopsy.html>.

¹⁶ Noah Cadwell et al., *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, NPR (Sept. 21, 2020), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection>.

¹⁷ *Id.*

¹⁸ Austin Sarat, *Failures in Tennessee and Oklahoma offer new evidence of America’s execution problems*, THE HILL (Jun. 8, 2022), <https://thehill.com/opinion/criminal-justice/3515619-failures-in-tennessee-and-oklahoma-offer-new-evidence-of-americas-execution-problems/>.

prolonged periods.¹⁹ A searchable database assisted reporters around the United States in covering the story in their communities in the wake of George Floyd’s death, resulting in “multiple news stories in other cities” and the Denver and Minneapolis police departments “chang[ing] their policies in the wake of the series.”²⁰

When a state or county cuts off access to death investigation records, as is the case here, reporters are no longer able to provide a fulsome account of nationwide, regional or statewide trends. The lower court’s interpretation here disfavors the public interest because it hampers this important investigative tool.

C. Lower Court’s Interpretation Flouts Access Norms of Requester Neutrality and Motive Immateriality by Sanctioning Ad Hoc Access Determinations

The lower court’s interpretation of Section 1252-B provides the Medical Examiner with broad “discretion” to determine who can access autopsy records for a fee. *Hailer*, No. SA21-000108, at 4. Any requester who is not seeking to specifically investigate an insurance policy claim or “determine liability for the death” through a “legal process” can now be denied access. *Id.* This broad discretion

¹⁹ *Kare 11* journalists honored with Peabody Award for ‘PRONE’ series coverage, KARE (last visited Jul. 19, 2022), <https://www.kare11.com/article/about-us/kare-11-2022-peabody-award-prone-series/89-900494d8-cbac-4bc0-9123-087aa1e6f73d#:~:text=Investigative%20journalists%20A.J.,on%20the%20award%2Dwinning%20project>.

²⁰ *Id.*

vested with the Medical Examiner runs counter to well-defined public records law norms throughout the United States, and in Pennsylvania in particular, finding that the identity and motive of a requestor are immaterial to the grant or denial of access. *See, e.g.,* Richard J. Peltz et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 Ark. L. Rev. 555, 705–06 (2006); *Hunsicker v. Pennsylvania State Police*, 93 A.3d 911, 913 (Pa. Commw. Ct. 2014) (citing 65 P.S. § 67.301(b) in finding that “[t]he status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible” under the Right to Know Law”); *Denver Pub. Co. v. Dreyfus*, 520 P.2d 104, 109 (1974) (rejecting claim of agency discretion to withhold autopsy records because public records statute’s statement of policy “establishes the basic premise that in the absence of a specific statute permitting the withholding of information, a public official has no authority to deny any person access to public records”). These norms “reject[] the traditional practice of using identification checks to deter access, or to limit public access to persons subjectively deemed worthy by government officials” and also reject “the common law tendency to require benign or constructive purpose to obtain access[.]” Peltz, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 Ark. L. Rev. 555, 705–06 (2006). While these “norms are not absolutes,” they are

typically “excepted only by well defined and duly enacted classes of persons and motives in accordance with compelling policy objectives.” *Id.* at 705.

No compelling policy objective has been or can be proffered for denying access to the media and the public at large to autopsy records in Allegheny and Philadelphia counties. The lower court’s decision creates, without a basis in public records law, the Coroner’s Act or prior precedent, two distinct classes of requesters: one that can access to autopsy records in all but two counties in the Commonwealth regardless of identity or motive and another that can only access autopsy records in Allegheny and Philadelphia counties in connection with an insurance claim or a vaguely defined legal process. The lower court’s decision thus disfavors the public interest and should be reversed.

II. Even if the Lower Court is Correct That a Requestor Must Demonstrate a Proper Motive to Access Autopsy Records, Media Appellants Have Already Done So

The lower court found that Media Appellants’ motive to determine whether jail conditions contributed to an inmate’s death and uncover systemic inequities failed to meet the liability requirement that the court read into Section 1252-B because it did not “directly implicat[e]” “the legal process” typically involved in determining liability. *Hailer*, No. SA21-000108, at 4. But the court’s decision ignored that media requestors seeking autopsy records can and do have just as much of an impact on “the legal process” as a prospective plaintiff would, for example, in

considering whether to bring a wrongful death suit. Of course, the very nature of journalists' work means that their ultimate impact on a liability determination typically cannot be measured in advance of their reporting being published and may take months or years to come to fruition.²¹ In one prominent recent example of reporting unearthing new evidence in a years-long investigation of a couple's murders, the *Toronto Star* just last month published an editorial concluding, based on autopsy and crime scene photos and accompanying notes, that the police and pathologist's initial theory of the case as an open-and-shut murder-suicide was "completely implausible."²² That "basic error[,]" according to the *Star*'s investigative reporter, had a "domino effect" on the investigation in its first crucial weeks, with "wrong leads" being followed and the lead investigator failing to personally visit the crime scene for several days."²³

Examples abound of journalists' investigation into the causes of a suspicious death ultimately leading to new liability determinations where inmates were exonerated for crimes they did not commit. The late *Patriot-News* reporter Pete

²¹ See, e.g., *Autopsy Photos Are Often Used to Refute Official Conclusions*, News Media & The Law (Spring 2001), <https://www.rcfp.org/journals/the-news-media-and-the-law-spring-2001/autopsy-photos-are-often-us/> (describing examples in which autopsy reports exposed inaccuracies in official accounts of deaths).

²² Star Editorial Board, *New evidence obtained by the Star shows investigation of the Sherman murders was bungled from the start*, TORONTO STAR (Jun. 16, 2022), <https://www.thestar.com/opinion/editorials/2022/06/16/new-evidence-obtained-by-the-star-shows-the-investigation-of-the-sherman-murders-was-bungled-from-the-start.html>.

²³ *Id.*

Shellem used Pennsylvania “coroner reports and records” as “the basis of his reporting” that led to the exoneration of Patty Carbone, Steven Crawford, Barry Laughman and David Gladden.²⁴ The “problems” Shellem uncovered with confessions, forensic testing and witness accounts were later examined by a commission studying wrongful convictions in Pennsylvania to help prevent innocent people from being jailed.²⁵ Boston local news station WBUR and Boston University’s New England Center for Investigative Reporting likewise relied on “public records” and other “extensive research” that contributed to Darrell Jones’ first trial for murder being vacated and his ultimate exoneration in 2019.²⁶

In cases like the one Media Appellants are investigating here, no family members have been identified who would seek access to the requested records themselves. *Hailer*, No. SA21-000108, at 2. Without journalists seeking access to autopsy records in cases like these, some jail deaths may never be investigated or become public knowledge at all. That lack of transparency leaves the public unable

²⁴ PennLive Editorial Board, *Access Denied? Carbone, Crawford, Laughman, Gladden -- Their Names Reveal Why Coroner's Info is a Must*, THE PATRIOT-NEWS (Nov. 26, 2010), https://www.pennlive.com/editorials/2010/11/access_denied_carbone_crawford.html.

²⁵ Sara Ganim, *Panel suggests DNA testing, recorded interrogations to reduce wrongful convictions in Pennsylvania*, PENNLIVE (Sept. 21, 2011), https://www.pennlive.com/midstate/2011/09/panel_suggests_dna_testing_rec.html.

²⁶ *WBUR Investigative Reporting Leads to Exoneration in Murder Trial*, WBUR (Jul. 8, 2019), <https://www.wbur.org/inside/2019/07/08/wbur-investigative-reporting-leads-to-exoneration-in-murder-trial-2>.

to advocate for remedial actions when necessary to prevent similar deaths in the future.

This issue is exacerbated in Pennsylvania by the recent underreporting of the very fact that jail deaths even occurred. Despite the fact that the federal government requires jails to report all deaths that occur while a person is in custody, less than half of all jail deaths in Pennsylvania were reported as required in 2020, according to a *PennLive* investigation.²⁷ This lack of accountability comes at a time when recent Bureau of Justice statistics on deaths in state and federal prisons demonstrate that an increasing share of the deaths reported to the federal government “are from discrete unnatural causes, like suicide, homicide, and drug and alcohol intoxication.”²⁸ Even prior to the COVID-19 pandemic wreaking havoc on prisons throughout the country, “deaths in jail had reached record high numbers,” according

²⁷ Joshua Vaughn, *Most deaths in Pa. jails went unreported despite rules: 'It is appalling'*, PENNLIVE (Feb. 9, 2022), <https://www.pennlive.com/news/2022/02/most-deaths-in-pa-jails-went-unreported-despite-rules-it-is-appalling.html>; see also Brittany Hailer, *Lack of transparency, oversight has officials, families questioning Allegheny County jail deaths*, PENNSYLVANIA CAPITAL STAR (Mar. 16, 2022), <https://www.penncapital-star.com/criminal-justice/lack-of-transparency-oversight-has-officials-families-questioning-allegheny-county-jail-deaths/#:~:text=Less%20than%20half%20of%20all,that%20they%20properly%20reported%20them> (citing *PennLive* investigation).

²⁸ Leah Wang & Wendy Sawyer, *New data: State prisons are increasingly deadly places*, PRISON POLICY INITIATIVE (Jun. 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/.

to the Prison Policy Initiative, “because they continue to be unregulated, under-resourced places where disadvantaged people are sent to languish.”²⁹

Investigative reporters seeking access to autopsy records oftentimes have just as much or more of an impact on the ultimate determination of liability for a suspicious death than a family member similarly seeking answers. Reporters have been credited with exonerating innocent people, uncovering new evidence in cold cases, and, without their tenacity, some suspicious deaths would perhaps go unreported and unexamined by authorities altogether. Media Appellants’ request thus plainly satisfies the lower court’s interpretation, if upheld, that a requester’s motive must “directly implicat[e]” “the legal process” to qualify for access to autopsy records under Section 1252-B. *Hailer*, No. SA21-000108, at 4. The lower court’s decision should thus be reversed and Media Appellants promptly provided with access to the requested records.

CONCLUSION

For all the foregoing reasons, *amici curiae* respectfully request this to Court grant the relief requested by Media Appellants to reverse the decision of the lower court and require the Medical Examiner to release the requested records.

Date: July 27, 2022

²⁹ Leah Wang, *Rise in jail deaths is especially troubling as jail populations become more rural and more female*, PRISON POLICY INITIATIVE (Jun. 23, 2021), https://www.prisonpolicy.org/blog/2021/06/23/jail_mortality/.

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I hereby certify that the above brief complies with the word count limits of Pa. R.A.P. 531(b)(1)(i) and 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, the body of this document contains under 7,000 words.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with 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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