

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FLORENCE WALLACE ET AL.

Plaintiffs,

v.

ROBERT J. POWELL ET AL.,

Defendants.

CONSOLIDATED TO:

Civil Action No. 3:09-cv-0286

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

WILLIAM CONWAY ET AL.,

Plaintiffs,

v.

MICHAEL T. CONAHAN ET AL.,

Defendants.

Civil Action No. 3:09-cv-0291

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

H.T. ET AL.,

Plaintiffs,

v.

MARK A. CIAVARELLA, JR. ET AL.,

Defendants.

Civil Action No. 3:09-cv-0357

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SAMANTHA HUMANIK,

Plaintiffs,

v.

MARK A. CIAVARELLA, JR. ET AL.,

Defendants.

Civil Action No. 3:09-cv-0630

(JUDGE CAPUTO)

**PLAINTIFFS’ MOTION FOR PRESERVATION ORDER OR, IN THE
ALTERNATIVE, PLAINTIFFS’ MOTION FOR RECONSIDERATION**

Plaintiffs in the above matter jointly move the Court to issue an Order requiring the Luzerne County Juvenile Probation Office, the Court of Common Pleas of Luzerne County Clerk of Courts – Juvenile Division, the Court of Common Pleas of Luzerne County Clerk of Courts – Domestic Relations Section, and the Luzerne County Court Reporter’s Office to preserve records critically important for the adjudication of Plaintiffs’ claims in this Court and to have that copy kept under seal by this Court.¹ In the alternative, Plaintiffs in the above

¹ Plaintiffs concurred in Defendants’ previous motion for a preservation order and were noted in that motion as concurring, but they did not formally join in the filing as “co-movants” with the Defendants. The instant motion therefore is pled in the alternative as an independent motion by Plaintiffs and as a motion for reconsideration in order to avoid any technical ambiguity as to their standing.

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matters jointly move the Court to reconsider its July 2, 2009 Memorandum Order denying Defendants' Motion for Preservation Order Directed to Third Parties.

Without such an Order, Plaintiffs will be severely and unjustifiably prejudiced in their effort to secure relief in this Court that is unavailable to them elsewhere.

In support of this Motion, Plaintiffs state the following and rely on the accompanying Brief and the exhibits attached thereto:

1. In 2007, the Juvenile Law Center, co-counsel for Plaintiffs, determined that children in Luzerne County were routinely and systematically being adjudicated delinquent and sent to detention or residential placement by former juvenile court judge Mark A. Ciavarella without regard to their constitutionally guaranteed right to counsel and other due process rights. On April 28, 2008, with no relief available in the lower courts,² the Juvenile Law Center filed a King's Bench petition, requesting the Pennsylvania Supreme Court to

(continued...)

Moreover, the scope of the records Plaintiffs seek to preserve in this motion is more limited than the scope addressed by the earlier motion.

² No appeal could be filed in the Superior Court of Pennsylvania because thirty days had elapsed since the juvenile court's disposition (sentencing) orders of the juveniles in question and the Superior Court lacks jurisdiction to hear an appeal where an appellant has not filed a timely notice of appeal. The juveniles could not raise their claims through a Post-Conviction Relief Action (PCRA) because PCRA does not apply to juveniles. *In the Matter of J.P.*, 573 A.2d 1057, 1062 (Pa. Super. Ct. 1990).

invoke its original jurisdiction pursuant to the Judicial Code, 42 Pa. C.S. §§ 502 and 721, on behalf of three named juveniles and all similarly situated juveniles, in order to vacate and expunge the records of youth whose constitutional rights were violated by Mr. Ciavarella. On January 8, 2009, the Supreme Court denied the Juvenile Law Center's petition, *per curiam*, in a one sentence Order without explanation.

2. On January 26, 2009, the United States Attorney for the Middle District of Pennsylvania filed a bill of information alleging two counts of fraud against Mr. Ciavarella and Michael T. Conahan based on the illegal kickback scheme involving juvenile detention facilities that now forms the basis of many of Plaintiffs' claims in this litigation.

3. On January 29, 2009, before these actions were filed but after criminal charges were filed against Mr. Ciavarella and Mr. Conahan, Juvenile Law Center, on behalf of its clients ("Petitioners"), petitioned the Pennsylvania Supreme Court for reconsideration of its earlier denied request that the Court exercise its King's Bench Authority to review the adjudications of youth who appeared before Mr. Ciavarella between 2003 and 2008. Petitioners again requested that the youth's adjudications be vacated and that their records be expunged.

4. On February 11, 2009, the Pennsylvania Supreme Court granted Petitioners' Motion for Reconsideration and appointed Senior Berks County Judge Arthur E. Grim as a Special Master to review the cases of youth who appeared before Mr. Ciavarella between January 2003 and May 2008 and to recommend remedial actions to the Pennsylvania Supreme Court.

5. In February and in April 2009, Plaintiffs filed actions in this Court, including two class actions, asserting federal and state causes of action arising out of events underlying the criminal charges against Mr. Ciavarella and Mr. Conahan.

6. On March 26, 2009, the Pennsylvania Supreme Court adopted and approved Judge Grim's First Interim Report and Recommendations. Specifically, the Pennsylvania Supreme Court adopted Judge Grim's recommendation that the adjudications or consent decrees of youth who met certain criteria be vacated and that their records be expunged.

7. On May 4, 2009, the Pennsylvania Supreme Court issued a Notice purporting to give individuals eligible to have their records expunged under the March 26, 2009 Order the opportunity to obtain copies of their records from the Luzerne County Juvenile Court Clerk's Office and the Luzerne County Juvenile Probation Office. However, the procedures outlined in the May 4 Notice provided youth with inadequate notice of their ability to request their records prior to

expungement. Notice was provided *by publication only* of a legal order replete with statutory citations which youth and their parents were expected to understand and then act accordingly. Even if youth saw the published notice, they were likely unable to determine whether they were eligible for expungement pursuant to the statutory provisions cited and therefore entitled to request a copy of their records before expungement.

8. Eligible individuals were required to request copies of their records by June 1, 2009.

9. Pursuant to the May 4 Notice, Judge Grim was authorized as of June 1, 2009 to enter orders of vacatur of consent decrees and adjudications and expungement of all records in eligible cases, with the apparent and important exception of those cases in which the individuals requested copies of their records.

10. On May 8, 2009, Petitioners moved for clarification and modification of the Pennsylvania Supreme Court's May 4 Notice regarding the potential expungement process. Petitioners sought, *inter alia*, a modification of the May 4 Notice to ensure that one copy of their records, which are needed by Petitioners to prosecute their claims in this Court, be physically preserved and maintained under seal until the conclusion of the federal litigation. In the alternative, Petitioners sought clarification that nothing in the May 4 Notice was intended to prevent any federal court from issuing an order that the Luzerne

County Court Clerk's Office and the Luzerne County Juvenile Probation Office must preserve records for the sole purpose of use in the federal litigation. On May 21, 2009, the Pennsylvania Supreme Court denied Petitioners' motion without explanation, thereby declining to modify or clarify the May 4 Notice.

11. On May 26, 2009, Special Master Grim issued an Order providing for notice and preservation of Petitioners' records, substantially similar to what Petitioners had requested in their May 8, 2009 motion for clarification and modification. This Order, however, was "withdrawn" one day later by the Pennsylvania Supreme Court, again without explanation, leaving the May 4 Notice intact.

12. On June 3, 2009, Defendants filed in the instant matters an unopposed motion for a Preservation Order. Defendants requested that a Preservation Order be served on the following individuals, entities, and their employees and agents directing them, while this litigation is pending, to refrain from physically destroying or failing to preserve (or directing others to destroy or fail to preserve) material relating to any juvenile who had appeared at any time in the Juvenile Court of the Court of Common Pleas of Luzerne County for an adjudication hearing, a disposition hearing, or for any other proceedings:

- the Administrative Office of Pennsylvania Courts;
- the Office of Special Master Arthur E. Grim;
- the Clerk of Courts and/or Prothonotary of the Court of Common Pleas of Luzerne County;

- the Clerk of Courts and/or Prothonotary of Juvenile Court of the Court of Common Pleas of Luzerne County;
- the Court of Common Pleas of Luzerne County Probation Office (both Juvenile and Adult Divisions);
- the Clerk of Courts and/or Prothonotary of the Court of Common Pleas of Luzerne County Domestic Relations Division;
- the Luzerne County District Attorney's Office;
- the Luzerne County Public Defenders' Office
- the police departments of Luzerne County;
- the Pennsylvania State Police;
- the Pennsylvania Juvenile Detention Facilities and treatment facilities to which the Court of Common Pleas of Luzerne County committed any juvenile;
- all private detention facilities and treatment facilities to which the Court of Common Pleas of Luzerne County committed any juvenile; and
- The Luzerne County Court Reporter's Office.³

13. On June 25, 2009, the Administrative Office of Pennsylvania Courts ("AOPC"), at the direction of the Pennsylvania Supreme Court, sent a letter to this Court expressing the Pennsylvania Supreme Court's concerns that any order preserving one copy of each juvenile record for the sole purpose of federal civil litigation would be at odds with the state court's commitment to expunging these juvenile records. The AOPC did not send copies of the letter to any party in the federal civil litigation. This Court docketed the letter on June 29, 2009.

³ Plaintiffs' instant motion and attached draft order are narrower than the June 3, 2009 motion, applying only to records of juveniles who appeared before Mr. Ciavarella between January 2003 and May 2008 and only to records held by four entities.

14. On July 2, 2009, this Court denied the unopposed Motion for Preservation, citing federalism considerations, on the grounds that the requested Order would “effectively enjoin the action taken by the Pennsylvania Supreme Court.” Memorandum Order, 3:09-cv-0286, at 5 (M.D. Pa. July 2, 2009). In reaching this conclusion, this Court relied in part on the June 25 AOPC Letter. *Id.* at 5 n.3. Plaintiffs had no opportunity to respond to and rebut the AOPC Letter before the Court’s denial of the Motion for Preservation.

15. For reasons set forth in the Brief supporting this Motion, this Court’s denial of Defendants’ unopposed Motion for Preservation is contrary to established Pennsylvania law and would result in manifest injustice to Plaintiffs.⁴ The contention that expungement on the one hand and preservation of a single copy for restricted use in federal litigation on the other hand are mutually exclusive remedies is wholly unsupported by Pennsylvania law. For instance, the Pennsylvania Rules of Juvenile Court Procedure, *adopted by the Supreme Court of Pennsylvania itself*, recognize that expungement and destruction are not synonymous. *See* Pa. R.J.C.P. 170, 172 (which state “expunge *or* destroy

⁴ A party seeking reconsideration must demonstrate “at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Cafe by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

(emphasis added), indicating that a record that is expunged is *not* necessarily destroyed). Moreover, 18 Pa. Cons. Stat. § 9102 sets out three alternate definitions of the term “expunge,” making clear that the term has multiple meanings under Pennsylvania law and lending further support to plaintiffs’ position that preservation of a single copy of a record solely for purposes of specific litigation and under strict confidentiality provisions is within the accepted meaning of “expunge.”

16. In light of the circumstances described above, only this Court can prevent the manifest injustice that could occur if a single copy of these records is not preserved.

17. As more fully explained in the supporting Brief accompanying this Motion, the Court also erred in its application of the Anti-Injunction Act, 28 U.S.C. § 2283. In applying the Anti-Injunction Act to the facts before it and concluding that the “in aid of jurisdiction” exception to the Act was inapplicable, the Court did not completely address the standard for determining whether that exception applies. In this case, the requested relief is “necessary to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case,” and so is within the “in aid of jurisdiction” exception. *See In re Diet*

Drugs Prods. Liab. Litig., 282 F.3d 220, 234 (3d Cir. 2002) (citing *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970)).

18. Furthermore, the requested relief is necessary to address the possible imposition of an unjustifiable Hobson's choice on Plaintiffs: The federal litigation encompasses claims seeking damages under 42 U.S.C. § 1983, which, Defendants are likely to argue, may not be cognizable in federal court until the state court has expunged and/or vacated the juveniles' adjudications. *See Heck v. Humphrey*, 512 U.S. 477, 486 (1994). But the Pennsylvania Supreme Court, in denying requests for preservation of a single copy of juveniles' records for the sole purpose of federal litigation, has explained that it will not permit juveniles' adjudications to be vacated (or their records expunged) if they request a copy of their records to prevent their destruction. Thus, those youth who seek a copy of their records in order to obtain relief in the federal courts may be denied relief in the state court proceedings; those who do not request a copy of their records in order to have their records cleared in the state proceedings may lack the evidence that may be claimed to be necessary to effectively pursue their federal claims or even to be identifiable as a class member. In either case, without the requested relief, there may be potentially insurmountable obstacles to Plaintiffs' ability to fully vindicate their rights, obstacles which so interfere with this Court's consideration of the case as to seriously impair this Court's authority to decide it.

19. The records that would be subject to Plaintiffs' proposed Preservation Order (the "Covered Records") are in the possession and control of the Luzerne County Juvenile Probation Office, the Court of Common Pleas of Luzerne County Clerk of Courts – Juvenile Division, the Court of Common Pleas of Luzerne County Clerk of Courts – Domestic Relations Section, and the Luzerne County Court Reporter's Office.

20. Plaintiffs seek to prevent the physical destruction of the Covered Records because they are critically important to the prosecution of their claims in federal court and to their ability to obtain relief unavailable to them before Judge Grim. (Plaintiffs in the federal court are, *inter alia*, seeking damages under, *inter alia*, 42 U.S. § 1983 and 18 U.S.C. §§ 1961-1968 to compensate them for the damages they have suffered as a result of Defendants' violations of their constitutional and statutory rights. The authority of Special Master Grim in state court does not extend to the awarding of damages.)

21. Specifically, Plaintiffs seek an order directing the entities identified in Paragraph 19, *supra*, to send to this Court one copy of all records pertaining to any youth who was adjudicated delinquent and/or placed on a consent decree by Mr. Ciavarella in the period from January 2003 through May 2008, with such copies to be kept under seal solely for the purpose of the federal litigation.

22. In support of this Motion, Plaintiffs further rely on the

accompanying Brief and the exhibits attached thereto.

23. A proposed Order for the Court's consideration is attached.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FLORENCE WALLACE ET AL.,

Plaintiffs,

v.

ROBERT J. POWELL ET AL.,

Defendants.

CONSOLIDATED TO:

Civil Action No. 3:09-cv-0286

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

WILLIAM CONWAY ET AL.,

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v.

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Defendants.

Civil Action No. 3:09-cv-0291

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

H.T. ET AL.,

Plaintiffs,

v.

MARK A. CIAVARELLA, JR. ET AL.,

Defendants.

Civil Action No. 3:09-cv-0357

(JUDGE CAPUTO)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SAMANTHA HUMANIK,

Plaintiffs,

v.

MARK A. CIAVARELLA, JR. ET AL.,

Defendants.

Civil Action No. 3:09-cv-0630

(JUDGE CAPUTO)

**PLAINTIFFS' BRIEF IN SUPPORT OF THE MOTION
FOR PRESERVATION OR, IN THE ALTERNATIVE,
PLAINTIFFS' MOTION FOR RECONSIDERATION**

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Plaintiffs move the Court to issue an Order requiring the Luzerne County Juvenile Probation Office, the Court of Common Pleas of Luzerne County Clerk of Courts – Juvenile Division, the Court of Common Pleas of Luzerne County Clerk of Courts – Domestic Relations Section, and the Luzerne County Court Reporter’s Office to preserve one copy of all records that may be necessary for the adjudication of Plaintiffs’ claims and to have that copy kept under seal by this Court.¹ In the alternative, Plaintiffs move the Court to reconsider its July 2, 2009 Memorandum Order denying Defendants’ Unopposed Motion for Preservation. Plaintiffs seek only to prevent the destruction of a single copy of the expunged records of all youth who were adjudicated and/or sent to placement by Mr. Ciavarella between 2003 and 2008.

I. INTRODUCTION

On July 2, 2009, this Court denied Defendants’ unopposed motion for preservation of Plaintiffs’ juvenile records. The Court explicitly relied on the June 25, 2009 letter from the Administrative Office of Pennsylvania Courts

¹ Plaintiffs concurred in Defendants’ previous motion for a preservation order and were noted in that motion as concurring, but Plaintiffs did not formally join in the filing as “co-movants” with the Defendants. The instant motion therefore is pled in the alternative as a motion for reconsideration and as an independent motion by Plaintiffs in order to avoid any technical ambiguity as to their standing. Moreover, the scope of the records Plaintiffs seek to preserve in this motion is more limited than the scope addressed by the earlier motion.

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(“AOPC”), sent at the direction of the Pennsylvania Supreme Court. *See* AOPC Letter, attached as Exhibit A. Counsel for the parties were not copied on this letter and could not review it until June 29, 2009 when this Court posted it on the electronic docket. This Court issued its Order two days later, allowing the parties no opportunity to respond to the AOPC letter.²

In the AOPC letter, the Supreme Court stated that a preservation order from this Court would interfere with the Supreme Court’s desire “to ensure that tainted convictions of affected juveniles in Luzerne County be undone as expeditiously as possible to remedy the immediate harm to the juveniles and to restore confidence in the integrity of the county’s juvenile justice system.” AOPC Letter at 2.

Accepting the Supreme Court’s view that any preservation order would be inconsistent with the expungement remedy, this Court wrote that the “Pennsylvania priority in correcting and restoring the state juvenile judicial system and the consequent confidence of the public in that system outweighs any benefit to

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² Plaintiffs seek reconsideration of the Court’s July 2, 2009 Order denying Defendants’ Motion for Preservation in order to correct a clear error of law and to prevent manifest injustice to the Plaintiffs. Additionally, Plaintiffs had no opportunity to respond to the AOPC letter, and therefore move the court for the requested relief on that basis, as well.

particular civil litigants that would be gained by this Court’s . . . order”

Memorandum Order, 3:09-cv-286, at 5, 6 (M.D. Pa. July 2, 2009).

The balance struck by this Court is false and ignores the profound consequences that the proposed *destruction* of all records, insisted upon by the Supreme Court, would have upon Plaintiffs’ fundamental right of access to this Court. The preservation remedy sought by Plaintiffs is fully consistent with the remedy of expungement. Moreover, the denial of preservation serves no legitimate purpose and would only contribute to undermining the public confidence in both the state and federal judicial systems. Indeed, it also trivializes the historic role that the Civil Rights Acts have played in redressing and deterring violations of individuals’ federal constitutional and legal rights.³

This Court’s adoption of an interpretation of “expungement” that is flatly at odds with Pennsylvania statutes and rules, Pennsylvania practice, and common sense limits the scope of Plaintiffs’ potential remedies. Expungement’s well-settled purpose – protecting juveniles from any prejudicial consequences that would bar their productive engagement in society arising out of their juvenile adjudications and erasing their records from the *public* view – is not undermined by the retention of a single copy of their records, under seal in this Court, for the

³ See *Parratt v. Taylor*, 451 U.S. 527, 554 n. 13 (1981) (Powell, J. concurring) (noting Section 1983’s “historical function of protecting individual rights from
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limited purpose of vindicating their civil rights and pursuing a remedy wholly separate from expungement in this forum.

This case likely involves the most significant child-related judicial corruption scandal in the nation's history. Working to restore the integrity of Pennsylvania's judicial system is of critical importance. However, restoration of the judicial system's integrity also mandates that Plaintiffs be able to vindicate their individual rights and pursue constitutional and legal remedies afforded by our Constitution and laws, including federal court legal remedies of compensatory and punitive damages.

By its actions to date, the Supreme Court has placed the Plaintiffs in the unjustifiable position of having to choose one forum over the other, declaring unequivocally that Plaintiffs may either (a) have their records preserved but then delay expungement until they have "exhaust[ed] the prospect of monetary damages," AOPC Letter at 2, or (b) have their records expunged but, in so doing, jeopardize their ability to secure federal remedies. This Hobson's choice serves neither the interests of Luzerne County children and families nor the interests of justice.

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unlawful state action").

For example, in the actions before this Court, Plaintiffs claim violations of their constitutional rights to counsel and to a constitutionally appropriate colloquy before entering a guilty plea. Notes of testimony from the juveniles' court cases before Mr. Ciavarella are important to these claims. Destruction of juveniles' records pursuant to an expungement order, without also preserving a copy for use in this litigation, risks denying juveniles a meaningful day in court – an extraordinary irony in light of the wholesale violations of their due process rights at the hands of Mr. Ciavarella. Additionally, the destruction of all juvenile records risks crippling Plaintiffs' ability to even identify absent class members, denying them their right to obtain either compensatory or punitive damages as a consequence of Defendants' conduct.

The Supreme Court's stance is characteristic of its apparent and persistent insensitivity to Plaintiffs' claims since Plaintiffs first sought relief from the Supreme Court over one year ago. The detailed history of the proceedings before the Supreme Court, set forth below, places the AOPC letter in full context.

II. BACKGROUND

In 2007, Juvenile Law Center ("JLC"), co-counsel for Plaintiffs, following its own investigation, determined that Luzerne County children were routinely and systematically being adjudicated delinquent and sent to detention or residential placement by former juvenile court judge Ciavarella without regard to their

constitutionally guaranteed right to counsel and other due process rights. On April 28, 2008, with no relief available in the lower courts, JLC petitioned the Pennsylvania Supreme Court to invoke its original jurisdiction pursuant to the Judicial Code, 42 Pa. Cons. Stat. §§ 502 and 721, on behalf of three named juveniles and all similarly situated juveniles (“Petitioners”), to vacate and expunge the records of youth whose constitutional rights were violated by Mr. Ciavarella. *See* Application, attached as Exhibit B. The Pennsylvania Attorney General and the Pennsylvania Department of Public Welfare joined in that petition. The Pennsylvania Supreme Court was silent for approximately eight months. On January 8, 2009, the Supreme Court denied the petition, *per curiam*, in a one sentence Order and without explanation. *See* Order, attached as Exhibit C.

On January 26, 2009, the United States Attorney for the Middle District of Pennsylvania filed a bill of information alleging two counts of fraud against now former Luzerne County Judges Ciavarella and Conahan based on the illegal kickback scheme involving juvenile detention facilities that now forms the basis of many of Plaintiffs’ claims in this litigation. The scandal received national and international media attention. Several news outlets, including the *Philadelphia Inquirer* and the *Legal Intelligencer*, directly called on the Supreme Court to take action. *See* articles attached as Exhibit D.

On January 29, 2009, Petitioners filed a Motion for Reconsideration of their denied petition in the Pennsylvania Supreme Court. *See* Motion, attached as Exhibit E. On February 11, 2009, the Supreme Court granted Petitioners' Motion for Reconsideration and appointed a Special Master, the Honorable Arthur E. Grim, to review all Luzerne County juvenile court adjudications and dispositions related to the criminal charges against the judges and to make recommendations concerning appropriate remedial actions. Order, No. 81 MM 2008 (Pa. Feb. 11, 2009), attached as Exhibit F.

Pursuant to that authority, Judge Grim, on March 12, 2009, issued his First Interim Report and Recommendations, defining a category of youth eligible to have their adjudications vacated and records expunged. These recommendations were adopted by the Pennsylvania Supreme Court on March 26, 2009. Order, No. 81 MM 2008, (Pa. Mar. 26, 2009) ["March 26 Supreme Court Order"], attached as Exhibit G.

Although vacating adjudications and expunging records is essential to repairing the damage inflicted by the corrupt and unlawful practices in the Luzerne County juvenile courts, many of the adjudicated juveniles and their families paid significant sums in placement costs, probation fees, and restitution and suffered other significant injuries as a result of Ciavarella's unconstitutional dispositions. Plaintiffs, therefore, commenced civil actions in this Court to, *inter alia*, seek

redress for the violations of their civil rights and monetary compensation for these expenses and other injuries. As noted above, Plaintiffs' claims in this Court include the assertion that many class members were denied their constitutional rights to counsel and to a constitutionally appropriate colloquy before entering a guilty plea; the documentary evidence supporting those claims can be found in the juvenile court records of the juveniles in question.

On May 4, 2009, the Supreme Court issued a Notice specifying the procedures for expunging the class of cases identified in their March 26 Order, including procedures for eligible juveniles to request a copy of their record before expungement. *In Re: Notice of Pending Expungement of Juvenile Records and Vacatur of Luzerne County Consent Decrees and Adjudications from 2003-2008*, No. 81 MM 2008, at ¶ 3 (Pa. May 4, 2009) ["May 4 Notice"], attached as Exhibit H. Unfortunately, the procedures outlined by the Supreme Court provided youth with inadequate notice of their ability to request their records prior to expungement.

The Order provided for notice *by publication only* of a legal order replete with statutory citations which youth and their parents were somehow expected to understand and act on.⁴ A copy of the Notice as it appeared in *Citizens' Voice* is

⁴For example, determining whether a specific offense is classified as a second degree misdemeanor (and therefore not eligible for vacatur and expungement

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attached as Exhibit I. Difficult even for practiced counsel to understand, the form and content of the notice rendered it unlikely that youth or their parents would see it, understand they were eligible for expungement, and request copies of their records – especially if the youth had moved out of the county or did not read the local papers. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (“It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts.”).

Just as problematically, the May 4 Notice implicitly stated that youth eligible for expungement who requested a copy of their records prior to expungement would not have their adjudications vacated or records expunged. The Notice stated:

Thereafter, the Special Master shall enter orders of vacatur of consent decrees and adjudications and expungement of all records in those juvenile cases that satisfy the aforementioned criteria, *with the exception of cases where a juvenile, parent, guardian, or legal representative timely requests copies of the relevant juvenile records* by Monday, June 1, 2009.

May 4 Notice, at ¶ 3. The Notice provided no mechanism for youth to both

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pursuant to the March 26, 2009 order) or a third degree misdemeanor (and therefore eligible for vacatur and expungement) requires an examination of Pennsylvania’s statutory definitions of criminal offenses. Most youth and their parents will not have the knowledge of, or access to, these statutes to make this

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preserve their records for the federal litigation and have their records vacated and expunged before the Supreme Court.

Because *destruction* of all juvenile court records pursuant to an expungement order would destroy evidence potentially crucial to Plaintiffs' claims, on May 8, 2009, Petitioners filed a Motion to Clarify and Modify the Supreme Court's May 4 Notice [hereinafter "May 8 Motion"], attached as Exhibit J. Among other things, it requested that the Supreme Court order the Clerk of Court of Luzerne County and/or the Luzerne County Juvenile Probation Office to make a single copy of each juvenile's record and hold it under seal to be released only by order of the federal court for the sole purpose of the federal litigation and with strict confidentiality mandates. Petitioners proposed that, at the conclusion of the federal litigation, these copies be destroyed.⁵

On May 21, 2009, the Pennsylvania Supreme Court denied the May 8 Motion, per curiam and *again* without explanation. *See* Order, attached as Exhibit K. However, on May 26, 2009, Special Master Grim himself issued an Order providing for precisely the individualized notice and preservation of records that

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notice provision meaningful.

⁵The May 8 Motion also sought modification of the Supreme Court's proposed method of notifying youth of their right to obtain a copy of their record to the provision of individual notice to all eligible juveniles.

(continued...)

Petitioners had requested. *See* Order, attached as Exhibit C. Petitioners' vindication was short-lived; the order was "withdrawn" one day later by the Pennsylvania Supreme Court, again without any explanation. This bizarre series of events left the May 4 Notice intact, including the risk of total destruction of all records not specifically requested by individual juveniles.

As a result of the Supreme Court's refusal to order the preservation of expunged records for use in the federal litigation, Defendants on June 3, 2009 filed an unopposed motion for the narrowly restricted preservation of these records. On June 25, 2009, the AOPC sent its letter to this Court, expressing the Pennsylvania Supreme Court's concerns that any order preserving one copy of each juvenile record for the sole purpose of federal civil litigation would be contrary to the Court's commitment to expunging these records. At the same time, however, the AOPC noted that "[s]hould [this] Court grant the motion in question, our Supreme Court will honor any such order issued by the federal court in the spirit of comity." *See* Exhibit A, at 1.

The June 25 AOPC Letter was not copied to Plaintiffs and was not docketed until June 29. Because the unopposed motion was denied on July 2, 2009, Plaintiffs had no meaningful opportunity to respond to it.

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III. LEGAL ANALYSIS

A. Plaintiffs' Motion for Preservation and, in the Alternative, Motion for Reconsideration, Should Be Granted

1. The "In Aid of Jurisdiction" Exception to the Anti-Injunction Act Plainly Mandates the Granting of Plaintiffs' Requested Relief

This Court erred in failing to fully consider the application of the "in aid of jurisdiction" exception to the Anti-Injunction Act ("AIA"). In its July 2 Order, this Court held, "if the AIA applied, none of the exceptions would be present in this case." Order, at 3.⁶ It is respectfully submitted that this conclusion resulted from an incomplete analysis of the law; therefore, as discussed above, this Court's conclusions with respect to the applicability of the "in aid of jurisdiction" exception should be reconsidered and the broader test set out by the Third Circuit should be applied.⁷

In concluding that the "in aid of jurisdiction" exception was inapplicable, the Court did not completely address the Third Circuit's standard. According to

⁶ The AIA expressly provides that a federal court may enjoin a state proceeding where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Only the "in aid of its jurisdiction" exception is applicable here.

⁷ This section assumes that the requested relief is, in fact, injunctive. As this Court noted, however, "a document preservation order is not designed to accord or protect any substantive relief sought by the complaints." Order, at 4 n.2. Additionally, for the reasons set out in Defendants' Supplemental Memorandum in Support of Unopposed Motion for Preservation Order, at pages 6-11, incorporated herein, the requested relief
(continued...)

the Third Circuit, “[a]n injunction may issue . . . where the ‘state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation.’” *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 234 (3d Cir. 2002) (citing *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996)). A federal court may find an injunction necessary in aid of its jurisdiction, and so permissible under the AIA, when ““some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.”” *Id.* at 234 (citing *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 295 (1970)).

This is precisely such a case. The Supreme Court’s actions in forcing the destruction of records relevant to the federal litigation are prohibiting the federal litigation from proceeding as it would absent that interference.

The Third Circuit has identified three “factors [that] are relevant to determin[ing] whether sufficient interference is threatened to justify an injunction otherwise prohibited by the [AIA].” These are (1) “the nature of the federal action to determine what kinds of state court interference would sufficiently impair the federal proceedings”; (2) “the state court’s actions, in order to determine whether

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is not injunctive and is therefore outside the scope of the AIA.

they present a sufficient threat to the federal action”; and (3) “principles of federalism and comity.” *Id.* at 234. The district courts have applied this test to determine whether an injunction should issue. For example, in *Piper v. Portnoff Law Assocs.*, 262 F. Supp. 2d 520, 530 (E.D. Pa. 2003), the court applied the factors to hold that the district court could enjoin state home-foreclosure proceedings because, “[i]f the sheriff’s sale were to proceed, the state court proceeding would ‘present a sufficient threat to the federal action’ in that [the federal court plaintiff] would lose her home even though the fees and costs assessed against her property were unlawful.”

The instant case is even more compelling than *Piper*. Turning to the first and second factors: This litigation encompasses claims seeking damages under 42 U.S.C. § 1983 as a result of violations of Plaintiffs’ rights to an impartial tribunal and to constitutionally adequate guilty-plea and waiver-of-counsel colloquies. These claims may not be cognizable in federal court until the state court has vacated the juveniles’ adjudications. *See Heck v. Humphrey*, 512 U.S. 477, 486 (1994). However, the Pennsylvania Supreme Court has stated that it will not permit juveniles’ adjudications to be vacated if they request a copy of their records to prevent their destruction, including for purposes of the federal litigation. *See* May 4 Notice, at 4 (emphasis added). This statement has placed the juveniles in an unjustifiable Catch-22, as described above.

A preservation order would eliminate the Hobson's choice forced on Plaintiffs by the Pennsylvania Supreme Court – to choose between vacatur and expungement in state court or money damages in federal court, neither of which alone affords a complete remedy. Thus, because the Supreme Court's actions "so interfere with [the] federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide the case," *In re Diet Drugs*, 282 F.3d at 235 n.12 (citing *Atl. Coast*, 398 U.S. at 295), the circumstances here require issuance of the requested preservation order.

As for the third factor, considerations of federalism and comity should not be an issue here. The state and federal actions are parallel, but not overlapping. Plaintiffs seek only vacatur and expungement in the state court, and only money damages in the federal court. Indeed, even the AOPC letter explains that the Pennsylvania Supreme Court "will honor any such order issued by the federal court in the spirit of comity." Exhibit A at 1.

In sum, the Third Circuit's three-factor test leads to the conclusion that a preservation order is necessary to prevent the Pennsylvania Supreme Court from seriously impairing this Court's authority to hear and decide Plaintiffs' federal claims.

2. Relying on the AOPC’s Mischaracterization of the Relief Sought by the Parties, this Court Adopted a Definition of Expungement that is Clearly Contrary to State Law and Practice

The Supreme Court claimed in its letter, *inter alia*, that by filing their motion for preservation in this court, the parties were seeking “to prevent expungement of records of juveniles” This remarkable statement makes no factual or legal sense. First, it is JLC, Plaintiffs’ co-counsel here, which has aggressively pursued expungement of records in the Supreme Court. And, second, the suggestion that expungement on the one hand and preservation of a single copy for restricted use in federal litigation on the other hand are mutually exclusive remedies is wholly unsupported by Pennsylvania law.

At least three factors demonstrate that both the letter and spirit of Pennsylvania law clearly contemplate preserving copies of expunged records under certain limited circumstances and clearly circumscribed conditions. First, the Pennsylvania Rules of Juvenile Court Procedure, *adopted by the Supreme Court itself*, recognize that expungement and destruction are *not* synonymous. Rule 170, entitled “Expunging *or* Destroying Juvenile Court Records” (emphasis added) sets forth the procedures to expunge *or* destroy juvenile court records. Similarly, Rule 172 specifically provides that courts may issue orders to “expunge *or* destroy the

juvenile court file” (emphasis added), indicating that a record that is expunged is *not* necessarily destroyed.⁸

A court must give effect, if possible, to every word, clause and sentence of a statute. *See United States v. Menasche*, 348 U.S. 528 (1995). If expungement encompasses destruction, then the phrase “expunge or destroy” in Rules 170 and 172 of the Rules of Juvenile Court Procedure would be redundant, and the word “destroy” would be mere surplusage.

Second, 18 Pa. Cons. Stat. § 9122(c) provides that the prosecuting attorney *must*, and the court *may*, maintain information about certain individuals whose records have been expunged, “solely for the purposes of determining subsequent eligibility for [certain] programs, identifying persons in criminal investigations or determining the grading of subsequent offenses.” The statute provides access to this expunged information to courts or law enforcement agencies upon request. Thus, consistent with statutory mandate, *see* 18 Pa. Cons. Stat. § 9102(3), Commonwealth district attorneys throughout the Commonwealth are authorized to retain copies of “expunged” records of Accelerated Rehabilitation Disposition (“ARD”) defendants to ensure that they are not awarded ARD a second time.

⁸ Where courts seek to both expunge *and* destroy a juvenile record, they regularly issue orders specifying precisely that. For example, Westmoreland and Allegheny County expungement orders specify that records must be both expunged and destroyed. *See* Orders, attached as Exhibit M.

Similarly, retention of “expunged” records would be authorized in juvenile court in cases where juveniles have been given consent decrees.⁹

Finally, the distinction between expungement and destruction has been repeatedly recognized by the courts. *See United States v. Bush*, 438 F. Supp. 839, 840 (E.D. Pa. 1977) (“While petitioner talks of expunging a record, the distinction between expungement (official action which notes the conviction itself has been eliminated from a defendant’s record) and expunction (actual destruction of the records themselves) should be noted.”) (internal citations omitted). *See also Commonwealth v. Fleming*, 955 A.2d 450, 455 (Pa. Super. Ct. 2008) (distinguishing between expungement and destruction).

B. The Court Must Grant This Motion to Prevent Manifest Injustice¹⁰

The Court’s Order states that “the question of juvenile records preservation is best left to the Pennsylvania Courts.” Memorandum Order, 3:09-cv-286, at 6, n. 4 (M.D. Pa. July 2, 2009). As described above, Petitioners have sought preservation from the Pennsylvania Supreme Court; unfortunately, that Court’s

⁹ As a further example of Pennsylvania practice, the Juvenile Court Judges Commission routinely retains copies of records provided to it by juvenile courts for the purpose of data collection and reporting; when JCJC receives an order of expungement, it removes identifying information from the record but otherwise retains a copy of the expunged record itself.

¹⁰ A motion for reconsideration may be granted on the basis of “manifest injustice.” *Max’s Seafood Café by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (continued...)

repeated refusal to preserve records, without explanation, threatens to force Plaintiffs to choose between securing expungement in state courts and vindicating their constitutional rights in federal court. Only this Court can prevent the manifest injustice that could occur without preservation.

The constitutional right of access to the courts has been recognized in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses of the U.S. Constitution. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). The United States Supreme Court recognizes that a litigant may have a valid claim for denial of access to the courts if, due to official action, a case “cannot now be tried (or tried with all material evidence), no matter what official action may be in the future.” *Id.* at 413-14. Courts allow such claims where litigants can show that the defendants’ actions foreclosed the plaintiff from filing a suit in court “or rendered ineffective any state court remedy she previously may have had.” *Swikel v. City of River Rouge*, 119 F.3d 1259, 1263-64 (6th Cir. 1997).

Here, the Supreme Court’s actions threaten to jeopardize plaintiffs’ access to a federal forum to vindicate their federal rights. The failure to preserve a single

(continued...)
(3d Cir. 1999).

copy of the juveniles' records could extinguish Plaintiffs' ability to obtain relief, as well as create significant obstacles for Plaintiffs to even identify unnamed members of the proposed class.¹¹ The identity of unnamed class members is presently within the exclusive control of the Luzerne County Juvenile Probation Department and Clerk of Courts; if these unnamed class members' records are destroyed in the course of "expunging" records of adjudications, Plaintiffs will lose documentation essential to class identification and certification.¹²

In the final analysis, the Supreme Court has created an unjustifiable "Catch-22" for Plaintiffs. Those youth who seek a copy of their record in order to obtain relief in the federal courts are denied relief in the state court proceedings; juveniles who forego requesting a copy of their records in favor of expungement in the state proceedings may lack the evidence necessary to effectively pursue their federal claims or even to be identifiable as a class member. In either case, the Supreme

¹¹ The Pennsylvania Supreme Court appears to be unwilling to vacate and expunge the records of youth who request their records, as evidenced by its failure to clarify the ambiguous language in the May 4 Notice. This is further evidence of the Supreme Court's intent to obstruct the proceedings before this Court.

¹² As further evidence of the Supreme Court's creation of affirmative obstacles to Plaintiffs, counsel for Petitioners have been provided copies of the daily court lists for the years 2003-2008, which contains the names of all juveniles who appeared before Ciavarella. However, the Supreme Court has prohibited Counsel from using that information outside the Pennsylvania court proceedings and prohibited the use of these records in proceedings before this Court. *See* Exhibit G at 9-10.

Court has posed potentially insurmountable obstacles to Plaintiffs' full vindication of their rights so profoundly violated in the Luzerne County scandal.

A decision to forego expungement has profound consequences as delinquency adjudications carry collateral consequences that follow youth into adulthood and, in some cases, for the rest of their lives. Although the Juvenile Act provides that an order of disposition or adjudication in a proceeding under the Act is not a conviction of a crime, *see* 42 Pa. Cons. Stat. § 6354(a), juvenile court dispositions now carry with them significant consequences that can hinder a juvenile's ability to productively reintegrate into society.

There is a general misconception that juvenile court records remain confidential, or are completely destroyed, when a juvenile reaches the age of majority. The reality is that records pertaining to a juvenile's involvement with the juvenile justice system can have longstanding and significant consequences upon the future of that individual.

Pennsylvania Juvenile Court Judges' Commission, *Juvenile Delinquency Records: Handbook And Expungement Guide* (2008), at 1. A juvenile's education, employment, driving privileges, military eligibility, eligibility for public housing, and subsequent judicial matters may be dramatically impacted by an adjudication of delinquency. Expungement is the only way to entirely eliminate these profound barriers.

Similarly, a decision to forego compensatory damages in this litigation would have significant negative consequences for Plaintiffs. The thousands of youth who were unlawfully adjudicated delinquent have suffered both personal and financial losses at the hands of a corrupt judiciary. Plaintiffs were forced to pay hundreds or thousands of dollars to pay for placement costs, probation fees, evaluations, restitution, and other costs and fees associated with the unlawful adjudications.

A manifestly unjust Hobson's choice can be avoided by this Court's issuance of an order of preservation. Failing to preserve a copy of these records will lead to the tragic irony that the courts in Pennsylvania are, yet again, denying justice to the youth and families in Luzerne County.

IV. CONCLUSION

Accordingly, Plaintiffs ask this Court to grant their Motion and enter the Order attached thereto.

Respectfully submitted,

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