App. No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM E. HENRY,
PETITIONER,

v.

STEVEN T. MARSHALL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ALABAMA,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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February 15, 2023

QUESTION PRESENTED

Nearly 33 years ago, this Court decided *Butterworth v. Smith*, 494 U.S. 624 (1990), holding that grand jury secrecy laws restricting a grand jury witness from disclosing their own testimony after the conclusion of the grand jury are unconstitutional. The *Butterworth* majority's consideration of such secrecy laws did not, however, address the constitutionality of grand jury secrecy laws that prohibit a witness's disclosure of their own "experience" before the grand jury. *Id*. at 629 n.2.

The question presented is:

Whether Alabama's Grand Jury Secrecy Act restricts a grand jury witness's public disclosure of their own testimony – including information known to the witness before testifying *and* information learned as a result of appearing as a witness – after they have appeared as a witness violates the Free Speech Clause of the First Amendment to the United States Constitution.

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The Eleventh Circuit's opinion (App. 1a) is reported at 45 F.4th 1272 (11th Cir. 2022). The district court's decision (App. 46a) is unreported.

JURISDICTION

The Eleventh Circuit entered its judgment on August 18, 2022. (App. 1a). On October 18, 2022, the Eleventh Circuit denied a timely filed petition for rehearing and rehearing en banc. (App. 93a). On January 20, 2023, this Court extended the deadline to file a petition for certiorari to be due on or before February 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, applicable to the states through the due process clause of the Fourteenth Amendment, *see Stromberg v. California*, 283 U.S. 359, 368 (1931), provides that "Congress shall make no law . . . abridging the freedom of speech. . .."

Title 42, § 1983 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Section 216 of Alabama's Grand Jury Secrecy Act, Ala. Code § 12-16-216, provides:

> No past or present grand juror, past or present grand jury witness or grand jury reporter or stenographer shall willfully at any time, directly or indirectly, conditionally or unconditionally, by any means whatever, reveal, disclose or divulge or endeavor to reveal, disclose or divulge or cause to be revealed, disclosed or divulged, any knowledge of the form, nature or content of any physical evidence presented to any grand jury of this state or any knowledge of the form, nature or content of any question propounded to any person within or before any grand jury or any comment

> made by any person in response thereto or any other evidence, testimony or conversation occurring or taken therein.

INTRODUCTION

Shrouded in secrecy, grand juries operate in the proverbial shadows of the criminal justice system. Still, "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth*, 494 U.S. at 630 (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)).

Thirty-three years ago, this Court decided *Butterworth*, holding that a Florida grand jury secrecy law which forever barred a grand jury witness's public disclosure of information known to them prior to their testimony violates the First Amendment. *Butterworth* remains at the forefront of the law related to grand jury secrecy matters. *See, e.g.*, *Hoffman-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003); *Doe v. Bell*, 969 F.3d 883 (8th Cir. 2020); *In re Subpoena* 2018R00776, 947 F.3d 148 (3d Cir. 2020) (addressing grand jury secrecy and accompanying nondisclosure orders).

This case challenges the constitutionality of Alabama's Grand Jury Secrecy Act (Ala. Code § 12-16-214, *et seq*.) and its application to witnesses. Petitioner asks the Court to find that a provision of Alabama's grand jury secrecy act is written – like the statute in *Butterworth* – to prohibit a grand jury

witness's disclosure of their own knowledge at any time after he has testified.

This case also presents this Court with the opportunity to resolve a connected issue: whether grand jury secrecy laws unconstitutionally preclude witnesses from publicly discussing the *entirety* of their testimony, which would include information learned within the grand jury itself.[1]

Nearly twenty-three years after *Butterworth*, former Speaker of the Alabama House of Representatives Mike Hubbard found himself the target of a Lee County, Alabama special grand jury convened by the Alabama Attorney General's Office. At the time of the Hubbard investigation, Petitioner was a state representative who would eventually be called to testify before the Hubbard grand jury. Petitioner knew of allegations about leaks coming from the Hubbard grand jury, and Petitioner believed

[1] Because review of this issue was not sought by the parties, the *Butterworth* majority expressly avoided it. 464 U.S. at 629 n.2; *see id*. at 636 (Scalia, J., concurring) ("Quite a different question is presented, however, by a witness's disclosure of the grand jury proceedings, which is knowledge he acquires not 'on his own' but only by virtue of being made a witness.").

he had knowledge related to Hubbard's acts under investigation. (App. 7a-9a).[2]

After his testimony, Petitioner wanted to discuss what he believed was prosecutorial misconduct surrounding the Hubbard grand jury. However, Petitioner became concerned about his potential exposure of felony criminal liability based on the warnings he received from the Hubbard prosecutor, a deputy attorney general at the time, and the language of Alabama's statute. As a result, Petitioner sued Respondent under 42 U.S.C. § 1983, alleging provisions of Alabama's Grand Jury Secrecy Act violate his First Amendment right to Free Speech.

STATEMENT OF THE CASE

A. Factual Background

In 2014, Petitioner William E. Henry ("Henry") testified before the special grand jury, convened by the Alabama Attorney General's office, investigating Mike Hubbard. Henry believes he was subpoenaed as

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[2] It is worth noting that even this type of public disclosure, while acceptable in the Eleventh Circuit, could be viewed much differently a few states over. *Compare* App. 6a-9a *with In re Subpoena*, 2022 U.S. App. LEXIS 19877 (7th Cir. July 9, 2022) (stating that *Butterworth* "makes it impossible for us to do more than hint at the nature of the parties' dispute. More information would permit readers to identify the nature of the investigation and its subject").

a witness because he was informed that the prosecutor in charge of the grand jury was leaking information to political enemies of its target. Following his testimony, Henry heard the prosecutor describe the "very broad prohibition" on grand jury-related public discussions under Alabama's law. The same prosecutor also stated that the secrecy act puts the state on "utterly solid ground shutting people up." (App. 8a).

In the days following his grand jury appearance, Henry wished to publicly discuss his testimony, to include information that would, to Henry, support his belief that prosecutorial plagued the grand jury. But because of the verbal warnings Henry received from the prosecutor and the plain language of Ala. Code § 12-16-216, he did not believe he could discuss any information discussed while he was a grand jury witness.

B. Procedural Background

In September 2017,[3] Henry sued Steve Marshall in his official capacity as Alabama Attorney General ("Marshall") pursuant to 42 U.S.C. § 1983 in the Middle District of Alabama, asserting that Alabama's Grand Jury Secrecy Act unconstitutionally restricts a witness's right to free speech and relying

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[3] Henry filed the lawsuit over one year after a jury convicted Hubbard. *Hubbard v. State*, 321 So. 3d 8, 23 n.3 (Ala. Crim. App. 2018) ("The jury rendered its verdict on June 10, 2016."). Ultimately, six of Hubbard's 12 convictions remain. *Ex parte Hubbard*, 321 So. 3d 70, 76 (Ala. 2020).

in large part on *Butterworth v. Smith*. Henry raised overbreadth and as-applied challenges to Ala. Code § 12-16-216. Henry and Marshall filed cross motions for summary judgment, and Henry's testimony was broken down into two categories: (1) what he knew before testifying, summed up here as "independent knowledge" and (2) what he learned while in front of the grand jury, or "grand jury information."

The district court sided with Henry in holding section 216 was similar to the Florida law in that its plain text encompassed a witness's disclosure of their independent knowledge. However, the district court then held that, under a strict scrutiny analysis, section 216 was narrowly tailored to the state's compelling interest in maintaining grand jury secrecy as to grand jury information.

The parties filed cross appeals in the Eleventh Circuit, making similar arguments to those presented in district court. (App. 13a-14a). The three-judge panel declined to apply strict scrutiny to section 216, and instead balanced the state's interests in maintaining secrecy against Henry's First Amendment right to free speech. (*Id*. at 19a). The panel reversed the district court as to the overbreadth of section 216, ruling that it did not encompass independent knowledge. (*Id*. at 45a). The panel considered and rejected Henry's argument that section 216 – as it applies to witnesses wishing to speak publicly about prosecutorial misconduct (grand jury information) – warrants an exception to grand jury secrecy when weighed against the state's interests. (*Id*. 44a-45a).

The court of appeals denied Henry's petition for rehearing. (App. 93a-94a).

REASONS FOR GRANTING THE PETITION

The decision below improperly interprets Ala. Code § 12-16-216, and it further conflicts with the premise that speech addressing "governmental misconduct . . . [is] speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth*, 494 U.S. at 632.

There is no doubt that grand juries play a critical "role in the administration of criminal justice" by fostering prosecutions and investigations. *Id.* at 629. The secrecy of grand juries supports their ability to function properly, and recognized state interests in secrecy are well-documented by this Court. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). But grand juries likewise serve as a protector of citizens from government "overreach[]" and "unfounded accusations." *Butterworth*, 494 U.S. at 629.

Douglas Oil noted that grand jury secrecy (1) increases a witness's likelihood of coming forward with information knowing their testimony will remain secret; (2) promotes "full[] and frank[]" testimony by witnesses; (3) prevents the risk of flight or improper influence of the accused; and (4) protects the reputations of those subject to a grand jury inquiry who are ultimately not indicted. *Id.* at 219. The same prosecutorial interests in secrecy remain

today. *See, e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 374 (2012) (explaining interests served by grand jury secrecy); *Trump v. Vance*, 140 S.Ct. 2412, 2427 (2020) (writing that "longstanding rules of grand jury secrecy aim to prevent the . . . stigma" of being the subject of a grand jury proceeding). Alabama is no outlier here, and its interests in secrecy track those outlined in *Douglas Oil*. Ala. Code § 12-16-214.

What Alabama's statute encompasses as far as the information subject to secrecy is nearly identical to the provision struck down in *Butterworth*. (App. 67a-68a). Ala. Code § 12-16-216 provides:

> [N]o past or present grand jury witness . . . shall willfully at any time, directly or indirectly, conditionally or unconditionally, by any means whatever, reveal, disclose, or divulge or endeavor to reveal, disclose or divulge or cause to be revealed, disclosed or divulged, . . . any knowledge of the form, nature or content of any question propounded to any person within or before the grand jury or any comment made by any person in response thereto or any other evidence, testimony or conversation occurring or taken therein.

The only relevant difference between the Alabama statute and the *Butterworth* statute is found in the phrases "nature or content" instead of "content,

gist, or import" of a witness's testimony. *Id.*; *Butterworth*, 494 U.S. at 626.

Below, the Eleventh Circuit got the scope of the statute wrong. Moreover, without binding precedent from this Court, lower courts are left making calls about the constitutionality of grand jury prohibitions on speech without a hard and fast rule of the applicable test or whether the party seeking public disclosure affects the outcome. *See, e.g.*, *Doe*, 969 F.3d at 888-89 (utilizing a strict scrutiny analysis for a grand juror's claim that Missouri's secrecy laws are unconstitutional); *In re Subpoena* 2018R00776, 947 F.3d at 155 (addressing whether a nondisclosure order that accompanies a grand jury subpoena passes strict scrutiny); (App. 18a) (utilizing the *Butterworth* balancing test as to Henry, a witness).

I. The decision below conflicts with this Court's precedent as to a witness's "independent knowledge."

A ban on a grand jury witness's disclosure of "the 'content, gist, or import' of his testimony . . . into the indefinite future" violates the First Amendment. *Butterworth*, 494 U.S. at 635-36. And in finding that Alabama's secrecy provision cannot be read to prohibit the disclosure of a witness's independent knowledge, the Eleventh Circuit decided that section 216 "is different enough to make a difference" from the *Butterworth* statute. (App. 43a).

Because Henry's challenge was based on the overbreadth of the statute, the court of appeals rightfully started by construing the statute. *United*

States v. Williams, 553 U.S. 285, 293 (2008). From there, "[i]t is axiomatic that '[the] starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (Powell, J., concurring)). "It is foundational 'that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.'" *Iancu v. Brunetti*, 139 S.Ct. 2294, 2309 (2019) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)).

The decision below points out two perceived differences between Alabama's law and the law struck down in *Butterworth*. (App. 42a). First, the panel emphasizes section 216's "occurring or taken therein" language, writing that the *Butterworth* statute lacked such limiting language. (*Id.*). However, that is not a fair reading of Florida's law. The *Butterworth* statute made specific reference to prohibition on disclosure of "the testimony of a witness examined before the grand jury." 494 U.S. at 627.

Next, the opinion asserts a difference between the "form, nature or content" of "any comment . . . testimony or conversation" occurring in the grand jury and "the content, gist, or import" of a witness's grand jury testimony. (App. 42a-43a). An examination of the plain meaning of these terms reveals no practical difference. *See Garland v. Gonzalez*, 142 S.Ct. 2057, 2063-64 (2022) (looking to dictionary definitions when analyzing the text of a statute). First, both statutes limit disclosure of the

"content" of testimony. "Form" indicates "one of several or many different ways in which something is seen, experienced, or produced." *Form*, THE BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/form (last visited Feb. 13, 2023). "Nature" is defined as "the essence of something." *Nature,* BLACK'S LAW DICTIONARY (11th ed. 2019). "Gist" means "[t]he main point." *Gist*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Import" is simply the "meaning" of something. *Import*, BLACK'S LAW DICTIONARY (11th ed. 2019). These words all contemplate restrictions on the general meaning or essence of something – here, grand jury witness testimony. To this point, the outcomes should be the same as to each statute's constitutionality.

Additionally, the court of appeals determined that section 216's "direct[]" or "indirect[]" prohibition on disclosure of "the form, nature or content" only described the manner in which disclosure was prohibited, not the information itself. (App. 40a) (stating that "this language *can't* be read to prohibit the disclosure of information a grand jury witness learned outside the grand jury room") (emphasis added). However, this cannot be squared with a plain reading of section 216 as a whole because, when looking at the entirety of section 216, it is apparent that the statute is intended to prevent public discussion of what information is *conveyed to the grand jury*. It makes no point to qualify that, to fall under the secrecy umbrella, the witness must also convey that the information was shared with the grand jury.

Even still, a facially challenged law may survive if given a limiting construction, but that remedy is appropriate only where "it is 'readily susceptible' to such a construction." *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (citing *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). A law of "open-ended character . . . provides no guidance whatever for limiting its coverage" and is thus not suitable for a limiting construction. *Reno*, 521 U.S. at 884. Additionally, federal courts should "decline to apply a limiting construction to save the valid portions of [a] provision, because '. . . a federal court . . . must be particularly reluctant to rewrite the terms of a state statute.'" *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1180 n.4 (11th Cir. 2001) (quoting *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993)).

Below, the court of appeals rejected the "strong medicine" of applying the overbreadth doctrine and adopted Marshall's interpretation. (App. 43a-44a); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In doing so, it fell short of its requirement to read the statute as a whole. The limitation on the direct or indirect disclosure of the "form, nature or content" of witness testimony – while also considering the statute's inclusion of the phrase "occurring or taken therein" – plainly includes independent knowledge. Ala. Code § 12-16-216. The language is too broad to be construed any other way, and the Eleventh Circuit's interpretation works only by rewriting its terms. *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964).

II. The Court should decide whether grand jury secrecy interests outweigh speech that lies at the heart of the First Amendment.

"Constitutional rights . . . are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue." *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2445 (2022) (Sotomayor, J., dissenting). At the same time, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Courts have thus looked to balance a person's "First Amendment rights against [a state]'s interests in preserving the confidentiality of its grand jury proceedings" while acknowledging speech "relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of

the First Amendment." *Butterworth*, 494 U.S. at 630, 632.[4]

Whether a secrecy law can prohibit disclosure of independent knowledge has been settled. *Butterworth*, though, left open the question of whether it is constitutional to permanently ban a witness's disclosure of grand jury information related to their own testimony. *Id*.

As a general matter, it is agreed that, in order to function properly, grand juries must maintain a degree of secrecy. *See, e.g.*, *Douglas Oil*, 441 U.S. at 218. From there, how much secrecy is required to protect the functionality of grand juries varies between the states and the federal government. For example, Ala. Code § 12-16-225 treats a witness's violation of the grand jury secrecy act as a felony offense. On the other hand, the Federal Rules of

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[4] As noted above, though, courts are not uniformly applying a straight balancing test. *See, e.g.*, *Doe*, 969 F.3d at 888-89 (utilizing a strict scrutiny analysis for a grand juror's claim that Missouri's secrecy laws are unconstitutional); *In re Subpoena* 2018R00776, 947 F.3d at 155 (addressing whether a nondisclosure order that accompanies a grand jury subpoena passes strict scrutiny); *cf. Nat'l Sec. Letters v. Sessions*, 33 F.4th 1058, 1078 (9th Cir. 2022) (noting that in cases where "government confidentiality restrictions" were imposed, the Court sometimes applied strict scrutiny and other times "applied a test closer to intermediate scrutiny").

Criminal Procedure omit witnesses entirely from secrecy obligations. Fed. R. Crim. P. 6(e).

Below, the court of appeals assigned too much weight to the state's interests (App. 25a) when remembering that "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections." *Butterworth*, 494 U.S. at 630 (quoting *Dionisio*, 410 U.S. at 11). It specified that "three critical differences . . . tip the balance in favor of Alabama" compared to *Butterworth*.

First, it found all of Alabama's interests present in Henry's case. (*Id.* 25a-26a). Wrongly, it stated that witness cooperation would be threatened "if he *knows* that his testimony *will be* disclosed after the investigation has ended." (App. 25a) (emphasis added). But in this case, the witness remains in control of whether or not to disclose their testimony. *See Texas v. U.S. Steel Corp.*, 546 F.2d 626, 629 (5th Cir. 1977) ("When the witness obtains his own transcript," concerns of fear and retaliation "remain[] unaffected."). Next, Alabama's interest in obtaining truthful testimony would be unaffected here, because its ability to prosecute offenses including perjury and witness tampering, etc. would be unaffected. Third, concern about flight of the target or destruction of evidence is of no matter because the investigation of Hubbard has long concluded. *Butterworth*, 494 U.S. at 632 ("When an investigation ends, there is no longer a need to keep information from the targeted individual to prevent his escape."). Finally, Alabama's interest in protecting the reputations of accused then exonerated individuals, by itself, is not enough to

justify a restriction of truthful speech. *Id.* at 634 (explicitly stating that this reason, standing alone, cannot restrict truthful speech).

The second and third differences pointed out by the appeals court focus on concerns that Henry would disclose information "create[ed]" by the State and information he learned through his compelled participation in the judicial process, even if that information is still limited to his own testimony. (App. 27a-28a); *Butterworth*, 494 U.S. at 636 (Scalia, J., concurring) ("There may be quite good reasons why the State would want . . . . information – which is in a way of the State's own creation – to remain confidential even after the term of the grand jury has expired."). And, given the limited scope of the *Butterworth* holding, it had to look to proceedings and judicial processes that are distinct from grand juries. (App. 27a-28a) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (dealing with secrecy of child services records) and *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (cited in *Butterworth* and dealing with protective orders and the discretion of the trial court)); *see also Levine v. United States*, 362 U.S. 610, 617 (1960) ("Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret."). Given the "potential for abuse of" grand jury secrecy "through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials," regardless of whether that information is learned inside the grand jury, this Court should address what was left open in *Butterworth*. 494 U.S. at 636-37.

Henry's role as a witness and the subject matter of what he wishes to voice publicly make this matter a clean vehicle for review. Seeking the ability to control the public disclosure of his *own testimony*, not the testimony of another witness or information related to grand jurors themselves, sharply limits the concerns of the State. *Compare* App. 3a *with Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir. 2020) (considering the interests of a historian in overcoming grand jury secrecy decades after its investigation). Further, it presents the Court with the opportunity to look at the issue in relation to speech "lying at the core of the First Amendment." *Butterworth*, 494 U.S. at 632.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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