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

APPENDIX

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February 15, 2023

APPENDICES

APPENDIX A

In the United States Court of Appeals
For the Eleventh Circuit

No. 21-11483

WILLAME. HENRY, Plaintiff-Appellant
-Cross Appellee,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
Defendant-Appellee
-Cross Appellant,

MILES M. HART,
in his official capacity as Deputy Attorney General
for the State of Alabama and Chief of the Special
Prosecutions Divisions,

Defendant.

Appeals from the United States District Court for
the Middle District of Alabama
D.C. Docket No. 2:17-cv-00638-RAH-JTA

Before WILLIAM PRYOR, Chief Judge, LUCK and

ED CARNES, Circuit Judges.

LUCK, Circuit Judge:

In *Butterworth v. Smith*, 494 U.S. 624 (1990), the Supreme Court held that, to the extent Florida's grand jury secrecy law prohibited a grand jury witness from divulging information he learned before he testified to the grand jury, it violated the First Amendment's Free Speech Clause. *Id.* at 635–36. But *Butterworth* left open the question of whether, to the extent Florida's grand jury secrecy law prohibited a witness from disclosing grand jury information he learned "only by virtue of being made a witness," the secrecy law also violated the First Amendment. *Id.* at 636 (Scalia, J., concurring).

This case raises both issues—the one *Butterworth* decided and the one it didn't. Does Alabama's grand jury secrecy law prohibit a grand jury witness from divulging information he learned before he testified to the grand jury, and if so, does the secrecy law violate the First Amendment? And does the Alabama grand jury secrecy law's prohibition on a witness disclosing grand jury information he learned "only by virtue of being made a witness" violate his First Amendment free speech rights? *See id.*

We conclude that Alabama's grand jury secrecy law, unlike the Florida law in *Butterworth*, cannot reasonably be read to prohibit a grand jury

witness from divulging information he learned before he testified to the grand jury. We also conclude that the grand jury secrecy law's prohibition on a witness's disclosure of grand jury information that he learned only by virtue of being made a witness does not violate the Free Speech Clause.

FACTUAL BACKGROUND

Alabama's Grand Jury Secrecy Law

For almost half a century, Alabama has protected the secrecy of its grand jury proceedings. In enacting the grand jury secrecy law in 1975, the Alabama Legislature determined that "it is essential to the fair and impartial administration of justice that all grand jury proceedings be secret and that the secrecy of such proceedings remain inviolate." Ala. Code § 12-16-214. The grand jury secrecy law is "to be construed" to accomplish four purposes:

> (1) That grand juries have the utmost freedom in their discussions, deliberations, considerations, debates, opinions and votes without fear or apprehension that the same may be subsequently disclosed, or that they may be subject to outside pressure or influence or injury in their person or property as a result thereof.
>
> (2) That those persons who have information or knowledge with respect

> to the commission of crimes or criminal acts be encouraged to testify freely and truthfully before an appropriate grand jury without fear or apprehension that their testimony may be subsequently disclosed, or that they may be subject to injury in their person or property as a result thereof.
>
> (3) That those persons who have committed criminal acts or whose indictment may be contemplated not escape or flee from the due administration of justice.
>
> (4) That those persons falsely accused of criminal acts are not subject to public scrutiny or display and their otherwise good names and reputations are left intact.

Id. § 12-16-214(1)–(4).

There are two key sections to the Alabama grand jury secrecy law. First, it prohibits the disclosure of the internal deliberations and opinions of the grand jurors:

> 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

> attempt or endeavor to reveal, disclose or divulge or cause to be revealed, disclosed or divulged, any knowledge or information pertaining to any grand juror's questions, considerations, debates, deliberations, opinions or votes on any case, evidence, or other matter taken within or occurring before any grand jury of this state.

Id. § 12-16-215.

And second, the law prohibits the disclosure of the evidence, questions, answers to questions, testimony, and conversations presented to the grand jury:

> 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.

Id. § 12-16-216.

The Alabama grand jury secrecy law allows any prosecutor, grand jury foreman, or circuit court to require witnesses "to submit to an oath or affirmation of secrecy." *Id.* § 12-16-219. It also provides that "[t]he failure of any witness to be so sworn shall not relieve such witness of any criminal liability imposed" by Alabama's grand jury secrecy law. *Id.* Any person who violates the grand jury secrecy law commits a felony punishable by one to three years' imprisonment. *Id.* § 12-16-225.

Henry's Testimony Before the Grand Jury

Starting in 2013, Mike Hubbard, the former Speaker of the House of the Alabama Legislature, was the target of a grand jury investigation in Lee County, Alabama. He was accused of misusing his office for personal gain, including by funneling money into his printing business. Speaker Hubbard was indicted in state court in October 2014 on twenty-three counts. He was convicted of twelve counts following a trial. The Alabama Court of Criminal Appeals vacated one of the convictions because of insufficient evidence of guilt and affirmed the other eleven. *Hubbard v. State*, 321 So. 3d 8 (Ala. Crim. App. 2018). The Alabama Supreme Court reversed five of the remaining convictions on insufficient-evidence grounds and affirmed the other

six. *Ex Parte Hubbard*, 321 So. 3d 70 (Ala. 2020). So, the Court of Criminal Appeals reversed one count of conviction on insufficiency-of-evidence grounds, the Alabama Supreme Court reversed five more counts on those grounds, and when the appellate dust cleared there were convictions on six counts still standing.

William Henry was a state representative at the time of the investigation into Speaker Hubbard. Henry believed that he had evidence undermining the accusations against the speaker and contacted the defense team to help them.

Before Henry testified as a grand jury witness, he talked with other legislators about the Speaker Hubbard investigation. These discussions included rumored leaks coming from the grand jury. Joe Hubbard, another state legislator, allegedly gave Henry detailed confidential grand jury information about witness testimony, subpoenas, and imminent indictments. Representative Hubbard told Henry in September 2013 that a witness had recently testified before the grand jury. Henry had an interaction with the witness that seemed to confirm the rumor. The media later published information about the witness appearing in front of the grand jury, but Henry already knew about the witness testifying before the story came out.

Henry heard rumors that Representative Hubbard's grand jury source was Baron Coleman—

Representative Hubbard's former law partner and a lobbyist who had connections to the lead prosecutor on the grand jury investigation, Deputy Attorney General Miles "Matt" Hart. Henry believed that Coleman was using information leaked by Deputy Attorney General Hart to improperly influence political races in Alabama.

Henry contacted Speaker Hubbard's defense team and told them about the grand jury leaks. Speaker Hubbard's counsel, in turn, reached out to a federal prosecutor. Deputy Attorney General Hart then called Henry to question him about his leak claims. Henry was subpoenaed to testify before the grand jury after his call with the Deputy Attorney General, and he testified one week later on January 24, 2014.

A local news organization later released a recorded conversation between Deputy Attorney General Hart and Coleman. The recording was made the day before Henry's grand jury testimony. In the recording, Deputy Attorney General Hart called Coleman a confidential source and said that "the [g]rand [j]ury [s]ecrecy thing . . . shut[s] you down because you go in there and we say 'Don't you speak about this,' it is a very broad prohibition." He told Coleman that "we are on utterly solid ground shutting people up."

Henry thought that Deputy Attorney General Hart engaged in prosecutorial misconduct during his

grand jury appearance. Henry wished to speak about his grand jury testimony and the prosecutorial misconduct he allegedly witnessed, but he believed that "discussing any of the information he disclosed to the grand jury" would violate the Alabama grand jury secrecy law.

PROCEDURAL HISTORY

In 2017, Henry sued the Attorney General of Alabama in federal court. His complaint brought First Amendment claims under 42 U.S.C. section 1983. In count one, Henry alleged that section 12-16-215, as "written and as applied to him," violated his First Amendment free speech rights. He alleged that he wished to reveal his knowledge about the grand jury investigation into Speaker Hubbard and that his speech about "his grand jury testimony" was constitutionally protected. Section 12-16-215 unconstitutionally abridged his speech, Henry alleged, and the statute failed strict scrutiny and was overbroad facially and as applied. In count two, Henry alleged that section 12-16-216, as written and as applied, also violated his First Amendment free speech rights by prohibiting the disclosure of his grand jury testimony and what he learned inside the grand jury room. He argued that this statute too failed strict scrutiny and was overbroad.[1]

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[1] In counts three and four, Henry brought the same facial and as-applied challenges to sections 12-16-

Henry sought: (1) a declaratory judgment that the Alabama grand jury secrecy law unconstitutionally prevented grand jury witnesses from discussing their testimony; (2) an injunction preventing the enforcement of the Alabama grand jury secrecy law against Henry for revealing his testimony; (3) an order releasing the transcript of Henry's testimony; (4) an order enjoining the Attorney General and his agents from providing inaccurate and misleading warnings to grand jury witnesses; and (5) attorney's fees and costs.

The parties filed cross motions for summary judgment. The Attorney General argued that the Alabama grand jury secrecy law didn't apply to information a witness learned "prior to being called to testify" and didn't prohibit Henry from discussing what "he learned outside the grand jury room." As to Henry's grand jury testimony and matters that occurred inside the grand jury room, the Attorney General contended that—applying the balancing test in *Butterworth*—the state's interests in continued grand jury confidentiality outweighed Henry's First Amendment free speech rights.

Henry, naturally, saw things differently. He argued that the Alabama grand jury secrecy law was overbroad because, in preventing witnesses from

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219 (the oath statute) and 12-16-225 (the statute making a violation of the grand jury secrecy law a felony). These counts are not at issue in this appeal.

speaking about the "content" of their testimony, it prohibited them from discussing information they learned outside the grand jury room. And, as to his grand jury testimony, Henry maintained that his First Amendment free speech rights outweighed the state's interests in confidentiality.

The district court partially granted and partially denied the cross motions for summary judgment. The district court split Henry's First Amendment claims into two parts: (1) a challenge to the Alabama grand jury secrecy law to the extent it prohibited Henry from disclosing information he learned on his own outside the grand jury room; and (2) a challenge to the Alabama grand jury secrecy law's prohibition against disclosing information he learned within the grand jury room.

As to the first part, the district court concluded that, even looking at section 12-16-215 "in the broadest sense," it didn't reach information Henry learned before testifying to the grand jury. The district court explained that section 12-16-215 was "directed toward the disclosure of the grand jury's actions," which Henry didn't seek to disclose.

But the district court reached a different conclusion about section 12-16-216. The district court explained that section 12-16-216's key terms were undefined, which left the public "to use its best guess as to the speech" prohibited by the statute. Section 12-16-216 "appears to capture prior

knowledge," the district court reasoned, because that would include "knowledge of the '*nature or content*'" of the physical evidence, the questions asked, the answers to them, and any "other testimony taken during the grand jury proceeding." The district court explained that the Alabama grand jury secrecy law was "not too different" from the Florida law struck down by *Butterworth*. Because the plain text of the statute would "arguably" allow for a prosecution against Henry if he were to disclose information he learned outside the grand jury room, the district court concluded that this "overly broad" language violated Henry's First Amendment free speech rights.

As to Henry's challenge to the Alabama grand jury secrecy law's bar against him disclosing what he learned only "as a direct result of his participation" as a witness, the district court sided with the Attorney General. Reasoning that the grand jury secrecy law was a content-based regulation of speech, the district court applied strict scrutiny to Henry's free speech claim. The district court concluded that the Alabama grand jury secrecy law was narrowly tailored to serve the state's compelling interests in grand jury confidentiality. And the district court found that the state's interests in grand jury confidentiality outweighed Henry's First Amendment free speech rights.

The district court declared section 12-16-216

unconstitutional "as it applie[d] to Henry's prior knowledge" and entered judgment for him to the extent the statute applied to information learned outside the grand jury room. The district court entered judgment for the Attorney General "on all other claims." Henry and the Attorney General appeal the district court's judgment.

STANDARD OF REVIEW

We review de novo the district court's summary judgment, viewing the evidence and all factual inferences in favor of the non-moving party. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). A district court should grant summary judgment only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We likewise review questions of constitutional law de novo. *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1330 (11th Cir. 2021). And we review de novo "the legal question of standing." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1351 (11th Cir. 2005).

DISCUSSION

We first address Henry's appeal that the district court erred in concluding that section 12-16-216 didn't violate his First Amendment free speech rights to disclose information he learned only by virtue of being made a grand jury witness. Then we

consider the Attorney General's cross appeal that the district court erred in concluding that section 12-16-216 violated Henry's free speech rights to the extent it prohibited grand jury witnesses from disclosing information they learned on their own before they testified.[2]

HENRY'S APPEAL

The Butterworth *Balancing Test*

Our analysis of Henry's appeal begins with the Supreme Court's decision in *Butterworth*. There, a reporter in Florida uncovered "information relevant to alleged improprieties committed by" the local prosecutor and sheriff's office. 494 U.S. at 626.

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[2] The parties don't appeal the district court's conclusion that section 12-16-215 only prohibits the disclosure of the grand jurors' actions (like their votes, deliberations, debates, and discussions), and, therefore, section 12-16-215 didn't prohibit Henry from disclosing the content of his grand jury testimony. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (explaining that "an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority"). Thus, our focus is on section 12-16-216 as it applies to information a witness learned inside the grand jury room (Henry's appeal) and outside the grand jury room (the Attorney General's cross appeal).

The reporter testified before a grand jury investigating the misconduct and was warned not to reveal his grand jury testimony. *Id.* Florida's grand jury secrecy law prohibited the disclosure of a witness's grand jury testimony "or the content, gist, or import thereof." *Id.* at 627. The reporter sought a declaratory judgment in federal court that the state's secrecy law violated his First Amendment free speech rights. *Id.* at 628.

The Supreme Court held that the Florida grand jury secrecy law violated the First Amendment to the extent it prohibited the reporter from making "a truthful statement of information he acquired on his own" before becoming a grand jury witness. *Id.* at 636. The "effect" of Florida's grand jury secrecy law on the reporter's ability to discuss his prior knowledge was "dramatic," the Supreme Court wrote:

> [B]efore he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information . . . .

Id. at 635.

The *Butterworth* Court explained that the

grand jury has historically "served an important role in the administration of criminal justice," with grand jury secrecy protecting a number of key government interests, including: (1) encouraging prospective witnesses to voluntarily come forward; (2) encouraging full and frank testimony by protecting witnesses from retribution and inducement; (3) preventing the target of the grand jury investigation from fleeing or trying to influence grand jurors; and (4) protecting the reputation of those exonerated by the grand jury. *Id.* at 629–30 (citing *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218-19 (1979)). The Supreme Court cautioned, however, that "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Id.* at 630 (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)). Rather, "grand juries are expected to 'operate within the limits of the First Amendment.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972)). Thus, the Court balanced the reporter's "asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings." *Id.*

The application of the balancing test in *Butterworth* tipped in favor of the reporter's First Amendment free speech rights. On the reporter's side of the scale, the Supreme Court explained that his desire to publish information about "alleged governmental misconduct" was speech "lying at the core of the First Amendment." *Id.* at 632.

On Florida's side, the Court said that "[s]ome of [the state's] interests [were] not served at all by the [state's] ban on disclosure" of a witness's knowledge of information obtained outside the grand jury, "and those that [were] served [were] not sufficient to sustain the statute." *Id.* at 632. As to the "need to keep information from the targeted individual in order to prevent his escape," the Court determined that this interest goes away when "an investigation ends" because the target will have either been exonerated or indicted. *Id.* As to the state's concern that "some witnesses will be deterred from presenting testimony due to fears of retribution," the Court explained that this interest wasn't served by the prohibition for two reasons: (1) "any witness is free *not* to divulge his own testimony"; and (2) the part of Florida's grand jury secrecy law "which prohibits the witness from disclosing the testimony of *another* witness remains enforceable." *Id.* at 633.

As to the state's "interest in preventing the subornation of grand jury witnesses who will later testify at trial," the Court wrote that this interest was "marginal" because Florida's discovery rules required pretrial disclosure of the names of witnesses to the accused, because Florida had criminal sanctions for tampering with witnesses, and because trial courts can use their subpoena and contempt powers to make hesitant witnesses testify.

Id. at 633–34. And, as to the state's interest in preserving reputational interests, the *Butterworth* Court reasoned that this interest was served by the prohibition, but "reputational interests alone cannot justify the proscription of truthful speech." *Id.* at 634. Weighing the reporter's First Amendment free speech rights against the state's interests in confidentiality, the Supreme Court concluded that the state's interests were "not sufficient to overcome" the reporter's "First Amendment right to make a truthful statement of information he acquired on his own." *Id.* at 636.

Butterworth provides the balancing test we must apply to Henry's claim that the Alabama grand jury secrecy law violates his First Amendment free speech rights. We balance Henry's "asserted First Amendment rights against [the state's] interests in preserving the confidentiality of its grand jury proceedings." *See id.* at 630. The "burden of demonstrating this balance rests upon" Henry, because he is "the private party seeking disclosure." *See Douglas Oil*, 441 U.S. at 223.

Henry contends that strict scrutiny applies to his First Amendment challenge because the Alabama grand jury secrecy law is a content-based regulation of speech. *See Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) (noting that "[s]trict scrutiny ordinarily applies to content-based restrictions of speech"). To survive strict scrutiny, a

law must be "narrowly tailored to serve compelling state interests." *Id.* at 861–62 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)).

But *Butterworth* tells us that we apply a balancing test—and not strict scrutiny—to a grand jury witness's claim that the state's grand jury secrecy law violates his First Amendment free speech rights. We apply the balancing test—and not strict scrutiny—because *Butterworth* didn't require that the state's grand jury secrecy law had to be narrowly tailored to serve a compelling state interest, which is inconsistent with applying strict scrutiny. *See Doe v. Bell*, 969 F.3d 883, 888 n.6 (8th Cir. 2020) (noting that *Butterworth* "did not apply strict scrutiny when evaluating a state secrecy requirement concerning the testimony of grand jury witnesses"). And we apply the balancing test—and not strict scrutiny—because *Butterworth* put the burden on the witness to show that his First Amendment free speech rights outweighed the state's interests, which is also inconsistent with applying strict scrutiny. *Compare Douglas Oil*, 441 U.S. at 223 ("It is clear . . . that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure."), *with Otto*, 981 F.3d at 868 (explaining that "[t]he government carries the burden of proof" under strict scrutiny).

Where the Supreme Court has a "general" legal standard but applies a more "specific" test to a specific type of claim, we use the more specific test where it applies. *See Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) (en banc). That is the case here. In general, strict scrutiny applies to content-based regulations of speech, *Otto*, 981 F.3d at 861, but the more specific *Butterworth* balancing test applies to a grand jury witness's First Amendment challenge to a state's grand jury secrecy law, 494 U.S. at 630. We therefore apply the *Butterworth* balancing test, weighing Henry's "asserted First Amendment rights against [Alabama's] interests in preserving the confidentiality of its grand jury proceedings." *Id.*

Henry's Asserted First Amendment Rights

As to Henry's asserted First Amendment rights, he argues that he has a strong interest in publicly disclosing his allegations of prosecutorial misconduct. We agree. The "publication of information relating to alleged governmental misconduct" is speech "lying at the core of the First Amendment." *Butterworth*, 494 U.S. at 632. Here, Henry alleges that: (1) there were leaks about the grand jury coming from Deputy Attorney General Hart; (2) some of these leaks were to Coleman, a lobbyist, who used the sensitive information to his benefit in political campaigns; and (3) Henry believed that Deputy Attorney General Hart

engaged in prosecutorial misconduct during his grand jury testimony. Because these accusations, if true, raise a claim of "governmental misconduct," they go to the core of the First Amendment. *See id.*

Alabama's Interests in Preserving Confidentiality

As to Alabama's interests in confidentiality, the grand jury has been an important check on government power since even before the Founding. As early as the fourteenth century, the grand jury "was '[n]o longer required to make known to the court the evidence upon which they acted' but instead was 'sworn to keep their proceedings secret by an oath which contained no reservation in favor of the government.'" *Doe*, 969 F.3d at 889–90 (quoting George J. Edwards, Jr., *The Grand Jury: Considered from an Historical, Political and Legal Standpoint, and the Law and Practice Relating Thereto* 26–28 (Cosimo 2009) (1906)). By the seventeenth century, the grand jury served "to safeguard citizens against an overreaching Crown and unfounded accusations." *Butterworth*, 494 U.S. at 629. Secrecy was essential to the grand jury's ability to check prosecutorial overreach; the "tradition of secrecy surrounding grand jury proceedings evolved" in part to ensure the grand jury's "impartiality." *Id.*

"When the institution of the grand jury crossed from England to the American colonies, the rule of grand jury secrecy came with it." *Doe*, 969 F.3d at 890. "The Framers later included the Grand

Jury Clause in the Fifth Amendment, making grand jury secrecy an implicit part of American criminal procedure." *Id.* (cleaned up). Today, grand jury secrecy "remains important to safeguard a number of" government interests. *Butterworth*, 494 U.S. at 630; *Douglas Oil*, 441 U.S. at 218 ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

The Supreme Court has identified four interests served by grand jury secrecy laws: (1) "many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) "witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements"; (3) "those about to be indicted [might] flee, or [might] try to influence individual grand jurors to vote against indictment"; and (4) people "accused but exonerated by the grand jury" would be "held up to public ridicule." *Douglas Oil*, 441 U.S. at 219.

We too have recognized the importance of grand jury secrecy, even after an investigation has concluded. "The grand jury, as an institution, has long been understood as a 'constitutional fixture in its own right,' operating independently of any branch of the federal government." *Pitch v. United States*,

953 F.3d 1226, 1228– 29 (11th Cir. 2020) (en banc) (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)). The grand jury's independence allows it "to serve as a buffer between the government and the people with respect to the enforcement of the criminal law." *Id.* at 1229. "But the ability of the grand jury to serve this purpose," we have said, "depends upon maintaining the secrecy of its proceedings." *Id.* "The long-established policy of upholding the secrecy of the grand jury helps to protect the innocent accused from facing unfounded charges, encourages full and frank testimony on the part of witnesses, and prevents interference with the grand jury's deliberations." *Id.* The state's interests in the confidentiality of the grand jury proceeding are interests "of the highest order." *See Doe*, 969 F.3d at 889–92 (citation omitted).

Finally, the state has an interest in the confidentiality of "information," including grand jury information, that is "the [s]tate's own creation." *See Butterworth*, 494 U.S. at 636 (Scalia, J., concurring). The Supreme Court has long recognized the state's interest in the confidentiality of records the state creates as a critical and necessary result of enforcing the law and running the people's government. *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 49 (1987) (recognizing a state's "acknowledged public interest" in the confidentiality of child services records). And so have we. *See, e.g.*, *Jordan v. Comm'r, Miss. Dep't*

of Corr., 947 F.3d 1322, 1338 (11th Cir. 2020) (examining Georgia's Lethal Injection Secrecy Act and recognizing "that the confidentiality provided by the Act is necessary to protect Georgia's source of pentobarbital for use in executions"); *Porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006) (recognizing that "parole files are 'confidential state secrets' under Georgia law" (citation omitted)).

Balancing Henry's Asserted First Amendment Rights Against the State's Interests in Preserving Confidentiality

Having identified both sides of the balancing test, we must weigh Henry's "asserted First Amendment rights against [the state's] interests in preserving the confidentiality of its grand jury proceedings." *See Butterworth*, 494 U.S. at 630. We conclude that the balance weighs in favor of continued confidentiality in grand jury information a witness learned by virtue of being made a witness. Here's why.

We begin with Henry's asserted First Amendment rights. Henry seeks to disclose information about alleged government misconduct inside the grand jury room. Henry's asserted First Amendment rights are the same as the First Amendment rights the reporter asserted in *Butterworth*. *See id.* at 632 ("Florida seeks to punish the publication of information relating to alleged governmental misconduct . . . ."). So, that side of the

scale in *Butterworth* and in Henry's case have the same weight.

But, on the other side of the scale, there are three critical differences between this case and *Butterworth* that tip the balance in favor of Alabama. First, in *Butterworth*, the Supreme Court explained that "[s]ome of" the state's interests were "not served at all by the Florida ban on disclosure" of information the witness learned before he testified. *See id.* This was so because there was no connection between Florida's interests in encouraging witness cooperation and frank and full testimony and a witness disclosing information that he learned before he entered the grand jury room. "[T]he concern that some witnesses will be deterred from presenting testimony due to fears of retribution" was, the Supreme Court reasoned, "not advanced by" Florida's prohibition on disclosing information the witness knew before he testified. *See id.* at 633.

Here, unlike in *Butterworth*, Alabama's interests are *all* served by the state's ban on witnesses disclosing what they learned inside the grand jury room. As to the state's interest in witness cooperation, a witness will be less likely to cooperate in a grand jury investigation if he knows that his testimony will be disclosed after the investigation has ended. The knowledge that his testimony may be disclosed in the future will chill cooperation out of fear of unwanted scrutiny or retaliation.

The same applies to the state's interest in encouraging truthful testimony. If the grand jury proceedings were made public, "witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements." *Id.* at 630 (quoting *Douglas Oil*, 441 U.S. at 219). A witness is going to be more candid if he knows that his testimony will not be exposed down the line.

As to the state's interest in making sure that the target of a grand jury investigation doesn't escape, that's obviously less of a concern once the target has been charged. *See id.* at 632. Speaker Hubbard, after all, has already been indicted and imprisoned. But even though the grand jury investigation here is over, there may be accomplices and coconspirators that a future grand jury could indict. Keeping the grand jury proceedings secret ensures that not-yet-indicted accomplices and coconspirators do not destroy evidence and do not flee. Grand jury secrecy safeguards the state's ability to bring future charges—either against Speaker Hubbard or outstanding accomplices and coconspirators—if new evidence comes to light.

The state also has "a substantial interest in seeing that 'persons who are accused but exonerated by the grand jury will not be held up to public ridicule.'" *See id.* at 634 (citation omitted). The grand jury may have considered evidence of other crimes

Speaker Hubbard committed that didn't result in his indictment. *See Doe*, 969 F.3d at 893 (explaining that the state has a "compelling interest in ensuring individual members of the grand jury do not use the information they gathered as part of the grand jury process to impugn the innocence of the accused with charges they could not agree to collectively"). And other people besides Speaker Hubbard—like grand jury witnesses or people mentioned by witnesses—could by harmed by the disclosure of grand jury information. Grand jurors hear evidence about people who aren't targets of the investigation and who aren't indicted. They also hear evidence that isn't subject to adversarial testing and may be hearsay or otherwise inadmissible and thus less trustworthy. Preventing the disclosure of grand jury testimony that could damage a third party's reputation is an important state interest that survives the grand jury's discharge.

Second, in *Butterworth*, the state had no confidentiality interest in the reporter's information because he acquired the information on his own. *See* 494 U.S. at 635. But here, Henry wants to disclose grand jury information he acquired "only by virtue of being made a witness." *See id.* at 636 (Scalia, J., concurring). The state has an interest in ensuring that "information of [its] own creation"—including grand jury proceedings—remains confidential. *See id.*; *cf. Ritchie*, 480 U.S. at 49 (recognizing a state's

"acknowledged public interest" in the confidentiality of child services records). While the state's confidentiality interest in information of its own creation wasn't served in *Butterworth* by barring the reporter from disclosing information he acquired on his own, it's served here by barring Henry from disclosing information he learned inside the grand jury room.

Third, the *Butterworth* Court recognized the distinction, for First Amendment purposes, between information that a witness had before he testified (like the reporter in *Butterworth*) and information that the witness learned in a judicial proceeding (like what Henry wants to disclose). The *Butterworth* reporter had a "right to divulge information of which he was in possession before he testified before the grand jury." 494 U.S. at 632. But that right did not necessarily extend to "information which [the reporter] may have obtained as a result of his participation in the proceedings of the grand jury." *Id.* As to information obtained from grand jury proceedings, the Court analogized it to information "obtained through [civil] discovery." *Id.* at 631. It "did not offend the First Amendment," the Court explained, to "prohibit[] a newspaper from publishing information which it had obtained through discovery procedures." *Id.* at 631–32.

Justice Scalia, in his *Butterworth* concurring opinion, also drew a sharp line between information

that a witness knew before he testified and information he learned in the grand jury room. "[T]here is considerable doubt whether a witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand jury room." *Id.* at 636 (Scalia, J., concurring). But for information that a witness learned "only by virtue of being made a witness," "[t]here may be quite good reasons why the [s]tate would want the . . . information . . . to remain confidential even after the term of the grand jury has expired." *Id.* Because Henry, unlike the reporter in *Butterworth*, wants to disclose information he learned only by virtue of being made a grand jury witness, Alabama, unlike Florida, had "quite good reasons" for wanting information about the grand jury proceedings to remain confidential.

To be sure, some of the state's interests in grand jury secrecy diminish "once a grand jury has been discharged." *See id.* at 632 (majority opinion). "When an investigation ends," the Supreme Court has explained, "there is no longer a need to keep information from the targeted individual in order to prevent his escape." *Id.* " There is also no longer a need to prevent the importuning of grand jurors" once their deliberations have ended. *Id.* at 633–32.

But the other important state interests remain "even after the term of the grand jury has expired." *See id.* at 636 (Scalia, J., concurring). In

Pitch, for example, a historian petitioned the district court "for the grand jury transcripts related to the Moore's Ford Lynching—a horrific event involving the murders of two African American couples for which no one has ever been charged—to be used in his book about the lynching." 953 F.3d at 1229. The grand jury records in the case were decades old because the lynching happened in 1946. *Id.* at 1230. Although the grand jury investigating the crime "heard sixteen days of testimony from countless witnesses," it "failed to charge anyone with the murders" and the "case remains unsolved." *Id.* Even though the crime happened over seventy years ago and most witnesses to the crime were probably deceased, we explained that the request for the grand jury transcripts "implicate[d] the long-established policy that grand jury proceedings in federal courts should be kept secret." *Id.* at 1232.

To sum up, Alabama's interests in prohibiting Henry from disclosing grand jury information he learned only by virtue of being made a witness are weightier than Florida's interests were in prohibiting the *Butterworth* reporter from disclosing information he learned on his own outside the grand jury. And the weightier interests tip the balancing test in favor of the Attorney General.

THE ATTORNEY GENERAL'S CROSS APPEAL

We now turn to the Attorney General's cross appeal of the district court's declaration for Henry

that section 12-16-216 violated his First Amendment free speech rights to the extent it prohibited him from disclosing information he learned before his grand jury testimony. We first address the Attorney General's argument that Henry lacks standing. We then consider whether the district court erred in concluding that section 12-16-216 prohibited Henry from disclosing information he learned outside the grand jury room.

Standing

The Attorney General argues that Henry lacks standing to challenge section 12-16-216 because he has no "inclination to enforce the" state's grand jury secrecy law "against *anyone* in the manner Henry fears."

Article III limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "The tripartite test for Article III standing" is "well known":

> *First*, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Second*, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and

> not the result of the independent action of some third party not before the court. *Third*, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1119 (11th Cir. 2022) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Because the elements of standing 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation.'" *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citation omitted).

We begin with injury in fact. The Attorney General doesn't argue that Henry failed to establish a concrete and particularized injury. Wisely so; alleged First Amendment free speech violations are concrete and particular injuries for purposes of Article III standing. *See Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 926 (11th Cir. 2020) (en banc) (explaining that "[v]iolations of the rights to free speech" are "intangible harms that are also both direct and concrete"); *Speech First*, 32 F.4th at 1119 ("There is no doubt—or dispute—that the [plaintiffs'] claimed injury is 'concrete and particularized' . . . because they have alleged a deprivation of their First Amendment right to free speech."). "The standing question here thus turns on

whether" Henry's injury is "imminent, not conjectural or hypothetical." *See Speech First*, 32 F.4th at 1119.

To determine whether a plaintiff bringing a First Amendment free speech claim established an imminent injury, "we simply ask whether the operation or enforcement of the government policy would cause a reasonable would-be speaker to self-censor—even where the policy falls short of a direct prohibition against the exercise of First Amendment rights." *Id.* at 1120 (cleaned up). "In making that assessment, the threat of formal discipline or punishment is relevant to the inquiry, but it is not decisive." *Id.* "The fundamental question under our precedent," the *Speech First* Court explained, is "whether the challenged policy 'objectively chills' protected expression." *Id.*

Applying *Speech First* to Henry's free speech claims, the question is whether the Alabama grand jury secrecy law objectively chills Henry's free speech rights. *Id.* We conclude that it does. Henry challenged section 12-16-216, facially and as applied, as an unconstitutional restriction on his ability to disclose what he knew about the investigation into Speaker Hubbard, his grand jury testimony, and the grand jurors' questions. The Attorney General's position in the district court and here is that section 12-16-216 prohibits Henry from disclosing his grand jury testimony and what he learned inside the grand

jury room. That position would objectively chill Henry's right to speak about his grand jury testimony and make a reasonable person self-censor. Section 12-16-216 doesn't "fall[] short of a direct prohibition against the exercise of [his] First Amendment rights"—it *is* a direct prohibition against the exercise of his First Amendment rights. *See id.* (cleaned up). Like *Speech First*, that is an imminent injury. *See id.*

That part of Henry's claim also includes speech—information he learned outside the grand jury room—that the Attorney General will not prosecute under section 12-16-216 doesn't change our conclusion. Once Henry has established at least some imminent injury to his free speech rights, he has established Article III injury in fact. *See Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) ("Article III standing is not a 'You must be this tall to ride' measuring stick. 'There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be.'" (citation omitted)).

For this reason, our decision in *Doe v. Pryor*, 344 F.3d 1282 (11th Cir. 2003) is distinguishable. We concluded in *Doe* that the plaintiffs lacked standing to challenge an Alabama statute criminalizing "deviate sexual intercourse" partly because the Attorney General had no intention of

enforcing the law following *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Doe* plaintiffs did not establish an injury in fact because their "complaint contain[ed] no allegations" supporting "a conclusion that their fear" that their First Amendment rights would be restrained was "objectively reasonable." 344 F.3d at 1287. But here, Henry's fear that his First Amendment rights will be restrained is objectively reasonable—the Attorney General has told Henry that he would enforce section 12-16-216 against Henry for disclosing information he learned inside the grand jury room. That's enough for injury in fact.

We also conclude that Henry established that his injury was fairly traceable to the Attorney General and redressable by a favorable decision. His injury was fairly traceable to the Attorney General because the grand jury investigation into Speaker Hubbard was spearheaded by the Attorney General's office and Deputy Attorney General Hart. Deputy Attorney General Hart led the investigation, subpoenaed Henry as a witness, and warned Henry about disclosing his grand jury testimony. *See* Ala. Code 36-15-13 (granting the Attorney General and his assistants the power to seek indictments before the grand jury). As Deputy Attorney General Hart told Baron Coleman, "the [g]rand [j]ury [s]ecrecy thing . . . shut[s] you down because you go in there and *we* say 'Don't you speak about this.'" Deputy

Attorney General Hart believed that "*we* are [on] utterly solid ground shutting people up." Any enforcement of the Alabama grand jury secrecy law against Henry for disclosing grand jury information would be "fairly traceable" to the Attorney General.

As to redressability, an injunction against the Attorney General prohibiting him from enforcing section 12-16-216 against Henry so Henry could disclose the content of his grand jury testimony would redress his alleged First Amendment violation. Deputy Attorney General Hart, if enjoined from enforcing section 12-16-216 against Henry, could no longer "shut [Henry] down" from speaking about the grand jury proceedings. Thus, Henry has standing to bring his First Amendment challenge to section 12-16-216.

Does Section 12-16-216 Prohibit Henry from Disclosing Information He Learned Before He Testified as a Witness?

The district court's declaration that section 12-16-216 violated Henry's First Amendment free speech rights because it prohibited him from disclosing information he knew before his grand jury testimony relied on two premises. The first premise was that section 12-16-216 could arguably be read to prohibit a grand jury witness from disclosing information he learned before he testified. The second premise was that, because the statute arguably prohibited a grand jury witness from

disclosing information he learned outside the grand jury room, section 12-16-216, like the Florida statute in *Butterworth*, violated the witness's First Amendment free speech rights. But the first premise is wrong; section 12-16-216 can't reasonably be read to prohibit the disclosure of information learned outside the grand jury room like the statute in *Butterworth* . We agree with the Attorney General that the "clear focus" of the statute "is on protecting the secrecy of the grand jury proceedings" and "not on prohibiting witnesses from discussing information they knew prior to testifying."

"[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). This analysis has two steps. First, we "construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Second, we ask "whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity." *Id.* at 297. Satisfying the second step of the overbreadth doctrine "is not easy to do." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232 (11th Cir. 2018). And Henry, as the plaintiff alleging overbreadth, has "the burden of demonstrating, from the text of the

law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (cleaned up).

We first construe section 12-16-216. The district court determined that section 12-16-216 was overbroad and prohibited the disclosure of information a witness knew before testifying because: (1) the law doesn't define its terms, leaving the public to "guess" what speech it captures; (2) the law is "not too different" from the Florida grand jury secrecy law struck down by *Butterworth*; and (3) the law's plain text would "arguably" sanction Henry for disclosing knowledge he obtained before he testified. Thus, the district court concluded that the law "captures a witness's prior knowledge," just like the Florida grand jury secrecy law in *Butterworth*. But section 12-16-216 doesn't prohibit the disclosure of information a witness learned outside the grand jury room.

Our starting point is the text. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999) ("The starting point for all statutory interpretation is the language of the statute itself."). Section 12-16-216 prohibits the disclosure of four things. First, it prohibits a grand jury witness from disclosing "any knowledge of the form, nature or content of any physical evidence presented to" the grand jury. Ala. Code § 12-16-216. Because the first prohibition expressly applies to physical evidence

"presented to" the grand jury, it doesn't apply to the disclosure of information the witness knew before he testified.

The second and third prohibitions in the Alabama grand jury secrecy law are related. The law prohibits a grand jury witness from disclosing "any knowledge of the form, nature or content of any question propounded to any person within or before any grand jury." *Id.* And the law prohibits the disclosure of "any comment made by any person in response thereto"—any answer given by a grand jury witness to a question. *Id.* Because the second and third prohibitions apply to questions asked to a grand jury witness and the answers given to those questions, they too don't apply to the disclosure of information learned outside the grand jury room.

That leaves the law's fourth prohibition. The grand jury secrecy law prohibits the disclosure of "any other evidence, testimony or conversation *occurring or taken therein*." *Id.* (emphasis added). The limiting language at the end of the fourth prohibition is key. It limits the statute's reach to evidence, testimony, or conversation that occurred or was taken inside the grand jury room—matters that occurred or were taken "therein." Because of this limiting language, the fourth prohibition doesn't reach the disclosure of information a witness knew before testifying.

Henry argues that section 12-16-216 prohibits

the disclosure of information a witness "knew prior to entering the grand jury room" because it prohibits the witness from disclosing "at any time, directly or indirectly, conditionally or unconditionally, by any means whatever," the four topics covered by the grand jury secrecy law. But this language doesn't extend the statute to a witness's prior knowledge. It regulates the duration of the prohibition against disclosing information learned within the grand jury room and provides that any type of disclosure violates the law. This language can't be read to prohibit the disclosure of information a grand jury witness learned outside the grand jury room. As the Attorney General correctly argues, this language explains the "litany of ways" information can be disclosed but is silent as to "*what* " can't be disclosed.

Reading section 12-16-216 to cover only evidence and testimony "occurring or taken" in the grand jury room is consistent with the other parts of Alabama's grand jury secrecy law. *See United States v. Velez*, 586 F.3d 875, 877 (11th Cir. 2009) ("In interpreting a statutory provision, we look to the language of the provision itself, the specific context in which that language is used, and the broader context of the statute as a whole." (cleaned up)). First, the Alabama Legislature's findings stress that "it is essential to the fair and impartial administration of justice that all grand jury *proceedings* be secret." Ala. Code § 12-16-214

(emphasis added). The Legislature's findings focus on the secrecy of the "proceedings," not on events occurring outside of those proceedings.

Second, the Alabama grand jury secrecy law prohibits the disclosure by a witness of "any knowledge or information pertaining to any grand juror's questions, considerations, debates, deliberations, opinions or votes on any case, evidence, or other matter *taken within or occurring before* any grand jury." *Id.* § 12-16-215 (emphasis added). Like section 12-16-216, this companion section contains limiting language showing that its secrecy requirements reach only information "taken within or occurring before" a grand jury proceeding. The focus of both sections is on the information disclosed within the grand jury room.

It doesn't matter that the terms of section 12-16-216 are undefined. Where a statutory term is undefined, "we look to the plain and ordinary meaning of the statutory language as it was understood at the time the law was enacted." *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021); *see also CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning." (citation omitted)). The ordinary meaning of the key language in section 12-16-216 ("occurring or taken therein"), coupled with the Legislature's

findings and the other sections of the Alabama grand jury secrecy law, shows that section 12-16-216 applies only to evidence, questions, testimony, and conversations occurring or taken within the grand jury proceeding. The failure to define terms with a readily discernable ordinary meaning doesn't leave the public guessing about the scope of section 12-16-216.

There are two important differences between the Alabama grand jury secrecy law and the Florida grand jury secrecy law in *Butterworth*. First, section 12-16-216 contains language limiting its scope to evidence, testimony, and conversations that took place inside the grand jury room. *See* Ala. Code § 12-16-216 (restricting the law to the disclosure of matters "occurring or taken therein"). The Florida grand jury secrecy law in *Butterworth* didn't have the same limiting language. *See* 494 U.S. at 627. Here, because the text of section 12-16-216 is limited to information "occurring or taken" before the grand jury, it cannot be read to prohibit the disclosure of information learned outside the grand jury room.

Second, the Alabama grand jury secrecy law prohibits the disclosure of the "form, nature or content" of physical evidence, of the questions asked to witnesses, as well as the disclosure of "any comment made . . . in response thereto," Ala. Code § 12-16-216, while the Florida law more broadly prohibited disclosure of the "gist" or "import" of

testimony, *Butterworth*, 494 U.S. at 627. This distinction matters: "The Florida statute specifically precluded disclosing the 'gist or import' of the testimony, which clearly encompassed the substance of the knowledge the grand jury witness had before entering the grand jury process." *Hoffman-Pugh v. Keenan*, 338 F.3d 1136, 1139 (10th Cir. 2003). Because this critical language is missing from the Alabama statute, it's wrong to say, as the district court did, that the Alabama grand jury secrecy law is "not too different" from the Florida law condemned by *Butterworth*. It's different enough to make a difference.

In sum, considering the text and structure of section 12-16-216, the statutory scheme as a whole, and the differences between the Alabama and the Florida grand jury secrecy laws, the district court erred in concluding that section 12-16-216 could "arguably" sanction Henry for disclosing his prior knowledge. It couldn't.

But, to the extent there is any doubt, we will "uphold a state statute against a facial challenge if the statute is readily susceptible to a narrowing construction that avoids constitutional infirmities." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1256 n.6 (11th Cir. 2005) (citation omitted). Although we will not "rewrite the clear terms of a statute in order to reject a facial challenge," *id.* (citation omitted), our occasional "reluctance" to

apply a limiting construction "is not an iron-clad rule," *Cheshire Bridge Holdings, LLC v. City of Atlanta*, 15 F.4th 1362, 1367 (11th Cir. 2021). Rather, we will not invoke facial overbreadth "when a limiting construction has been or could be placed on the challenged statute." *Id.* (quoting *Broadrick*, 413 U.S. at 613).

Here, a limiting construction has and can be placed on section 12-16-216. The Attorney General has read the Alabama grand jury secrecy law not to prohibit the disclosure of information a witness learned outside the grand jury room; as we have explained, the plain language of the statute supports this reading of the statute. Because the statute can be read not to prohibit disclosure of information a witness learned outside the grand jury room without rewriting its plain terms, we should read it that way if there's any lingering doubt about its scope. *See id.*; *see also United States v. Waymer*, 55 F.3d 564, 569 (11th Cir. 1995) (explaining that the "[a]pplication of the overbreadth doctrine is employed as a last resort and is not to be invoked when a limiting construction has been or could be placed on the challenged statute").

CONCLUSION

As to Henry's appeal of what he learned only by virtue of being made a grand jury witness, the district court did not err in concluding that the state's interests in continued grand jury

confidentiality outweighed Henry's First Amendment free speech rights. We therefore affirm the district court's partial summary judgment for the Attorney General.

But as to the Attorney General's cross appeal of what Henry learned on his own outside the grand jury room, the district court erred in concluding that section 12-16-216 arguably prohibited the disclosure of a witness's prior knowledge. We therefore reverse the district court's partial summary judgment for Henry, and remand with instructions for the district court to enter judgment for the Attorney General.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Case No. 2:17-cv-638-RAH-JTA(WO)

WILLIAM E. HENRY,

Plaintiff,

v.

STEVEN T. MARSHALL,
In his official capacity as Attorney General of the State of Alabama,
Defendant.

MEMORANDUM OPINION AND ORDER

The question before the court is what a former Alabama grand jury witness may publicly speak about, after having testified before a grand jury, without violating the Alabama Grand Jury Secrecy Act, *see* Ala. Code § 12-16-214, *et seq*. ("the Act"). The Plaintiff here, William Edgar "Ed" Henry, is a former member of the Alabama House of Representatives who testified on January 24, 2014,

before a Lee County grand jury that later indicted former Alabama House Speaker Mike Hubbard for violations of the state's ethics laws. Now, Henry wants to speak publicly about the proceedings, including the details of his grand jury testimony, his observations and opinions of the proceeding, those involved in it, and what transpired therein.[1]

Henry filed this suit claiming the secrecy provisions of the Act unconstitutionally deprive him of his First Amendment right to free speech. This case examines whether those secrecy provisions run afoul of the Constitution in preventing Henry from discussing: (1) information he knew prior to testifying before the grand jury ("prior knowledge") and (2) what transpired in the grand jury room, including testimony Henry gave and did not give, his personal observations of the proceeding, and his opinions regarding perceived prosecutorial misconduct ("grand jury proceeding").

As explained herein, the court finds that the Act, by virtue of its overbreadth, does impermissibly

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[1] In 1999, Brad Pitt, Edward Norton, and Helena Bonham Carter starred in the movie *Fight Club*. One of the central themes throughout the film was the rule that participants in "Fight Club" could "not talk about Fight Club." In a sense, Henry wishes to do just that–talk about his participation in a secret proceeding; here, the grand jury.

violate Henry's First Amendment right to speak to facts and matters known to him before he testified before the grand jury—a result compelled by the United States Supreme Court's decision in *Butterworth v. Smith,* 494 U.S. 624 (1990). However, the court also concludes that the Act does not otherwise violate Henry's First Amendment rights by prohibiting Henry from publicly discussing what transpired in the grand jury room, including his testimony before the grand jury, the questions asked of him, the questions not asked of him, the actions and discussions of the prosecutor, and his personal opinions and observations of the proceeding and those involved.

BACKGROUND

A. Mike Hubbard and Ed Henry

Much ink has been spilled in the press and in judicial opinions concerning the prosecution of Mike Hubbard, the former Speaker of the Alabama House of Representatives. *See generally Ex parte Hubbard*, No. 1180047, 2020 WL 1814587 (Ala. Apr. 10, 2020). In October of 2014, a Lee County grand jury indicted Hubbard on twenty-three counts of violating the Alabama Ethics Act, Ala. Code § 36-25-1, *et seq*., and after a four-week trial, a Lee County jury convicted Hubbard on twelve of those counts. 2020 WL

1814587, at *2. On appeal, the conviction was affirmed on six of the twelve counts. *Id*. at *21.

Pertinent to Hubbard's ethics issues as they involved Henry, Hubbard owned an interest in Craftmasters, Inc. ("Craftmasters"), a printing business located in Auburn, Alabama; Hubbard's hometown. Of his many alleged transgressions, Hubbard was accused of using his political power to *gently suggest* that state house representatives use Craftmasters to print their campaign materials. This, of course, was violative of the Ethics Act, so the theory went.[2]

Ed Henry represented Morgan County, Alabama in the state house during the time period at issue in this case. Henry was elected in 2010, despite Hubbard's apparent opposition to his candidacy.

Henry entered the ethics mix involving Hubbard because, following his 2010 victory, Henry's campaign consultant recommended that Henry use Craftmasters for his future printing needs. Following this recommendation, Henry retained Craftmasters, although Henry vehemently contested that this was a quid-pro-quo or that improper

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[2] Hubbard ultimately was found not guilty of a crime for these actions, but instead, was convicted for, *inter alia*, obtaining the assistance of a former Business Council of Alabama lobbyist in acquiring investments in Craftmasters (which was experiencing financial difficulties), also an apparent criminal violation of the Ethics Act.

pressure was used.

B. The Lee County Grand Jury

A few years later, the Alabama Attorney General's Office began investigating Hubbard for potential ethics code violations, including issues involving Craftmasters. A special grand jury in Lee County was empaneled on August 19, 2013, and a twenty-three-count indictment returned against Hubbard on October 17, 2014. *Hubbard v. State*, Appeal No. CR-16-0012, 2018 WL 4079590, at *4 (Ala. Crim. App. Aug. 27, 2018). Leading the grand jury endeavor was Matt Hart, a prosecutor with the Attorney General's office.

C. The Leaks

Like any scandal involving elected officials, intrigue and innuendo abounded, and those with the inside-know were in short supply due to the confidential nature associated with an on-going grand jury proceeding. One person claiming inside knowledge of the grand jury proceeding was an Alabama state representative, who would occasionally call Henry to discuss the happenings inside the grand jury room.

Believing that this representative—and others—were receiving information via improper

leaks from Matt Hart as a means of undermining Mike Hubbard, Henry spoke with Mike Hubbard's criminal defense attorney about the leaks. Hubbard's counsel then notified the U.S. Attorney's Office and told Matt Hart about it as well.

Following Henry's conversations with Hubbard's attorney, Henry was subpoenaed to appear before the grand jury.

D. Henry's Grand Jury Testimony

Henry appeared before the grand jury on January 24, 2014. At the outset of Henry's testimony, Hart warned Henry about the need to tell the truth and emphasized the secrecy of the proceeding itself and of Henry's testimony. Aside from testifying to subject matters related to Hubbard's ultimate indictment, near the end of Henry's testimony, Hart gave Henry warnings about the Alabama Grand Jury
Secrecy Act, again reinforcing the secrecy of the proceedings and of Henry's testimony. Hart also warned Henry of the criminal penalties associated with violations of the Act.

Henry claims that the tone of Hart's warnings was very imposing and ominous. Henry also alleges that Hart acted in an intimidating manner.

E. Events After Henry's Grand Jury Testimony

After his testimony before the grand jury, Henry learned of a recording, released on www.al.com, of a conversation between Hart and radio host and local attorney, Baron Coleman, that occurred on January 23, 2014. In that conversation, Hart apparently told Coleman that "we are on utterly solid ground shutting people up" by bringing witnesses before the grand jury, due to the Act's "very broad prohibition" on disclosure of information from inside the grand jury room.

Based on Hart's warnings in the grand jury room and Hart's statements in the recording, Henry believes that he was subpoenaed by Hart for the sole and improper purpose of preventing Henry from disclosing his knowledge about the grand jury leaks and discussing in a public forum what Henry believes were Hart's lies to the grand jury.[3]

On September 25, 2017, Henry filed this lawsuit[4] claiming he wants to, but cannot due to the

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[3] After the indictment, Hubbard and his defense attorneys raised Hart's alleged prosecutorial misconduct in a motion to dismiss the indictment filed in Hubbard's criminal case in Lee County. Ultimately, the presiding circuit court judge concluded there was insufficient evidence of misconduct to dismiss the charges. (*See* Doc. 109-5.)

[4] This matter was reassigned to the undersigned on

Act and the threats from Hart, discuss in an open, public forum his knowledge about grand jury leaks, his communications and dealings with Mike Hubbard, Matt Hart, and others, his appearance and testimony before the grand jury, and his observations and opinions concerning perceived prosecutorial misconduct by Hart in the grand jury room.[5]5 (*See* Doc. 1.)

Henry brings both facial and as-applied challenges under the First Amendment to the following provisions in the Act:

1) Ala. Code § 12-16-215, providing in relevant part as follows: "No . . . past or present grand jury witness . . . shall willfully at any time directly or indirectly, conditionally or

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December 17, 2019. Since that time, Hubbard's criminal case reached a final conclusion with a decision from the Alabama Supreme Court on April 10, 2020, *see Ex parte Hubbard*, No. 1180047, 2020 WL 1814587 (Ala. Apr. 10, 2020). Hubbard's Petition for a Writ of Certiorari, filed with the United States Supreme Court, was denied on February 22, 2021, *see Michael Gregory Hubbard v. Alabama*, Supreme Court Case No. 20-986.

[5] At the court's request, the parties have filed a stipulation regarding the various topics and subjects on which Henry wishes to speak. In reviewing these items, the court groups them into the aforementioned topics: prior knowledge and grand jury proceeding.

unconditionally, by any means whatever, reveal, disclose or divulge or cause to be revealed, disclosed or divulged, any knowledge or information pertaining to any grand juror's questions, considerations, debates, deliberations, opinions or votes on any case, evidence, or other matter taken within or occurring before any grand jury of this state."

2) Ala. Code § 12-16-216, providing in relevant part as follows: "No 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 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.*"

(emphasis added).

Henry seeks from this court a declaration that the aforementioned provisions of the Act violate the First Amendment and an injunction against the enforcement of these provisions against him. Henry further requests that the court order the release of the transcript and audio recording of Henry's grand jury testimony and enjoin the Defendant from providing "inaccurate and misleading warnings to grand jury witnesses that they can never reveal their grand jury testimony." (Doc. 1, p. 20.)

The Defendant's summary judgment briefs note that Counts III and IV target the enforcement mechanisms of § 12-16-215 and § 12-16-216, rather than assert actual separate claims. (*See* Doc. 108, p. 19.) Henry does not dispute that point, and the court will thus limit its analysis to those two operative sections of the Act.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). No genuine

issue of material fact exists if the opposing party fails to make a sufficient showing on an essential element of his case as to which he would have the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Just as important, the "mere existence of a scintilla of evidence in support of the [opposing party's] position" is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In making this assessment, the court must "view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party," *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997) (citation omitted), and "resolve all reasonable doubts about the facts in favor of the non-movant," *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990) (citation omitted).

The applicable Rule 56 standard is not affected by the filing of cross-motions for summary judgment. *See, e.g., Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005). "Cross-motions . . . will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed . . . ." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984) (citation omitted). When both parties move for summary judgment, the court must

evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. *Am. Bankers Ins. Group*, 408 F.3d at 1331.

III. ANALYSIS

A. Differentiating Between Facial and As-Applied Challenges

Although he does little to clearly argue it, Henry apparently brings[6]6 facial and as-applied challenges to the Act, particularly Ala. Code § 12-16-216, and to a much lesser extent, § 12-16-215.

"A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1329 (11th Cir. 2001). "Generally, for a facial challenge to succeed, 'the challenger must establish that no set of

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[6] Even if he characterized his claims as both facial and as-applied challenges, the court is not bound by Henry's designations and looks to the Complaint to determine what claims, if any, his allegations support. *See Harrell v. The Fla. Bar*, 608 F.3d 1241, 1259 (11th Cir. 2010) (citing *Jacobs v. The Florida Bar*, 50 F.3d 901, 905 n.17 (11th Cir. 1995)).

circumstances exists under which the Act would be valid.'" *Indigo Room, Inc. v. City of Fort Myers*, 710 F.3d 1294, 1302 (11th Cir. 2013) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Under the Supreme Court's holding in *Salerno*, generally, a law is not facially unconstitutional unless it "is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *Salerno*, 481 U.S. at 745). In a facial challenge, the claimed constitutional violation derives from the terms of the statute, not its application. *See* Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. at 1229–38. The court's remedy should therefore be directed at the statute itself and injunctive and declaratory in nature, for a successful facial challenge results in the statute being invalidated. *See Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011).

However, while a plaintiff mounting a facial attack must usually prove "that no set of circumstances exists under which the [statute] would be valid," *Salerno*, 481 U.S. at 745, "(o)verbreadth is an exception to that rule." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1232 (11th Cir. 2018) (citing *Salerno*, 481 U.S. at 745). It is an exception because of the concern that "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976); *see also Broadrick v.*

Oklahoma, 413 U.S. 601, 612 (1973).

In a facial overbreadth challenge, the plaintiff must show that the statute punishes a substantial amount of First Amendment-protected free speech, "judged in relation to the statute's plainly legitimate sweep." *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Fla. Office of Legislative Servs.*, 525 F.3d 1073, 1079 (11th Cir. 2008). "Substantial overbreadth" is not a precisely defined term, but it requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010) (citing *United States v. Williams*, 553 U.S. 285, 293 (2008)). Given the threat to freedom of expression, traditional rules of standing are altered to permit litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. Thus, a statute found to be overbroad is "totally forbidden

until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Id*. at 613. The Supreme Court has recognized the overbreadth doctrine as "strong medicine" that should be "employed . . . sparingly and only as a last resort." *Id*. Thus, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id*. at 615.

While it is well-established that, in the area of free speech, an overbroad law may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable, *see Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *Taxpayers for Vincent*, 466 U.S. at 799, because Henry seeks to vindicate his own rights, his challenge may actually be an as-applied challenge. *See Harrell*, 608 F.3d at 1259 (noting the Supreme Court's characterization of a challenge as being "as-applied" when the plaintiff "alleged that but for the prohibition, he would engage in the prohibited behavior") (citing *Jacobs*, 50 F.3d at 906). But as discussed herein, an analysis of Henry's as-applied claim is unnecessary in light of the statute's facial overbreadth.

B. Henry's Facial Challenge to the Act's

Restrictions on Disclosure of "Prior Knowledge"

Henry argues that language in the Act, particularly Ala. Code § 12-16-216, is facially overbroad, relying primarily on a United States Supreme Court decision that partially invalidated Florida's grand jury secrecy statute on First Amendment overbreadth grounds. (Doc. 119, pp. 4-5.) Specifically, in *Butterworth v. Smith,* the Supreme Court affirmed an Eleventh Circuit decision holding that "the provisions of [the statute] prohibiting 'any other person' from disclosing the nature of grand jury testimony are unconstitutional to the extent that they apply to witnesses *who speak about their own testimony* after the grand jury investigation is terminated." *Butterworth*, 494 U.S. at 628-29 (citing 866 F.2d 1318, 1319, 1321 (11th Cir. 1989) (emphasis added)). *See also Butterworth*, 866 F.2d at 1319 ("Appellant argues that [the statute] is *unconstitutionally overbroad*, in that it prohibits any person appearing before the grand jury from ever disclosing matters testified to, even long after the investigation is terminated.") (emphasis added).

1. The *Butterworth* Decision

In *Butterworth*, the Supreme Court balanced a Florida grand jury witness's asserted First Amendment rights against Florida's interests in preserving the confidential nature of its grand jury

proceedings. 494 U.S. at 630–31. There, a reporter wanted to publish a story detailing information he had learned about a public corruption matter, but was prohibited from doing so because he had testified about the same corruption matter before a state grand jury. The Supreme Court held that Florida's interest in continued secrecy under the statute in question, which provided that no one could "publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, *any testimony of a witness* examined before the grand jury, *or the content, gist, or import thereof*," had to be weighed against the reporter's First Amendment rights to make a truthful public statement about the investigation. *Butterworth*, 494 U.S. at 635–36 (discussing Fla. Stat. § 905.27 (1989)). The Court found that the restrictive effect of the Florida statute was "dramatic," stating:

> Before he is called to testify in front of the grand jury, [the reporter] is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the 'content, gist, or import' of his

> testimony. The ban extends not merely to the life of the grand jury but into the indefinite future. The potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent.

494 U.S. at 635–36.

In effect, the Supreme Court concluded that the language of the Florida statute captured the knowledge and information held by the witness before he entered into and testified during the grand jury proceeding because it fell within the language prohibiting a witness from "disclos[ing], divulg[ing], or communicat[ing] . . . in any manner whatsoever" "*the content, gist, or import thereof*" of "*any testimony of a witness* examined before the grand jury." Thus, for example, if a witness testified before the grand jury about a particular matter of which he had lawful knowledge before giving his testimony, the statute, by its language, prohibited the witness from later discussing that same matter because it was the subject of his testimony.

According to Henry, Ala. Code §§ 12-16-215 and 12-16-216, like the Florida grand jury secrecy statute that was partially invalidated in *Butterworth*, have a similarly "dramatic" impact on an individual's ability to speak on matters of public concern about which the witness knew prior to

testifying before a grand jury. While the sections differ somewhat from the Florida statute that was analyzed in *Butterworth*, Henry argues that the Alabama provisions also contain broad language, which clearly impacts the free speech rights of witnesses in Alabama grand jury matters.

The Alabama Attorney General, on the other hand, argues that the Act's language, unlike Florida's language, does not pose any unconstitutional infringement on a grand jury witness's right to speak publicly about matters that the grand jury witness knew *before* setting foot inside the grand jury room because these two statutes, by their language, do not capture prior knowledge. (Doc. 108, pp. 20- 22.) Therefore, argues the Attorney General, the Act survives First Amendment scrutiny under *Butterworth*.

2. Ala. Code § 12-16-215

The court begins with the text of Ala. Code § 12-16-215. There, a grand jury witness, such as Henry, is precluded from "reveal[ing], disclos[ing] or divulg[ing]" "at any time" "directly or indirectly" "by any means whatsoever" "any knowledge or information pertaining to any *grand juror's* . . . considerations, . . . evidence, or any other matter taken within or occurring before any grand jury of this state." Henry argues that this language captures and therefore includes prior knowledge. The Attorney General says it does not. But what the parties do seem to agree upon, is that if the language

does include prior knowledge, then the Eleventh Circuit's and Supreme Court's decisions in *Butterworth* hold that the language unconstitutionally infringes upon Henry's First Amendment rights.

Here, reviewing the language of Ala. Code § 12-16-215 even in the broadest sense, the court strains to find any construction that would capture a witness's prior knowledge. Perhaps such would be captured under the language prohibiting a witness from disclosing the evidence presented to a grand juror for consideration, which in Henry's case, would be the facts and information that Henry testified to before the grand jury. But it appears that, at its core, § 12-16-215 is directed toward the disclosure of the grand jury's actions, such as its votes, deliberations, debates and discussions, issues that Henry does not seek permission to openly discuss.

Because only through an extremely strained and unorthodox reading of § 12- 16-215 can it arguably be interpreted as capturing a witness's prior knowledge, the court concludes that § 12-16-215 does not run afoul of *Butterworth*. The fact that Henry gives little mention to it in his summary judgment brief suggests that Henry does not challenge this interpretation either.

3. Ala. Code § 12-16-216

But aside from § 12-16-215, Henry also raises a challenge to § 12-16-216. That section precludes a grand jury witness, such as Henry, from "reveal[ing],

disclos[ing] or divulg[ing]" "at any time" "directly or indirectly" "by any means whatsoever" "any knowledge of the form of, nature or content of any physical evidence presented" or "any question propounded" or "any comment made by any person in response thereto or any other evidence, testimony or conversation occurring or taken therein." The Act does not provide definitions for the terms contained in § 12-16-216. Instead, the public is left to use its best guess as to the speech that is captured by § 12-16-216's language.

On its face, this section appears broader in application than § 12-16-215 and appears to capture prior knowledge because such would constitute knowledge of the "*nature or content*" of physical evidence presented, questions propounded and responses thereto, and other testimony taken during the grand jury proceeding. In that context, the language at issue is not too different from the language of Florida Statute § 905.27 (1989) at issue in *Butterworth*, which provided it was "unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person . . . any testimony of a witness examined before the grand jury, or the *content, gist, or import thereof*." Fla. Stat. § 905.27 (1989) (emphasis added). The Supreme Court explained the issue thusly:

> (B)efore he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted

> public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the *"content, gist, or import" of his testimony*. The ban extends . . . into the indefinite future. The potential for abuse of the Florida prohibition . . . as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent. We agree with the Court of Appeals that the interests advanced by the portion of the Florida statute struck down are not sufficient to overcome respondent's First Amendment right to make a truthful statement of information he acquired on his own.

494 U.S. at 635–36 (emphasis added).

Here, though the Lee County grand jury has long since terminated its proceedings against Speaker Mike Hubbard, and though Henry wishes to discuss his own conversations that occurred before Henry set foot in the grand jury room, § 12- 16-216's text, plainly read, arguably would sanction a prosecution of Henry for doing so. Like the Florida statute at issue in *Butterworth*, the Act's language can be read to prohibit a witness's ability to communicate about "information on matters of

admitted public concern about which he was free to speak at will" prior to the witness testifying about that information in the grand jury room because those matters relate to the "nature or content" of responses to questions propounded and the "nature or content" of other evidence, testimony, and conversations occurring within the grand jury proceeding. *Butterworth*, 494 U.S. at 635. As a result of this overly broad language, the Act captures a witness's prior knowledge and thus impermissibly restricts that witness's First Amendment rights pursuant to *Butterworth*. *Id.*

The Attorney General maintains both directly and through its expert witness that no grand jury witness has ever been prosecuted for divulging this "prior knowledge," and so there is simply no First Amendment infringement here. (*E.g.*, Doc. 108, p. 7.)[7] This does not, however, mean a prosecutor will

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[7]Equally unpersuasive is the Attorney General's contention that because prosecutors have interpreted the Act in a way that has not precluded grand jury witnesses from speaking about their prior knowledge, the Act is "readily" subject to competing interpretations, thus necessitating the application of the doctrine of constitutional avoidance. (Doc. 108, p. 22.) While the practice in the Eleventh Circuit is to "uphold a state statute against a facial challenge if the statute is readily susceptible to a narrowing construction that avoids constitutional infirmities,"

not do so in the future.[8] The willingness of the

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the Circuit also cautions against "rewrit[ing] the clear terms of a statute in order to reject a facial challenge," particularly when a federal court is reviewing a state statute. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1256, n.6 (11th Cir. 2005) (citing *Fla. Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326 (11th Cir. 2001) (citing in turn *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993) (internal marks omitted)). Importantly, there is no Alabama Supreme Court decision that limits the Act, and a narrowed reading would require this court to rewrite the basic terms of the statute by inserting limiting language. The court is reluctant to do so. Instead, the task of drafting a constitutionally permissible grand jury secrecy statute should be left to the state legislature. *See Dimmitt v. City of Clearwater,* 985 F.2d 1565 (11th Cir. 1993). In any event, even if the Act could be construed in a constitutional manner, overbreadth is an exception to the rule that a plaintiff mounting a facial attack must prove that no set of circumstances exists under which the challenged statute would be valid. *Valencia Coll.*, 903 F.3d at 1232.

[8] In having found that § 12-16-216 is, in part, facially unconstitutional, and in light of the Attorney General's insistence that he has not and will not prosecute a grand jury witness for disclosing prior

executive branch to follow the law in a manner that is constitutional does not affect whether a statute is facially invalid; if the text is repugnant to the Constitution, that is the end of the matter. *See, e.g., Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985) ("The danger in an overbroad statute is not that actual enforcement will occur or is likely to occur, but that third parties . . . may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute.") (citing *Taxpayers for Vincent*, 466 U.S. at 801). "It is no answer, therefore, to this facial challenge that the statute has not been enforced" against third parties who could conceivably be affected by the statute's overbreadth. *E.g., Clean Up '84*, 759 F.2d at 1514. A government's past practice of non-enforcement does not negate a statute's First Amendment chilling effect. *See Parker v. Judicial Inquiry Comm'n of Alabama*, Case No. 2:16-CV-442-WKW, 2017 WL 3820958, at *5 (M.D. Ala. Aug. 31, 2017) (Watkins, J.) ("What matters is whether the Attorney General 'has the power' to enforce the challenged provision against the plaintiff.") (citing *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1246 (11th Cir. 1998)).

Here, we have a clear example of such a

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knowledge, the court pretermits discussion under an as-applied theory.

chilling effect. Counsel for the Attorney General admitted at oral argument that a witness who has appeared before a grand jury would have no way of guaranteeing his freedom from prosecution if he wanted to talk about his own testimony, short of consulting with an attorney about what is precisely permissible to discuss and what is not. That admission itself demonstrates the law's overbreadth under the First Amendment: "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119.[9]

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[9] The court is mindful, especially given our country's current national environment, of the general necessity for grand jury proceedings to be kept out of the public view. *See Anonymous Grand Juror #1 v. Commonwealth of Kentucky*, Case No. 20-CI-5721 (KY. Circ. Ct. 2020); *see also Doe v. Bell*, 969 F.3d 883 (8th Cir. 2020); *Doe v. McCulloch*, 542 S.W.3d 354 (Mo. Ct. App. 2017). Again, the court only finds § 12-16-216 invalid insofar as that provision can be read to prohibit disclosure of a witness's prior

4. Remedy

What the court can practically do to remedy the problematic language in Ala. Code § 12-16-216 is a tricky question. *See, e.g.,* Fallon, 113 Harv. L. Rev. 1321, 1339 (2000) ("A court has no power to remove a law from the statute books. When a court rules that a statute is invalid--whether as applied, in part, or on its face--the legal force of its decision resides in doctrines of claim and issue preclusion and of precedent."). The court notes that although it is upholding a facial challenge against one section in the Act, the entire Act is not rendered invalid thereby under the venerable rule that statutes are to be rendered invalid partially, leaving in place the rest of the law. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) ("the normal rule that partial, rather than facial, invalidation is the required course."). There is no severability provision specifically contained within the Act. "In determining whether to sever a constitutionally

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knowledge after the grand jury has completely finished its work, nothing more. *See generally Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

flawed provision, courts should consider whether the balance of the legislation is incapable of functioning independently," *United States v. Romero–Fernandez*, 983 F.2d 195, 196 (11th Cir. 1993), and whether partial invalidation of the statute "would be contrary to legislative intent in the sense that the legislature would not have passed the statute without the invalid portion," *Smith v. Butterworth*, 866 F.2d at 1321. The court's inquiry "does not, however, begin and end there. That is so, because courts will strive to uphold acts of the legislature." *State ex rel. Pryor ex rel. Jeffers v. Martin*, 735 So. 2d 1156, 1158 (Ala. 1999) (citing *City of Birmingham v. Smith*, 507 So. 2d 1312, 1315 (Ala. 1987) (quotations omitted)).

Under applicable Alabama law, "if a portion of a legislative enactment is determined to be unconstitutional but the remainder is found to be enforceable without it, a court may strike the offending portion and leave the remainder intact and in force." *Martin*, 735 So. 2d at 1158. "Nevertheless, the authority of a court to eliminate invalid elements of an act and yet sustain the valid elements is not derived from the legislature, but rather flows from powers inherent in the judiciary." *Id.* (citing 2 Norman J. Singer, *Sutherland Statutory Construction*, § 44.08 (5th ed. 1992) (quotations omitted)).

Alabama Code § 12-16-216 is severable from the rest of Act, as shown by the similar severability analysis undertaken by the Eleventh Circuit in

Butterworth. There, as here, "(t)he remainder of the statute accomplishes the legislature's general intent of enhancing the integrity of the grand jury system by providing for the confidentiality of the proceedings." 866 F.2d at 1321.

To be clear, the court is not striking Ala. Code § 12-16-216 in its entirety, nor is it striking any of the specific language contained therein. Rather, this court's finding is that, pursuant to *Butterworth* and the governing First Amendment overbreadth doctrine, Ala. Code § 12-16-216 is unconstitutional only in its application to Henry's disclosure of information he possessed prior to his testimony before the grand jury. Accordingly, summary judgment as to Henry's facial challenge to the Act is due to be GRANTED, in part, as to Henry, and DENIED, in part, as to the Attorney General.

In his Complaint, Henry also asks this court to issue a permanent injunction to prevent the Attorney General from enforcing the Act against him. Under traditional equitable principles, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. *See Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). Neither Henry nor the Attorney General, however, address these factors or the request for an injunction in their respective summary judgment motions. Having declared the Act unconstitutional as it applies to Henry's prior knowledge, and given

the parties' lack of briefing on the issue, the court declines to issue an injunction here. Instead, the court expects that the parties will act in accordance with the court's order.

C. Henry's Ability to Speak About the Grand Jury Proceeding

While *Butterworth* leads the way as it concerns any restriction by the State of Alabama on a grand jury witness's efforts to discuss and divulge prior knowledge, *Butterworth* does not definitively answer the question as it concerns Henry's desire to discuss what happened in the grand jury room, whether that be which questions he was asked, which questions he was not asked, Hart's demeanor and actions, and any belief by Henry of prosecutorial misconduct occurring inside the grand jury room. Indeed, in *Butterworth*, the Supreme Court purposely did not address the right of a witness to discuss his "experience" before the grand jury. 494 U.S. at 629 n.2. The Supreme Court instead limited its holding to allow the witness to "divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Id*. at 631-32.

The *Butterworth* Court stated that its holding

was limited to a grand jury witness's testimony, as that was how the question was limited by the Eleventh Circuit, to which the plaintiff did not object. 494 U.S. at 629, n.2 ("In his complaint, respondent also sought a declaration that he was entitled to divulge his 'experience' before the grand jury. Whatever this term might encompass, it is clear that the Court of Appeals limited its holding to a witness' 'testimony' before the grand jury. Since respondent has not sought review of any portion of this ruling, we similarly limit our holding to the issue of a witness' grand jury testimony."); *see* 866 F.2d at 1320–21 ("We thus conclude that [the statute] is unconstitutional insofar as it applies to witnesses who speak about the nature of their own grand jury testimony after the investigation has been completed.").

As Justice Scalia noted in his *Butterworth* concurrence, it was "[q]uite a different question presented, however, by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires 'not on his own' but only by virtue of being made a witness." 494 U.S. at 637.

Thus, Henry's case varies from *Butterworth* in a critical way. He not only wants to divulge information that he possessed prior to his grand jury testimony, but he also wants to publicly disclose information he learned as a direct result of his participation in the Lee County grand jury proceeding. The question then is whether the First

Amendment requires the State of Alabama to allow Henry to disclose both the former and the latter.

To this point, the court has only dealt with Henry's right to disclose information that he knew prior to entering the grand jury room. The next question this court must answer is whether Henry may speak to the things he heard, saw, and experienced within that deliberative chamber. This issue implicates the full range of justifications for the secrecy of grand jury deliberations. *See Douglas Oil*, 441 U.S. at 218; *Butterworth*, 494 U.S. at 629. The question is complicated by the fact that the grand jury investigation at issue is in the distant past, and the criminal proceeding against Hubbard only recently concluded. As the matters Henry wishes to discuss comprise speech that attempts to hold a public official to account, this speech lies at the very core of First Amendment protection. *See Butterworth*, 494 U.S. at 632.

Instructive here is another recent high-profile case, *Doe v. Bell*. There, the Eighth Circuit upheld the State of Missouri's grand jury secrecy law as to a grand juror who sought to talk about matters of public interest that she witnessed during the grand jury proceeding that investigated the police shooting of Michael Brown in Ferguson, Missouri. *See Doe v. Bell*, 969 F.3d 883, 894 (8th Cir. 2020) (upholding Mo. Ann. Stat. § 540.320).[10] This grand juror argued

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[10] The statute at issue in *Bell* reads in full: "No grand

that she should have been able to discuss in public what transpired during the grand jury proceeding in the interests of justice and transparency. The juror believed the prosecutor released misleading information to the public following the conclusion of the grand jury's work in that case, where ultimately, the officer who shot Michael Brown was not indicted. *See* 969 F.3d at 886.

The *Bell* court analyzed First Amendment concerns in determining whether the Missouri statute was narrowly tailored to achieve a compelling governmental interest as applied to the speech in which the plaintiff averred she wanted to engage, and found that the statute was narrowly tailored. *Id*. at 889. The court held that, among other things, the Missouri statute protected the identity of witnesses and the information they presented to the grand jury, protected the secrecy of the grand jury's deliberative process, and protected the unindicted accused from public ridicule or opprobrium. The

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juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto; nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section shall be deemed guilty of a class A misdemeanor." Mo. Ann. Stat. § 540.320.

court also held that the statute did not sweep too broadly, did not permit vast swaths of speech that would undermine the state's otherwise compelling interest such that the statute cannot be accurately said to advance its stated purposes, and that there was no more limited means by which the state could advance its interest in preserving its functioning grand jury system. *Id.* at 892-894.

Here, unlike in *Bell*, this court is faced with a state grand jury witness, not a grand juror, who wishes to recount his own personal experience within the grand jury proceedings. The court notes that the basic presumption in federal criminal cases is that grand jury witnesses are not bound by secrecy with respect to the content of their testimony. *See, e.g., In re Grand Jury*, 490 F.3d 978, 985 (D.C. Cir. 2007) ("The witnesses themselves are not under an obligation of secrecy."); *see also id.* at 989 ("A grand jury witness is legally free to tell, for example, his or her attorney, family, friends, associates, reporters, or bloggers what happened in the grand jury. For that matter, the witness can stand on the courthouse steps and tell the public everything the witness was asked and answered.") (citing Fed. R. Crim. P. 6(e)(2)(A)-(B); Fed. R. Crim. P. 6, Advisory Committee Notes, 1944 Adoption, Note to Subdivision (e)). But that exception in the federal context does not render the state's interest in its own grand jury proceedings any less compelling, as courts have upheld state law restrictions on grand

jury witnesses' disclosure of information learned only by participating in grand jury proceedings where the restrictions were limited in duration, *see Butterworth*, 494 U.S. at 632, or allowed for broad judicial review, *see Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (agreeing state court grand jury witness could be precluded from disclosing information learned through giving testimony, but noting state law provided a mechanism for judicial determination of whether secrecy was still required).

As in *Bell*, the Alabama statute is a content-based restriction of speech, and so the court must evaluate whether the Alabama statute is narrowly tailored to the state's compelling interest in maintaining grand jury secrecy against Henry's desire to publicly recount his experience before the Lee County grand jury. *See, e.g., Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 861 (11th Cir. 2020) ("because the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny.").

1. Compelling Interest

That Alabama's interest in grand jury secrecy is compelling needs little repetition, for as the Supreme Court has recounted, that interest is a venerable part of our common law heritage from England. *Douglas Oil*, 441 U.S. at 219 n.9 ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings

have been kept from the public eye. The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system.") (citation omitted). Grand jury secrecy "serves several interests common to most such proceedings, including enhancing the willingness of witnesses to come forward, promoting truthful testimony, lessening the risk of flight or attempts to influence grand jurors by those about to be indicted, and avoiding public ridicule of those whom the grand jury declines to indict." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 876 (2d Cir. 2008), *as modified* (Mar. 26, 2009) (citing *Douglas Oil*, 441 U.S. at 218–19).

However, "the invocation of grand jury interests is not some talisman that dissolves all constitutional protections;" instead, "grand juries are expected to "operate within the limits of the First Amendment, as well as the other provisions of the Constitution." *Butterworth*, 494 U.S. at 630 (citations and quotations omitted). The court therefore turns next to the justifications proffered by the State of Alabama. *Id.* ("We must thus balance respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings.").

Alabama Code § 12-16-214 lists four interests protected by the state's grand jury secrecy statutes, including that grand jurors have the utmost freedom in their deliberations without fear of outside

influence, that witnesses may testify freely without fear of retaliation, preventing the accused from fleeing prosecution, and protecting the reputations of those falsely accused. *See* Ala. Code § 12-16-214. The Attorney General also offers the testimony of Ellen Brooks, an expert with more than forty years of experience as a prosecutor for the State of Alabama. (*See* Doc. 109-2.) Brooks articulates five primary reasons for the continued maintenance of the veil of secrecy over all that happens in the grand jury room. First, Brooks believes that criminal suspects and the media will put pressure on grand jurors. Second, witnesses might face external pressure and be told not to answer questions. Third, when a suspect learns of a grand jury investigation, documents or other evidence may "disappear." Fourth, continued secrecy, even after the conclusion of the grand jury term, protects the accused because prosecutors can conduct investigations while ensuring that the reputation of the accused remains intact. Fifth, new grand jury proceedings against a suspect can be instigated years later based on new evidence. These final two examples, Brooks claims, show the importance of secrecy long after the investigation is completed.

Because the grand jury proceeding against Mike Hubbard has concluded and because Hubbard's criminal matter has recently come to an end, only two of the justifications listed within the statute and offered by Brooks directly bear on the case at bar:

protecting the reputation of those persons falsely accused of criminal acts and safeguarding the ability of prosecutors to later bring new charges against a suspect.

First, as to protecting the reputation of the accused, although Hubbard was indicted and convicted on multiple counts, the public does not know whether or not the grand jury considered evidence of other alleged crimes for which an indictment did not issue. Should Henry be permitted to discuss what transpired within the grand jury proceeding, he could potentially disclose evidence or accusations which are not now publicly known, further jeopardizing Hubbard's reputation as well as the reputations of others who were discussed during Henry's testimony. With regard to this specific interest, there is no indication that Mike Hubbard wants or has asked Henry to publicly speak about what transpired within the grand jury proceeding. Alabama's interest in protecting the reputation of those accused of criminal acts thus remains sufficiently compelling to protect the secrecy of the proceedings at issue in this case.

Second, should Henry reveal evidence of other alleged crimes or even generally discuss what transpired within the grand jury room, his disclosures could impede the prosecutor's ability to instigate new proceedings against an accused. This interest is equally compelling, given that the proper functioning of the grand jury system depends on the

secrecy of those proceedings. *See Bell*, 969 F. 3d at 892.

While the public interests that the Attorney General claims are served by the Act may be limited under the particular facts in the instant case, the secrecy interests behind the Act nevertheless do exist and are real, especially when viewed through the broader lens of the very high profile prosecution of Mike Hubbard.[11]

2. Henry's First Amendment Assertions

Furthermore, and dispositive here, unlike most other First Amendment cases where content-based regulations are challenged, the Supreme Court has held that piercing grand jury secrecy requires the proposed speaker's justifications to also be weighty; that is, the burden is not solely on the state to show a "compelling" interest. *See Douglas Oil*, 441 U.S. at 222-223. The grand jury's

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[11] Indeed, when grand jury proceedings are challenged in a public forum, delicate matters can become complicated and distorted. For example, the release of materials from the grand jury inquiries into the police shootings of Michael Brown and Breonna Taylor sparked a rancorous public debate regarding what should or should not have resulted from those proceedings. Without commenting on what transpired in those particular cases, the court is cognizant that sensitive matters of public import require sober and deliberate resolution in the judiciary rather than in the court of public opinion.

"indispensable secrecy . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (citation and quotations omitted). This court "must thus balance respondent's asserted First Amendment rights against [the state's] interests in preserving the confidentiality of its grand jury proceedings." *Butterworth*, 494 U.S. at 630–31 (citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (balancing the state's interest in preserving confidentiality of judicial review proceedings against the rights of newspaper reporting on such proceedings); *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972) (balancing state interest in effective grand jury proceedings against burden on reporters' news gathering from requiring disclosure of sources)).

Here, Henry's offered interest—ostensibly, telling the public about prosecutorial misconduct he witnessed in the grand jury room—especially as it relates to matters that he only learned by virtue of being present in the room and having participated in the proceeding, would eliminate the secrecy of the Lee County grand jury's proceedings for the rather weak purpose of essentially politicizing the grand jury process that indicted Mike Hubbard. After all, Henry filed this lawsuit while the Hubbard case was

ongoing, perhaps in a roundabout attempt to publicly challenge the accusations of wrongdoing against Hubbard which ultimately resulted in Hubbard's criminal conviction.

Harkening back to the "public pressure" cases of the recent past, the court considers what would happen if a grand jury witness were to speak about a grand jury investigation of an innocent man who is not yet indicted. Outside pressure might warp the very purpose of the grand jury: to stand as a barrier on behalf of every citizen between the state's prosecution and the not-yet indicted citizen. "To be sure, in a case where the name of the accused and the facts are widely known, this concern is of less importance, (b)ut the fact that much of the evidence is public does not lessen [the state's] compelling interest in ensuring [grand jury participants] do not use the information they gathered as part of the grand jury process to impugn the innocence of the accused with charges they could not agree to collectively." *Bell*, 969 F.3d at 893 (citing *Douglas Oil*, 441 U.S. at 218 n.8 (noting that petitioners were entitled to the "protection" of grand jury secrecy even though they had already been indicted and had pleaded nolo contendere)). "Only the grand jury as a whole is in a position to have competently considered . . . the relevant evidence." *Bell*, 969 F.3d at 893. "The interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." *Douglas Oil*, 441

U.S. at 222.

3. Least Restrictive Means

Simply put, there is no more limited means by which Alabama can advance its interest in preserving the functioning of the grand jury system other than mandating that its proceedings remain secret, for if a grand jury witness is to be allowed to speak about his "experiences," or the quality of the evidence discussed, or the name of the accused, then not only will jurors "hesitate to discuss matters candidly or to vote their conscience out of fear of future publicity," but the ability of the state to prosecute alleged criminals would be severely harmed as well. *See Bell*, 969 F.3d at 894 (citing *Butterworth*, 494 U.S. at 636-37 (Scalia, J., concurring)); *see also Douglas Oil Co.*, 441 U.S. at 218-19 ("There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment."). The court "must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." *Douglas Oil*, 441 U.S. at 222.

The court is mindful that there is a bona fide interest in ferreting out prosecutorial misconduct, including misconduct which takes place within a grand jury proceeding. But there is already an outlet for addressing that interest: voicing concerns to the court overseeing the grand jury itself. And if a criminal indictment results from the grand jury's

proceedings, concerns about a rogue prosecutor could then be directed to the judge overseeing the criminal trial of the accused. Indeed, that is precisely what occurred in Mike Hubbard's criminal proceeding. (*See* Doc. 109-5.)

IV. CONCLUSION

In sum, drawing the line at what Henry knew prior to setting foot in the grand jury room, the First Amendment protects Henry's right to publicly speak about his own prior knowledge, but it does not protect his desire to speak about what he learned only as a result of his participation in the grand jury proceeding. There is no more limited means by which Alabama can advance its compelling state interest in preserving the functioning of the grand jury system. If Henry were to speak on the quality of the evidence or the prosecutor, or what transpired inside the proceeding, he would necessarily undermine the functioning of the grand jury and, as reflected in this case, politicize those proceedings. As the *Bell* court noted, "[w]itnesses in future cases may be less candid. The unindicted may face unending questions about culpability as juror after juror comes forward with their own view of the evidence, feeling pressured to respond either to challenge or defend Doe's views, lest their collective decision be mischaracterized. And in future cases, jurors might

hesitate to discuss matters candidly or to vote their conscience out of fear of future publicity." *Bell*, 969 F.3d at 894. The imposition of secrecy is narrowly tailored to serve Alabama's compelling interest in the confidentiality of its grand jury proceedings.

For the foregoing reasons, the court finds that provisions of the Alabama Grand Jury Secrecy Act, specifically Ala. Code § 12-16-216, are unconstitutionally overbroad to the extent these provisions preclude a grand jury witness from disclosing his prior knowledge in a public forum. The Act otherwise meets constitutional muster. Accordingly, it is ORDERED as follows:

1. The Plaintiff's Motion for Summary Judgment (Doc. 111) is GRANTED in part as to the Plaintiff's overbreadth claim. The motion is DENIED as to all other claims.
2. The Defendant's Motion for Summary Judgment (Doc. 103) is DENIED as to the Plaintiff's overbreadth claim. The motion is GRANTED as to all other claims in the Complaint.
3. The Plaintiff's request for a permanent injunction as to the enforcement of the Act against Henry is DENIED.
4. The Plaintiff's request for an order releasing the transcripts and audio recordings of Henry's 2014 testimony before a Lee County grand jury is DENIED.
5. The Plaintiff's request for a permanent injunction as to the warnings given to grand jury witnesses

is DENIED.

DONE and ORDERED this 31st day of March, 2021.

/s/ R. Austin Huffaker Jr.
R. AUSTIN HUFFAKER, JR. UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Case No. 2:17-cv-638-RAH-JTA(WO)

WILLIAM E. HENRY,

Plaintiff,

v.

STEVEN T. MARSHALL,
In his official capacity as Attorney General of the State of Alabama,
Defendant.

FINAL JUDGMENT

In accordance with the memorandum opinion and order entered on this date, it is the ORDER, JUDGMENT and DECREE of the Court that judgment is entered in favor of the Plaintiff and against the Defendant as to the Plaintiff's overbreadth claim. It is the further

ORDER, JUDGMENT and DECREE of the Court that judgment is entered in favor of the Defendant and against the Plaintiff on all other claims.

Costs are taxed as paid.

The Clerk is DIRECTED to enter this document on the civil docket as a Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

Done, on this the 31st day of March, 2021.

/s/ R. Austin Huffaker Jr.
R. AUSTIN HUFFAKER, JR. UNITED STATES DISTRICT JUDGE

APPENDIX D

In the United States Court of Appeals
For the Eleventh Circuit

No. 21-11483-CC

WILLAME. HENRY, Plaintiff-Appellant
-Cross Appellee,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
Defendant-Appellee
-Cross Appellant,

MILES M. HART,
in his official capacity as Deputy Attorney General
for the State of Alabama and Chief of the Special
Prosecutions Divisions,

Defendant.

Appeal from the United States District Court for the
Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILLIAM PRYOR, Chief Judge, LUCK and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before ethe panel and is DENIED. (FRAP 35, IOP2)

ORD-42