HENRY V. ATTORNEY GENERAL: ELEVENTH CIRCUIT UPHOLDS ALABAMA'S GRAND JURY SECRECY LAW AS CONSTITUTIONAL AND CONCLUDING THAT IT MAY BE APPLIED TO PREVENT A WITNESS FROM DISCLOSING INFORMATION LEARNED BY VIRTUE OF BEING A WITNESS

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In *Henry v. Attorney General*, the Eleventh Circuit clarified the scope and upheld the constitutionality of Alabama's grand jury secrecy law.[1] The case raised two issues: (1) whether Alabama's grand jury secrecy law could "reasonably be read to prohibit a grand jury witness from divulging information he learned before he testified to the grand jury," and (2) whether the law's "prohibition on a witness's disclosure of grand jury information that he learned only by virtue of being made a witness" violates the Free Speech Clause.[2]

The Alabama legislature passed its grand jury secrecy laws in 1975, intending to serve four government interests: (1) give grand juries freedom to deliberate without fear of reprisal or outside pressure, (2) encourage people with relevant information to testify "freely and truthfully," (3) avoid giving criminals or potential subjects of indictment a chance to "flee from the due administration of justice," and (4) preserve the "otherwise good names and reputations" of those falsely accused but exonerated by the grand jury.[3] The language focuses on prohibiting disclosure of "the internal deliberations and opinions of the grand jurors" and "the evidence, questions, answers to questions, testimony, and conversations presented to the grand jury."[4] Any violation is a felony punishable by one to three years imprisonment.[5]

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[1] 45 F.4th 1272 (11th Cir. 2022).

[2] *Id.* at 1276.

[3] *Id.* at 1276–77.

[4] *Id.* at 1277.

[5] *Id.* (quoting Ala. Code § 12-16-225).

Plaintiff William Henry served as an Alabama state representative from 2013–2014, the time of the relevant events in this case.[6] Deputy Attorney General Miles Hart led the prosecution investigating allegations concerning Mike Hubbard, the former Speaker of the Alabama House of Representatives.[7] In October 2014, a grand jury issued twenty-three indictments concerning allegations of Hubbard misusing his office for personal gain.[8] As the investigation progressed, Henry heard rumors that the prosecutor was improperly conducting the proceedings.[9] Henry told Hubbard's team, which then contacted a federal prosecutor.[10] Hart called Henry to testify before the grand jury to question Henry about his leak claims.[11] Although he believed that Hart engaged in prosecutorial misconduct as Henry was testifying before the grand jury, Henry refrained from speaking publicly about what he allegedly witnessed because he was fearful that doing so would violate Alabama's grand jury secrecy laws.[12]

In 2017, Henry sued the Attorney General of Alabama under 42 U.S.C. § 1983, arguing that Alabama's grand jury secrecy laws violated his free speech rights.[13] In the first claim, he alleged that Ala. Code § 12-16-215 prevented him from speaking about the grand jury investigation, leak rumors, and his own testimony.[14] He alleged that the statute was overbroad and unconstitutional, both facially and as applied here.[15] In the second count, he argued that § 12-16-216 prevented him from speaking about what he witnessed in the grand jury room—including the alleged prosecutorial misconduct—and about his own testimony in violation of his First Amendment rights to free speech.[16] In its analysis, the United States District Court for the Middle District of Alabama focused both on information Henry learned on his own and information Henry learned within the grand jury room.[17] The

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[6] *Id.* at 1278.

[7] *Henry*, 45 F.4th at 1277.

[8] *Id.* After extensive litigation, convictions on six counts against Hubbard remained. *Id.*

[9] *Id.* at 1278. Specifically, Henry heard that Deputy Attorney General Hart was leaking information to a witness who was using it "to improperly influence political races in Alabama." *Id.*

[10] *Id.*

[11] *Henry*, 45 F.4th at 1278.

[12] *See id.*

[13] *Id.* at 1278–79.

[14] *Id.* at 1278.

[15] *Id.*

[16] *Id.* at 1278–79.

[17] *Henry*, 45 F.4th at 1279.

district court first found Ala. Code § 12-16-215 did not apply to information Henry had learned before testifying.[18] Thus, the district court upheld this provision as constitutional.[19] With regards to the information Henry learned within the grand jury room, however, the district court further split its analysis before holding § 12-16-216 unconstitutional in part and constitutional in part.

The district court held Ala. Code § 12-16-216 unconstitutionally prohibited the disclosure of information Henry learned *prior* to testifying.[20] The district court also held, however, that § 12-16-216's prohibition against disclosing information learned "'as a direct result of his participation' as a witness" was constitutional under a strict scrutiny standard.[21] Both sides appealed the holdings concerning § 12-16-216, with the Attorney General appealing the district court's first finding and Henry appealing the district court's second finding.[22]

The Eleventh Circuit reviewed the district court's decision *de novo*.[23] The Eleventh Circuit disagreed with the first district court holding, concluding § 12-16-216 was not overly broad because it "could not reasonably be read to prohibit a grand jury witness from divulging information he learned before he testified before the grand jury."[24] The court agreed with the second holding, however, finding that Henry could not disclose information "he learned only by virtue of being made a witness."[25] Notably, the Eleventh Circuit applied a balancing test from *Butterworth v. Smith*[26] to reach its conclusion rather than strict scrutiny.[27]

First, to assess whether a law is overly broad and should be facially invalidated, a court must construe the challenged statute and then ask "whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity."[28] The Eleventh Circuit found that the text of Alabama's statute prohibited four things—none of which applied to "disclosure of information the witness knew before

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1280.
[22] *Id.*
[23] *Henry*, 45 F.4th at 1280.
[24] *Id.* at 1276.
[25] *Id.*
[26] 494 U.S. 624 (1990).
[27] *Henry*, 45 F.4th at 1280–83.
[28] *Id.* at 1290 (quoting United States v. Williams, 553 U.S. 285, 293, 297 (2008)).

testifying."[29] In contrast, Florida's law "more broadly prohibited disclosure of the 'gist' or 'import' of testimony."[30] The court noted, "It's different enough to make a difference."[31] That difference, the Eleventh Circuit implied, meant Alabama's law did not "criminalize[] a substantial amount of protected expressive activity."[32] To avoid any confusion or "constitutional infirmities," the court stated a limiting construction "has and can be placed."[33] "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."[34] Thus, the Eleventh Circuit remanded with instructions for the district court to find for the Attorney General.[35]

Next, to assess the constitutionality of the law as it applies to Henry's free speech rights, the court applied the *Butterworth* balancing test rather than strict scrutiny because strict scrutiny applies to more broad "content-based regulations of speech."[36] The *Butterworth* Court created this balancing test specifically for a "grand jury witness's First Amendment challenge to a state's grand jury secrecy law."[37] *Butterworth* arose out of a Florida reporter alleging he discovered that local authorities committed "improprieties."[38] As a result, the reporter testified before a grand jury and the prosecutor warned him not to reveal his testimony.[39] "Florida's grand jury secrecy law prohibited the disclosure of a witness's grand jury testimony 'or the content, gist, or import thereof.'"[40] The reporter sued, seeking a declaratory judgment on the basis that the law violated his First Amendment rights.[41] The *Butterworth* Court found the Florida law violated the reporter's free speech rights because it prevented him from "making 'a truthful

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[29] *Id.* The four prohibitions are: (1) "knowledge of the form, nature or content of any physical evidence presented to [the] grand jury," (2) the "nature or content of any question propounded to any person within or before [the] grand jury," (3) "any comment made by any person in response" to questions, and (4) "any other evidence, testimony or conversation occurring or taken therein." *See* Ala. Code § 12-16-216.

[30] *Henry*, 45 F.4th at 1292 (quoting *Butterworth*, 494 U.S. at 627).

[31] *Id.*

[32] *See id.* at 1290 (internal quotation marks omitted) (quoting *Williams*, 553 U.S. at 297).

[33] *Id.* at 1292.

[34] *Id.*

[35] *Id.*

[36] *Henry*, 45 F.4th at 1280–87.

[37] *Id.* at 1283.

[38] *Id.* at 1280; *see* Butterworth v. Smith, 494 U.S. 624, 626 (1990).

[39] *Henry*, 45 F.4th at 1280–81.

[40] *Id.* at 1281.

[41] *Id.* (citing *Butterworth*, 494 U.S. at 626).

statement of information he acquired on his own' before becoming a grand jury witness."[42]

The *Butterworth* Court laid out a balancing test, weighing the reporter's "asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings."[43] The key government interests to consider include: "(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."[44]

Here, the Eleventh Circuit found that Henry's interest—of equal weight to that of the reporter's in *Butterworth*—in disclosing alleged government misconduct went to "the core of the First Amendment."[45] However, the court found Henry's interest was outweighed by Alabama's interests in "preserving the confidentiality of its grand jury proceedings."[46] The court found three important differences that tipped the *Butterworth* balancing scale toward Alabama.[47] These differences stem from the fact that Alabama's law applies only to "witnesses disclosing what they learned inside the grand jury room," not outside the grand jury room.[48] Because of this distinction, Alabama's law served all four interests, even the third and fourth.[49] The court found the third factor—"preventing the target of the grand jury investigation from fleeing or trying to influence grand jurors"—relevant despite Hubbard's indictment and imprisonment because "[g]rand jury secrecy safeguards the state's ability to bring future charges . . . if new evidence comes to light."[50] The fourth factor also protected his reputation as the

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[42] *Id.* (quoting *Butterworth*, 494 U.S. at 636).

[43] *Id.* (internal quotation marks omitted) (quoting *Butterworth*, 494 U.S. at 630).

[44] *Id.* (citing *Butterworth*, 494 U.S. at 629–30). "On the reporter's side," publishing information about alleged government misconduct rests "at the core of the First Amendment." *Butterworth*, 494 U.S. 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.'" *Henry*, 45 F.4th at 1281 (quoting *Butterworth*, 494 U.S. at 632)).

[45] *Id.* at 1283–85.

[46] *Id.* at 1281.

[47] *Id.* at 1285.

[48] *Id.* at 1285–86.

[49] *Id.* at 1285–87.

[50] *Henry*, 45 F.4th at 1281, 1285.

"grand jury may have considered evidence of other crimes Speaker Hubbard committed that did[] [not] result in his indictment."[51]

The Eleventh Circuit's ruling bolsters the trajectory of a tradition dating to the fourteenth century. Grand juries began as a "safeguard . . . against an overreaching Crown and unfounded accusations."[52] Over time, "the tradition of secrecy" evolved partially "to ensure the grand jury's 'impartiality,'" resulting in four government interests noted by the *Butterworth* Court in 1990.[53] *Henry v. Attorney General* clarifies a question left unanswered by that Court: whether a "grand jury secrecy law's prohibition on a witness disclosing grand jury information he learned 'only by virtue of being made a witness' violate[s] his First Amendment free speech rights."[54] The answer? It does not. Looking forward, the Eleventh Circuit reinforces the increasing emphasis on secrecy in grand jury proceedings, illuminating the high bar for citizens to overcome to establish their interests outweigh that of the government when it comes to disclosing information learned in proceedings.

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[51] *Id.* at 1285 (citing Doe v. Bell, 969 F.3d 883, 893 (11th Cir. 2020)).

[52] *Id.* at 1283 (internal quotation marks omitted) (quoting Butterworth v. Smith, 494 U.S. 624, 629).

[53] *Id.* at 1281, 1283 (internal quotation marks omitted) (quoting *Butterworth*, 494 U.S. at 629).

[54] *Id.* at 1276 (quoting *Butterworth*, 494 U.S. at 636 (Scalia, J., concurring)).