IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC, Publisher of *THE PALM BEACH POST*,

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of Palm Beach County, Florida; SHARON R. BOCK, as Clerk and Comptroller of Palm Beach County, Florida,

Defendants.

CASE NO.: 50-2019-CA-014681-XXXX-MB
Div.: AG

PLAINTIFF'S OPPOSITION TO DEFENDANT DAVE ARONBERG, AS STATE ATTORNEY OF PALM BEACH COUNTY, FLORIDA'S MOTION TO DISMISS COUNT II OF THE FIRST AMENDED COMPLAINT

Plaintiff CA Florida Holdings, LLC, publisher of *The Palm Beach Post* ("*The Palm Beach Post*") files this opposition to Defendant Dave Aronberg, State Attorney of Palm Beach County's Motion to Dismiss Count II of *The Palm Beach Post's* First Amended Complaint ("Motion"):

I. SUMMARY OF ARGUMENT

The State Attorney believes this action to be "frivolous." Motion at 13. Far from it. This action is an opportunity for an institution of the State of Florida to exercise its authority, not to shield the sordid and powerful, but instead to further justice and restore the public's confidence in the criminal justice system.

The State Attorney pushes the general rule of grand jury secrecy too far. The State Attorney does so by arguing that Florida Statute § 905.27 does not allow *The Palm Beach Post* to seek relief under that statute, and even if it did, disclosure of the grand jury records in furtherance of justice cannot solely be made for purposes of informing the public. The State Attorney also appears to argue

that the Court lacks the inherent authority and supervisory powers over the grand jury to order such disclosure. Motion at 12.[1] Both arguments fail.

The Palm Beach Post has sufficiently pled the existence of its right to maintain an action under Section 905.27, as it does so for the benefit of the public and consistent with the general legislative scheme. *The Palm Beach Post* has the right to use the grand jury materials to inform the public, which is consistent with Section 905.27.

The Palm Beach Post has further stated a claim that either together with, or independently of, Section 905.27, the Court has inherent authority to order the release of the grand jury records. The exercise of such authority is regularly made for purposes as varied as promoting court efficiency to providing transparency for the judicial system.

The Palm Beach Post has therefore stated a claim under both Section 905.27 and pursuant to the Court's inherent powers by which this Court may order the release of the grand jury records sought in this action.

II. FACTUAL BACKGROUND

The facts underlying this action are largely uncontested. *See* Answer of State Attorney; Answer of Clerk. Indeed, they are now largely a matter of public record as a result of the extensive legal proceedings arising out of the various crimes of Epstein and his co-conspirators over the course of more than a decade. While the complete factual allegations are set forth in the First Amended Complaint, a summary of the relevant facts is set forth below.

A. First Epstein Sex Crimes Investigation, Indictment, and Plea Agreement: 2005 - 2008

The investigation into Epstein's sex crimes began more than fifteen years ago, when a 14-

[1] The State Attorney also contends that it is "not in custody or control of the records sought." Motion at 12. Whether the State Attorney possesses custody or control over the records is a disputed issue of fact that cannot be determined at the motion to dismiss stage.

year-old girl's stepmother reported to police in the Town of Palm Beach, Florida, that Epstein and others who worked for him arranged for her to give Epstein a "massage." Epstein required the girl to strip, exposed himself, and masturbated while touching her. The girl was paid $300. Epstein was 52 years old at the time. First Amended Complaint ("FAC") ¶ 11.

Following this initial report in 2005, the Town of Palm Beach Police, and later, in 2006, the FBI, investigated Epstein. Interviews under oath with five additional alleged victims and seventeen witnesses revealed that the events described by the 14-year-old girl occurred, with disturbingly similar details, with each of the other victims. *Id.* ¶ 12.

Both the victim/witness interviews, as well as evidence retrieved following a search of Epstein's home, showed that some of the girls involved were under the age of 18. The police search of Epstein's residence also found two hidden cameras and, throughout the house, large numbers of nude photos of girls, including victims whom the police had not interviewed in the course of their investigation. *Id.* ¶ 13.

In March 2006, a State grand jury was scheduled at which all of the victims were expected to testify. The proceeding was postponed, however, due to meetings between the State Attorney's office and Epstein's prominent criminal defense lawyer and personal friend, Alan Dershowitz. *Id.* ¶ 14. Another grand jury was convened in April 2006, but canceled the day before it was to begin receiving evidence. *Id.* ¶ 15.

1. Police Chief Reiter's Letter to the State Attorney

On May 1, 2006, Town of Palm Beach Police Chief Michael Reiter wrote a "personal and confidential" letter to then Palm Beach County State Attorney Barry Krischer, stating:

> I must renew my prior observation to you that I continue to find your office's treatment of [the Epstein] cases highly unusual. It is regrettable that I am forced to communicate in this manner, but my most recent telephone calls to you and those of the lead detective to your assigned attorneys have been unanswered and messages remain unreturned. After giving this

much thought and consideration, ***I must urge you to examine the unusual course that your office's handling of this matter has taken and consider if good and sufficient reason exists to require your disqualification from the prosecution of these cases.*** (Emphasis supplied)

Id. ¶ 16.

Chief Reiter's letter to State Attorney Krischer enclosed the Town of Palm Beach Police Department's probable cause affidavits charging Epstein and two of his assistants with multiple counts of unlawful sex acts with a minor and one count of sexual abuse, and requested that either an arrest warrant be issued for Epstein or the State Attorney directly initiate the charges against him, which would be public. *Id.* ¶ 17.

2. <u>The July 2006 State Grand Jury Presentation</u>

Instead, State Attorney Krischer elected to refer the case to a grand jury, which is mandatory for capital cases but rarely used for all other crimes. According to an official spokesperson, this was the first time that a sex crimes case was presented to a grand jury in Palm Beach County. *Id.* ¶ 18.

In July 2006, after State Attorney Krischer presented testimony and evidence from just one victim, the grand jury returned an indictment on a sole count of solicitation of prostitution. There is no mention in the indictment of the victim being a minor. *Id.* ¶ 19. Another of Epstein's victims was supposed to testify before the grand jury, but did not. *Id.* ¶ 20. No reasonable explanation has been provided as to why the numerous other known victims were not presented as witnesses and crime victims to the grand jury convened in July 2006. *Id.* ¶ 21. Nor has any reasonable explanation been provided as to why State Attorney Krischer, who was initially eager to investigate and prosecute Epstein for his crimes, over time lost the desire to do so. *Id.*

During the grand jury appearance of the single victim who testified, the State Attorney presented evidence that vilified the victim and attacked her credibility, including soliciting testimony regarding underage drinking and questionable personal behavior that was unrelated to the charges against Epstein. *Id.* ¶ 22. This information was initially brought to the attention of the State Attorney's

office by Epstein's defense counsel. *Id.*

3. The FBI's Investigation and Epstein's Non-Prosecution Agreement With Federal Authorities

Following the deficient July 2006 indictment, and with Chief Reiter's encouragement, the FBI began its own investigation of Epstein. *Id.* ¶ 23. Records unsealed in 2015 revealed that the FBI compiled reports on "34 confirmed minors" that were victims of Epstein's sexual predations. Based on evidence gathered by the FBI, a 53-page indictment was prepared by the U.S. Attorney's Office in June 2007. *Id.* ¶ 24. However, at the request of Epstein's lawyers, the indictment was never presented to a federal grand jury. *Id.*

Instead, then U.S. Attorney for the Southern District of Florida, Alexander Acosta, negotiated a plea deal with Epstein's team of lawyers to grant immunity to Epstein (along with four named co-conspirators and any unnamed potential co-conspirators) from all federal criminal charges. *Id.* ¶ 25. Throughout the remainder of 2007 and through the first half of 2008, Epstein's lawyers and the U.S. Attorney continued negotiating the plea arrangement. Upon information and belief, Epstein's lawyers insisted that (1) the victims not be notified, (2) the deal be kept confidential and under seal, and (3) all grand jury subpoenas (including one that had already been issued for Epstein's computers) be withdrawn. *Id.* ¶ 26.

On June 30, 2008, Epstein pled guilty to State charges: one count of solicitation of prostitution and one count of solicitation of prostitution with a minor under the age of 18. He was sentenced to 18 months in jail, followed by a year of community control or house arrest, and was adjudicated as a convicted sex offender required to register twice a year in Florida. *Id.* ¶ 27.

The plea deal, called a non-prosecution agreement ("NPA"), allowed Epstein to receive immunity from federal sex-trafficking charges that could have sent him to prison for life. Public records reveal that former State Attorney Krischer communicated with then U.S. Attorney Acosta

concerning the NPA's negotiation with Epstein's lawyers. *Id.* ¶ 28.

Indeed, Epstein was not incarcerated in a Florida prison for the State crimes for which he was convicted. Instead, he was placed in a private wing of the Palm Beach County Stockade, where, after 3 1⁄2 months, he was allowed to leave the jail on "work release" for up to 12 hours a day, 6 days a week. His private driver provided his transportation to and from "work." *Id.* ¶ 29. Epstein was also known to have violated the terms of his probation, but was not prosecuted. *Id.* Epstein was then released five months early. *Id.* ¶ 30.

Following publicity exposing the extraordinary leniency of the plea deal, dozens of civil suits were brought against Epstein, most of which Epstein's lawyers settled out-of-court. *Id.* ¶ 34.

4. <u>The Crime Victims' Rights Act Litigation</u>

During the course of the Town of Palm Beach and FBI investigations, Epstein retained private investigators to follow, harass, and photograph his victims and their families, as well as Chief Reiter and the Town of Palm Beach detective who investigated the case against Epstein. *Id.* ¶ 36. Epstein's victims were threatened against cooperating with law enforcement and told that they would be compensated only if they did not cooperate with law enforcement. *Id.* ¶ 37.

To add insult to injury, Epstein's victims only learned after the fact about his plea deal in State court and filed an emergency petition to force federal prosecutors to comply with the Crime Victims' Rights Act (18 U.S.C. § 3771, "CVRA"), which mandates certain rights for crime victims, including the right to be informed about plea agreements and the right to appear at sentencing. U.S. District Judge Kenneth A. Marra ruled in 2019 that federal prosecutors violated the CVRA by failing to notify Epstein's victims before allowing him to plead guilty to only the two State offenses. *Id.* ¶ 32. The prosecution's failure to keep the victims apprised, among other things, also contravenes the Florida Constitution, Article 1, § 16(b) and Fla. Stat. § 960.001. *Id.* ¶ 33.

B. Second Epstein Sex Crimes Investigation, Indictment, Suicide: 2019

On July 6, 2019, Epstein was arrested on federal sex trafficking charges. *Id.* ¶ 38. The United States government's prosecution of Epstein based on new allegations and charges stemmed, in part, from continued press investigations and reporting on the mishandling of the 2006 charges and the civil suits that followed. *Id.* ¶ 39.

In a July 8, 2019, letter to the federal district court by the U.S. Attorney for the Southern District of New York, Epstein was described as "a serial sexual predator who preyed on dozens of minor girls over a period of years." The letter emphasized that "the Government has real concerns – grounded in past experience with this defendant – that if allowed to remain out on bail, the defendant could attempt to pressure and intimidate witnesses and potential witnesses in this case, including victims and their families, and otherwise attempt to obstruct justice." It also described the results of the FBI's search of Epstein's Manhattan townhouse: evidence of sex trafficking in the form of "hundreds—and perhaps thousands—of sexually suggestive photographs of fully- or partially-nude females," including underage females. In a locked safe, compact discs were found with handwritten labels including the descriptions: "Young [Name] + [Name]," "Misc nudes 1," and "Girl pics nude." *Id.* ¶ 40.

On July 8, 2019, prosecutors with the Public Corruption Unit of the U.S. Attorney's office for the Southern District of New York charged Epstein with sex trafficking and conspiracy to traffic minors for sex. The grand jury indictment alleges that "dozens" of underage girls were brought into Epstein's mansions for sexual encounters. A few days later, owing to public outcry over the NPA with Epstein entered into by the U.S. Attorney for the Southern District of Florida, Alexander Acosta, who by then was serving as U.S. Secretary of Labor in the Trump administration, resigned from office. *Id.* ¶ 41.

On or about August 6, 2019, Florida Governor Ron DeSantis ordered a state criminal probe into the actions of the Palm Beach Sheriff and former State Attorney Krischer for their handling of the

Epstein underage sex trafficking case. *Id.* ¶ 43.

On August 20, 2019, Epstein was found dead, by apparent suicide, at the federal Metropolitan Correction Center in lower Manhattan where he was being held without bail. *Id.* ¶¶ 42, 44.

C. <u>The August 27, 2019, SDNY Hearing: Epstein's Victims Speak</u>

Following Epstein's death, prosecutors sought to dismiss the indictment against Epstein, while maintaining that they would continue to investigate his co-conspirators. *Id.* ¶ 45. United States Senior District Judge Richard M. Berman ordered a hearing on August 27, 2019, on the prosecutors' decision to dismiss the indictment and allowed victims to speak at the hearing. *Id.* ¶ 46.

In the course of the hearing, more than two dozen victims delivered their personal stories of pain, frustration, and sexual abuse at the hands of Epstein. Several victims spoke of violent rape by Epstein. Many more victims were present in the courtroom but did not testify. *Id.* ¶ 47.

While some questioned the reasoning behind the court's decision to give the victims voice after Epstein's death, Judge Berman noted that "a public hearing is [the] preferred vehicle of resolution," emphasizing that "public hearings are exactly what judges do. Hearings promote transparency and they provide the court with insights and information which the court may not otherwise be aware of." Indeed, even Epstein's defense lawyer noted at the hearing that the court "is the institution that most people have confidence in, in these very troubled times." *Id.* ¶ 48.

At the August 27th hearing, the girls, now women, spoke about their "exploitation and coercion," and to the fact that many of them "were in very vulnerable situations and in extreme poverty, circumstances where [they] didn't have anyone on [their] side, to speak on [their] behalf…." One victim lamented that "as a victim, [she] never got to see what the agreement was or why the special treatment got approved" in the Florida case years earlier. Another noted how "completely

different" the investigators leading to the 2019 federal indictment were from the prosecutors in the Florida case, both in their treatment of her and their investigation of her victimization by Epstein. *Id.* ¶ 49. A former federal judge in attendance at the August 27th hearing emphasized that "transparency is one of the overriding objectives in our criminal justice system." *Id.* ¶ 50.

Nearly all of the victims expressed the conviction that the secrecy that shielded Epstein has caused them "irreparable harm" and that an opportunity to address his criminal wrongdoings, and those of the individuals who enabled his sexual racketeering, would allow for at least some measure of justice to be served after his death. Indeed, one victim stated: "Any efforts made to protect Epstein's name and legacy send a message to the victims that he wins and that he is untouchable." Another victim expressed fear that this is a world "where there are predators in power, a world where people can avoid justice if their pockets run deep enough." *Id.* ¶ 51.

In short, the "unusual" treatment Epstein received in Florida in 2006 based on his wealth, social status, and connections severely eroded the public's faith in the integrity and impartiality of the criminal justice system. Allowing *The Palm Beach Post's* claims to proceed in this action would allow for public examination and understanding of the operation of the criminal justice system in Florida.

III. LEGAL ARGUMENT

A. Legal Standard

Fla. R. Civ. P. 1.110(b) provides that a pleading that sets forth a claim for relief shall contain a short and plain statement of the grounds of the ultimate facts showing that the pleader is entitled to relief. Fla. R. Civ. P. 1.110(g) permits a party to "set up in the same action as many claims or causes of action … as the pleader has, and claims for relief may be stated in the alternative." The Rule further provides "[a] party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both." Fla. R. Civ. P. 1.110(g).

Here, *The Palm Beach Post* brings two claims: one pursuant to Fla. Stat. § 905.27, and one for declaratory relief based on the principles set forth in Section 905.27 as well as constitutional principles of freedom of the press as protected by the Court's inherent authority and supervisory powers. The State Attorney concedes that the declaratory relief claim is adequately plead. For the same reasons requiring that concession—and those set forth below—the Court should, respectfully, find that both claims have been sufficiently plead.

B. Relevant Legal Framework: Fla. Stat. § 905.27

1. Grand Jury Secrecy Is Not Absolute

Typically, grand jury proceedings are conducted and maintained in secret. Fla. Stat. § 905.24. But this secrecy has never been—and was never intended to be—absolute. First, as a practical matter, grand jury proceedings are already subject to public disclosure, as a testifying grand jury witness is free to disclose her grand jury testimony. In *Butterworth v. Smith*, the United States Supreme Court, weighing the competing interests of grand jury secrecy and the First Amendment, held unconstitutional Section 905.27's purported prohibition on a witness revealing her own testimony. 494 U.S. 624, 626 (1990).[2] The "secrecy" of grand juries in Florida is thus qualified – not absolute – based on principles embodied in the First Amendment.

Second, Section 905.27(1) specifically provides exceptions to grand jury secrecy: "the testimony of a witness examined before the grand jury or other evidence received by it" may be disclosed "when required by a court . . . for the purpose of: (a) Ascertaining whether it is consistent

[2] The Florida Supreme Court has similarly confirmed that grand jury secrecy is not absolute and that any "harm to public officeholders" from disclosure will be the product of their own conduct, and not the consequence of an unrestrained body of misguided citizens." *Miami Herald Pub. Co. v. Marko*, 352 So. 2d 518 (Fla. 1977). The decision in *Marko* emphasized that a grand jury's important role in "expos[ing] official misconduct" precludes restricting access to its activities for the purpose of protecting "public officeholders." *Id.* ("[t]he benefits to be derived from this extraordinary exercise in citizen participation [in the grand jury] would be severely limited if the fruits of that activity were not available to the public on whose behalf it is undertaken. Implicit in the power of the grand jury to investigate and expose official misconduct is the right of the people to be informed of its findings.").

with the testimony given by the witness before the court; (b) Determining whether the witness is guilty of perjury; or (c) Furthering justice." Fla. Stat. § 905.27(1)(a)-(c). The Florida legislature therefore clearly intended to empower a court to order the disclosure of grand jury proceedings to, among other things, further justice, as this Court should do here.

Subsequent to such disclosure, *The Palm Beach Post* is not, as the State Attorney argues, constrained by the statute from using the materials for public disclosure—nor could it be, under the First Amendment.[3] Motion at 13. The State Attorney argues that "grand jury testimony 'can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever'…" Motion at 12-13. But that limitation only applies "[w]hen such disclosure is ordered by a court pursuant to subsection (1) *for use in a civil case*." Fla. Stat. § 905.27 (emphasis added). Here, *The Palm Beach Post* is not asking the Court to order the disclosure of grand jury records "for use in a civil case;" rather, it seeks disclosure for the express reason set forth in Section 905.27(1)(c)—*i.e.*, to further justice by allowing the public, through the efforts of *The Palm Beach Post*, access to this information.

2. ***The Palm Beach Post* Has Standing Under Section 905.27**

The Palm Beach Post has the right to maintain this private right of action because the furtherance of justice, an express legislative exception to grand jury secrecy, is intended for the public benefit, and *The Palm Beach Post* seeks access on behalf of the public it serves. Fla. Stat. § 905.27(1)(c). It is further mandated in Fla. Stat. § 905.27 that the legislature intended for a *court* to be the party to make the determination of disclosure. Fla. Stat. § 905.27(1). In other words, the legislature granted *the courts* the power to consider and determine the propriety and scope of grand

[3] In this regard, the State Attorney's interpretation of Section 905.27 would render the statute a prior restraint, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (noting a "deeply-seated American hostility to prior restraints"). To the extent redactions to the grand jury materials may be required to protect the privacy of unnamed victims or third parties, the Court of course may require such redactions prior to ordering disclosure of the records.

jury secrecy.

The Supreme Court of the United States has "recognized that the invocation of grand jury interests is not "'some talisman that dissolves all constitutional protections.'" *Butterworth*, 494 U.S. at 630-31 (quoting *U.S. v. Dionisio*, 410 U.S. 1, 11 (1973)); *see also Landmark Communications*, at 838 (balancing state's interest in preserving confidentiality of judicial review proceedings against rights of newspaper reporting on such proceedings).

As explained in the FAC (¶¶ 56-59), the Supreme Court has further recognized that the press has a constitutional right of access to criminal proceedings, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), including pre-trial criminal proceedings. *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983). Indeed, "the integrity of the judicial process, which public scrutiny is supposed to safeguard, is just as much at issue in proceedings of this kind [pre- and post-trial] as at trial." *Id*. at 801; *see also Miami Herald Publ. Co. v. Lewis*, 426 So. 2d 1, 6–7 (Fla. 1982) (identifying the news media as a "public surrogate" in matters concerning the closure of judicial proceedings). The press also has a First Amendment interest in receiving information from willing speakers. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 756–57 (1976) ("Where a speaker exists . . . the protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Pittman v. Cole*, 267 F.3d 1269, 1283 n.12 (11th Cir. 2001) ("The Supreme Court has recognized that the First Amendment offers protection to both speakers and those wishing to receive speech."); *see also Stephens v. Cty. of Albemarle, VA*, 524 F.3d 485, 492 (4th Cir. 2008) (providing that a plaintiff has "standing to assert a right to receive speech" by "show[ing] that there exists a speaker willing to convey the information to her").

Because of the unique role performed by the press as a "public surrogate" (*Lewis*, 426 So. 2d at 6–7) in protecting the right of access and its interest in reporting information about criminal

proceedings, news organizations "presumptively have a right to access judicial records," *Comm'r, Ala. Dep't of Corr. v. Advance Local Media, LLC*, 918 F.3d 1161, 1166 (11th Cir. 2019), and "standing to question the validity of an order restricting publicity because its ability to gather news is directly impaired or curtailed." *Lewis*, 426 So. 2d at 4; *see also Carlson v. United States*, 837 F.3d 753, 757–58 (7th Cir. 2016) ("[a]s a member of the public, [the Reporters Committee] has standing to assert [its] claim" to grand jury materials because such materials are "public records to which the public may seek access, even if that effort is ultimately unsuccessful").

Here, the continued denial of access to information sought by *The Palm Beach Post* on behalf of its journalists and the public "unquestionably constitutes irreparable injury." *Gainesville Woman Care, LLC v. State of Florida*, 210 So. 3d 1243, 1263 (Fla. 2017); *see also Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (noting that "the press's function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired," as it is by Attorney General's refusal to disclose unredacted report and underlying grand jury materials).

The Palm Beach Post does not disagree that Section 905.27 makes no express provision for a civil suit or civil liability, but that is just the start of the inquiry. In determining whether a private right of action lies in a statute, courts in Florida consider: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is any indication, either explicit or implicit, of a legislative intent to create or deny such a remedy; and (3) whether judicial implication is consistent with the underlying purposes of the legislative scheme. *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. 3d DCA 1989) (adding the second and third factors; previously, courts considered solely the "class benefited" factor). "Courts must strike a balance; neither 'fashioning a per se rule of construction that implicit in every penal statute is a concomitant civil remedy,' nor relinquishing the task of judicial implication in the face of legislative faltering or uncertainty." *Fischer*, 543 So. 2d at 789 (quoting

Roger Rankin Enters., Inc. v. Green, 433 So. 2d 1248, 1250 (Fla. 3d DCA 1983); *Smith v. Piezo Tech. and Prof'l Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) (Supreme Court of Florida implied a statutory cause of action for the wrongful discharge of employees who sought workers' compensation benefits).

Consideration of these three factors weighs in favor of finding a private right of action in Section 905.27. First, the statutory exception to grand jury secrecy embodied in Section 905.27 – "furthering justice" – is intended to benefit the public at large, not just those previously party to the grand jury proceeding at issue. Because, as set forth above, members of the press, are "public surrogate[s]" (*Lewis*, 426 So. 2d at 6–7) and play a vital role in gathering information and reporting on the criminal justice system, *The Palm Beach Post* is "one of the class for whose especial benefit the statute was enacted"—namely, the public itself. *See Moyant v. Beattie*, 561 So. 2d 1319 (Fla. 4th DCA 1990) (finding plaintiffs "had the right to maintain a private cause of action as the persons the legislature intended to protect by the enactment of" the relevant statute).

Second, there is a dearth of legislative history surrounding Section 905.27, and *The Palm Beach Post* was unable to locate any documents capturing any legislative intent regarding the possibility of a private right of action. There is no explicit statement in favor of such a right, but to be clear, there is also no intent—express or otherwise—prohibiting a private right of action, in the absence of which disclosure of grand jury materials to "further justice" under the statute would be rendered a hollow vessel. *See Moyant*, 561 So. 2d at 1320 ("The absence of express provision for civil liability in the case of violation of a statute does not negative the existence of a legislative intent that the statute shall effect private rights.") (quoting Florida Statutes, Section 475.482 (1989)).

In such circumstances, consideration of the third factor – whether judicial implication is consistent with the underlying purposes of the legislative scheme – is instructive. When scrutinizing the history of legislation to determine legislative intent, it is appropriate to consider acts passed at

subsequent sessions. *Fischer*, 543 So. 2d at 790. In 1994, at the same time Section 905.27 was reenacted to expressly provide for the three exceptions to grand jury secrecy, including furthering justice, the Florida legislature also reenacted Fla. Stat. § 905.395, which concerns the secrecy of *statewide* grand juries. 1994 Fla. ALS 285, 1994 Fla. Laws ch. 285, 1994 Fla. SB 114; Fla. Stat. § 905.395. Like Section 905.27, Section 905.395 has a general prohibition on disclosure of grand jury proceedings, absent a court order. Fla. Stat. § 905.395. Tellingly, however, Section 905.395 does not provide any specific exceptions to nondisclosure, including the furtherance of justice. Through the intentional omission of these exceptions, including the fundamental "furthering justice" exception, it can be understood that the legislature did not intend for court-ordered disclosure of statewide grand jury records to further justice, and did not anticipate such disclosures would benefit the public. By contrast, the legislature's decision to include the catchall "furthering justice" exception in Section 905.27 reflects an intent to protect and inform the public—the ultimate benefactors of the criminal justice system—by providing a means of access in those rare situations where the integrity of the grand jury process has been called into serious question. Accordingly, implying a private right of action is consistent with the purposes underlying the legislative scheme in Chapter 900 of the Florida Statutes.

C. This Court has Inherent Power to Release Grand Jury Records in Order to Further Justice and Vindicate Confidence in the Judicial Process

As set forth in the FAC (¶¶ 60-64), even in the absence of the statutory framework in Section 905.27, disclosure is appropriate pursuant to this Court's inherent authority over grand jury proceedings because of the exceptional public interest in this case and the compelling circumstances supporting transparency rather than continued secrecy.

1. The Grand Jury is Under the Court's Supervision and Jurisdiction

It is well-settled that the grand jury is "'a judicial proceeding in a court of justice…an appendage or adjunct to the circuit court.'" *In re Grand Jury Investigation*, 287 So. 2d 43 (Fla. 1973)

(quoting *Craft v. State*, 42 Fla. 567, 29 So. 418 (1900)). Indeed, it is the court that gives the grand jury its initial charge and advises the grand jury about its legal duties. Fla. Stat. § 905.18.

"It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). "There can be no question of the inherent power of a court 'to protect itself, and hence society, as an instrument of justice.'" *In re Osborn*, 376 F.2d 808, 810 (6th Cir. 1967).

Thus, in a variety of contexts, it has been held that "courts have the inherent power to protect the integrity of the judicial process from perversion and abuse." *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1099-1100 (Fla. 4th DCA 2001); *Attwood v. Singletary*, 661 So. 2d 1216 (Fla. 1995) (invoking court's inherent authority to prevent "abusive filer" from filing additional cases to prevent interference with orderly process of judicial administration); *Tramel v. Bass*, 672 So. 2d 78 (Fla. 1st DCA 1996) (invoking court's inherent authority to strike pleadings to sanction fraud perpetrated on the court).

The Florida Supreme Court has noted that it is "of vital importance to maintain the dignity and the integrity of both the grand jury and the presiding judge." *State v. Clemmons*, 150 So. 2d 231, 233-34 (Fla. 1963).[4] "[I]n states such as Florida, where the grand jury is preserved, it is an important appendage of the court which impanels it…[and] it should not be forgotten that the judge of that court is equally important and he is generally charged with the supervision of the grand jury's activities…" *Id.* "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015). Courts do not command armies and have "no influence over either the sword or the purse[.]" *Id.* (citing The Federalist No. 78,

[4] *State v. Clemons* was superseded by statute. *See Kelly v. Sturgis*, 453 So. 2d 1179 (Fla. 5th DCA 1984).

p. 465 (C. Rossiter ed. 1961) (A. Hamilton)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.*; *see also In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1269-70 (11th Cir. 1984) (upholding the exercise of the court's inherent power to release grand jury records to further "a matter of great societal importance" that affected "the public confidence in the judiciary"). "The perception of a viable healthy judiciary is of critical importance to our system of justice." *Id.* at 1271. This "perception" is of equal importance with respect to state courts, which are invested with primary responsibility for overseeing the investigation and prosecution of crimes.

The Supreme Court of the United States, while acknowledging the values in grand jury secrecy, has long authorized the disclosure of grand jury records where the need for transparency outweighs any remaining interest in secrecy. *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). Courts around the country have followed suit. *See, e.g., In re Petition of Nat'l Sec. Archive*, No. 08 CIV. 6599, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008) (release of grand jury records concerning the indictment of Julius and Ethel Rosenberg); *In re Petition of Nat'l Sec. Archive*, 104 F. Supp. 3d 625 (S.D.N.Y. 2015) (same); *In re Petition of Kutler*, 800 F. Supp. 2d 42 (D.D.C. 2011) (release of President Nixon's grand jury deposition testimony in connection with the third Watergate grand jury); *In re Unseal Dockets Related to the Indep. Counsel's 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314 (D.D.C. 2018) (release of records related to independent counsel's investigation of President Clinton). Most recently, the D.C. Circuit ordered the Trump administration to provide the House Judiciary Committee redacted portions of grand jury materials from former special counsel Robert Mueller's probe into Russian election interference. *In Re: Application of the Committee on the Judiciary, U.S. House of Representatives, For an Order Authorizing the Release of Certain Grand Jury Materials, Committee on the Judiciary, United States House of Representatives*

v. U.S. Department of Justice, No. 19-5288 (D.C. Cir. March 20, 2020). There is no evidence that the disclosures resulting from these cases have adversely affected the grand jury process. On the other hand, there is no doubt that the release of these materials has contributed greatly to the historical record of significant events in our country's history, as well as exposing failures in our justice system.

2. <u>This Court has Inherent Power to Release Grand Jury Records in Order to Further Justice and Vindicate Confidence in the Judicial Process</u>

Courts have identified nine "non-exhaustive" factors that a court may consider when determining whether their inherent authority should be exercised to order the release of grand jury documents. These factors include:

> (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

Kutler, at 47-48 (quoting *In re Petition of Craig*, 131 F.3d 99, 106).[5]

The vast majority of these factors weigh in favor of disclosure in this case. First, the party seeking disclosure does so pursuant to its First Amendment right to receive information in order to inform the public. *See Va. Pharmacy Bd.*, 425 U.S. at 756–57; *Pittman*, 267 F.3d at 1283. Second, the defendant to the grand jury proceeding is deceased, although the government is opposed to the disclosure. *The Palm Beach Post* respectfully submits that the government's opposition should be

[5] While it is largely federal courts that have applied these nine factors, (1) there can be no dispute that Florida courts are endowed with inherent authority like their federal counterparts, *see supra* at 15-16; and (2) notably, federal courts consider these factors when the enumerated exceptions to grand jury secrecy set forth in Federal Rule of Criminal Procedure 6(e)(3)(E) do not appear to apply. *See, e.g., In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984) ("it has been authoritatively said that [Rule 6(e)] is not the true source of the district court's power with respect to grand jury records but rather is a codification of standards pertaining to the scope of the power entrusted to the discretion of the district court"). Thus, to the extent the Court does not find that it is authorized by Fla. Stat. § 905.27 to order disclosure of the Epstein grand jury materials, its inherent authority provides "ample[]" (*id.*) grounds for such disclosure.

given little weight where, as here, the disclosure of records is sought to uncover the alleged misconduct of a prior State Attorney (as opposed to, for example, witness perjury). Third, disclosure is being sought—based on information learned by *The Palm Beach Post* from (1) a series of Florida Public Records Law requests, (2) law enforcement sources with direct knowledge of the grand jury evidence and proceedings, (3) judicial documents obtained from independent but related court proceedings, and (4) documents otherwise available in the public record—to inform the public as to whether the then State Attorney for Palm Beach County presented truncated evidence of Epstein's criminal wrongdoing to the 2006 grand jury in a manner that precluded Epstein's indictment for the serious crimes he committed, including sex trafficking and sexual assault. Fourth, the records being sought are the testimony, minutes, and other evidence presented in 2006 to the Palm Beach County grand jury, which appear to have been whitewashed so that Epstein would not be charged with serious crimes of which there was ample evidence. Fifth, the grand jury proceedings took place nearly fifteen years ago. Sixth, the current status of the principals of the grand jury proceedings are unknown. Seventh, because much of the requested information has now entered the public domain through victims protesting their mistreatment by and misgivings concerning prosecutors (both state and federal), other lawsuits surrounding Epstein and his co-conspirators, and public records requests and extensive news reporting, this factor weighs in favor of full disclosure. Eighth, the status of the witnesses who appeared is unknown—indeed, *The Palm Beach Post*'s request is made, in part, to learn who the witnesses were that the State Attorney did decide to call. [6] Finally, *The Palm Beach Post* submits that with the death of the defendant, the widely-known and litigated acts of his co-conspirators, the length of time that has passed, and the widely reported nature of this miscarriage of justice, there is no additional need for maintaining secrecy. *See U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) ("[A]fter the grand

[6] With respect to the sixth and eighth factors, an *in camera* review by this Court, followed by appropriate redactions, would remedy any potential harm to innocent parties.

jury's functions are ended, disclosure is wholly proper where the ends of justice require it.").

Courts have long realized that a transparent criminal justice system, affords "significant community therapeutic value." *Richmond Newspapers v. Virginia*, 448 U.S. at 570-71. "[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Id.* at 571. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner." *Id.*

The Palm Beach Post has accordingly stated a claim pursuant to this Court's inherent authority and supervisory powers, which allow the Court to take appropriate and necessary action to preserve and promote the integrity of the justice system. The citizens of Palm Beach County and throughout the State of Florida are entitled to nothing less in this case of exceptional importance and public interest.

IV. CONCLUSION

Pursuant to Fla. Stat. § 905.27 and this Court's inherent supervisory authority, *The Palm Beach Post* has sufficiently pleaded its claims.

Dated: March 13, 2020

Respectfully submitted,

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