ED105181

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

GRAND JUROR DOE,
Plaintiff-Appellant,

v.

ROBERT P. MCCULLOCH,
Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Ellen Hannigan Ribaudo, Circuit Judge

BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of the Circuit Court of St. Louis County. The case does not involve any issues within the exclusive jurisdiction of the Missouri Supreme Court. This Court has jurisdiction over this appeal pursuant to Article V, § 3 of the Missouri Constitution and RSMo § 474.050.

INTRODUCTION

Appellant Grand Juror Doe ("Doe") served on the St. Louis County grand jury that declined to indict Officer Darren Wilson after the fatal shooting of Michael Brown in Ferguson in 2014. Doe has brought federal and state lawsuits against Respondent Robert P. McCulloch ("McCulloch"), the elected prosecutor of St. Louis County, alleging that she should be excused from her oath of secrecy and from various statutes binding her to secrecy. In effect, Doe seeks a blank check to speak publicly about the witnesses, evidence, and deliberations of the grand jury investigation of the shooting of Michael Brown. Doe also seeks authorization to speak publicly and freely about grand-jury proceedings and deliberations in "hundreds" of unrelated investigations.

There is no basis for this radical departure from the longstanding tradition of grand-jury secrecy. Doe's planned disclosures are barred by the plain language of Missouri's statutes governing grand-jury secrecy and by the oath she took twice during her service as a grand juror. Her disclosures would violate the core purposes of grand-jury secrecy by divulging witnesses' identities, disclosing the deliberations and voting decisions of other grand jurors, and making public the grand-jury proceedings and deliberations in "hundreds" of other cases. The reasons for secrecy retain considerable weight even after the conclusion of the investigation of Darren Wilson. And, contrary to Doe's arguments, McCulloch's partial disclosure of redacted grand-jury transcripts under Missouri's Sunshine Law does not relieve Doe from her grave obligation of secrecy. Doe's appeal is without merit, and the trial court's judgment should be affirmed.

STATEMENT OF FACTS[1]

Doe was a member of the St. Louis County grand jury that declined to indict former Ferguson Police Officer Darren Wilson after the August 9, 2014 shooting death of Michael Brown. LF 8, 10, 178–79. Doe began her grand jury service on May 7, 2014, when she was administered her oath and received her charge from the Honorable Carolyn C. Whittington of the St. Louis County Circuit Court. LF 8, 179.

McCulloch is the elected Prosecuting Attorney for St. Louis County. LF 8, 179. After Wilson shot Brown on August 9, 2014, McCulloch publicly declared his intention to submit the matter to a grand jury for consideration. LF 8, 179.

Doe's grand jury service, which was originally scheduled to end on September 10, 2014, was formally extended on that date, when Doe and her fellow grand jurors were again administered the oath and recharged by St. Louis County Circuit Judge Whittington for the express purpose of investigating the circumstances of Brown's death. LF 8, 179.

On November 17, 2014, Judge Whittington denied a request by the grand jury to issue a statement upon the completion of the grand jury's work. LF 116–17, 179. Shortly thereafter, on November 24, 2014, the grand jury returned a "no true bill" on all the charges against Officer Wilson, and Doe was discharged from her grand jury service. LF 10, 180.

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[1] Because the trial court resolved this case on a motion to dismiss, Doe's factual allegations are taken as true for the purposes of this appeal. McCulloch does not concede the correctness of any of her factual allegations.

Following the discharge of the grand jurors, McCulloch attended a press conference where he made a public statement about the grand jury's investigation and he released redacted evidence that had been presented to the grand jury. LF 10.

On January 5, 2015, Doe filed suit against McCulloch in federal court, claiming a right under the First Amendment to be free from the obligation of secrecy imposed by sections 540.320, 540.310, 540.120, and 540.080 of the Missouri Revised Statutes. LF 118–19, 126–28, 180.

The U.S. District Court for the Eastern District of Missouri found that Missouri's grand jury system is an area of "fundamental importance to a sovereign state" and that "[f]ederal intervention would interfere with Missouri's procedures and policies in an area of special state interest." LF 140. The district court abstained from exercising jurisdiction over Doe's claims and dismissed her complaint on May 5, 2015, reasoning that "the State of Missouri should be given the opportunity to address [Doe]'s request to be released from her oath of secrecy . . ." LF 143–44.

The Eighth Circuit held that the district court had properly abstained from considering the merits of Doe's case, but it reversed the district court's dismissal order and directed the court to stay Doe's First Amendment claims pending the resolution of state-law issues by the Missouri courts. LF 180. In particular, the Eighth Circuit invited the state courts to consider "whether [Doe]'s federal case was brought against the wrong party or filed in the wrong venue." LF 180 (citing *Doe v. McCulloch*, 835 F.3d 785, 788–89 n.2 (8th Cir. 2016)).

Doe filed her state-court Petition in this case on June 2, 2015. LF 1, 180. In the state-court case, unlike in the federal case, Doe did not challenge the applicability of section 540.120 of the Missouri Revised Statutes, which applies to witnesses, not to grand jurors. LF 181, n.3. Doe, instead, challenged only sections 540.320, 540.310, and 540.080 of the Missouri Revised Statutes. LF 12–13.

Doe's Petition alleged three Counts. In Count I, Doe alleged a federal claim under the First Amendment, and sought declaratory and injunctive relief barring McCulloch from enforcing the grand jury secrecy laws against her. LF 15–16, 180–81. Doe made an *England* reservation with respect to Count I. LF 15 n.2 ("Should Missouri's courts hold against Doe on questions of state law, Doe intends to return to the United States District Court for disposition of the federal claim.") (citing *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964)).

In Count II of her Petition, Doe sought a declaration that section 540.320 of the Missouri Revised Statutes is no longer applicable or valid as applied to her. LF 17 ("In light of [McCulloch]'s disclosures, Mo. Rev. Stat. § 540.320 should be interpreted as no longer being applicable or valid as applied to [Doe].").

In Count III, Doe sought a declaration freeing her from the oath she swore as a grand juror. LF 17–18 ("Based on [McCulloch]'s own disclosures and the unique circumstances of this case, [Doe] should be released from the oath to keep grand jury proceedings secret.").

McCulloch filed his Motion to Dismiss on July 16, 2015, requesting dismissal of Doe's Petition for failure to state a claim. LF 2–3, 53.

McCulloch argued, in part, that the trial court lacked jurisdiction over Doe's claims that were brought under RSMo §§ 540.080 and 540.310 because those are not criminal statutes. LF 70 ("[McCulloch] does not have authority to criminally prosecute [Doe] for violating sections 540.310 and 540.080 RSMo, and it is premature to find that [Doe] is at risk of prosecution under section 540.320 RSMo. Accordingly, the Court lacks jurisdiction over [Doe]'s 42 U.S.C. § 1983 claims under the Eleventh Amendment.").

McCulloch further argued in his Motion to Dismiss that Doe has failed to state a valid claim for equitable relief because Doe's alleged injuries are speculative; Doe's colorable claims, if any, should be addressed to Judge Whittington; and Doe has no right to violate Missouri's grand jury secrecy laws. LF 54, 57–58, 60.

On December 13, 2016, the circuit court entered its Order and Judgment. LF 178. The court concluded that it had jurisdiction over all of Doe's claims. LF 182. The court held that "[Doe]'s claims for relief must be addressed to the Missouri courts, and in particular, to the St. Louis County Circuit Court where [Doe] served" because it "retains inherent authority to hold [Doe] in contempt for violating her obligations as a grand juror" and "[Doe] may not circumvent such authority by seeking another court's permission to violate her obligations." LF 183–84. Therefore, the court held that "[Doe]'s federal lawsuit was filed in the wrong venue, and that [the circuit court] has jurisdiction to hear all of [Doe]'s claims." LF 184.

The circuit court further held that, notwithstanding Doe's *England* reservation of Count I, it was necessary for the circuit court to address the scope of Doe's rights under the First Amendment in deciding the state-law claims because "article I, section 8 [of the

Missouri constitution] has been found comparable to the First Amendment, *see State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc. 2012), and there is no reason to believe that the Missouri constitution was meant to give any more rights to grand jurors [than] were available under federal law." LF 190.

The circuit court decided all of Doe's claims on the merits and dismissed those claims with prejudice, reasoning that "[c]omplete transparency is anathema to the very nature of a grand jury, which depends upon secrecy and anonymity for its proper functioning" and that "the circumstances identified by [Doe] are not a sufficient basis upon which to release [Doe] from her obligation to maintain secrecy." LF 185–87, 191. Doe now appeals from that order.

ARGUMENT

I. The Trial Court Correctly Concluded that a Declaratory Judgment Against McCulloch Alone "Would Have No Practical Effect" Because Other Government Officials, Whom Doe Did Not Include as Defendants, Have the Authority to Enforce the Grand-Jury-Secrecy Statutes Against Her. (Responds to Appellant's First Point Relied On).

Standard of Review. The trial court's decision to dismiss Grand Juror Doe's petition is reviewed *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

In her Petition, Doe unambiguously pled that her planned speech is "chilled" by her fear of enforcement "by government officials" of three separate Missouri statutes: RSMo § 540.080 (the grand jurors' general oath of secrecy), RSMo § 540.310 (prohibiting disclosure of grand jurors' deliberations and votes), and RSMo § 540.320 (prohibiting disclosure of evidence and witnesses before the grand jury, and imposing misdemeanor criminal sanctions for violation). *See* Petition ¶¶ 39-40, LF12–13.

Doe pled that she "is chilled from expressing [her] views and experiences because [she] fears the imposition of criminal penalties or other punishment by *government officials*." Petition ¶ 39, LF12 (emphasis added). She also pled that each of the three "challenged laws" "reasonably chilled" her "from engaging in expressive activity." *Id.* ¶ 51, LF 15. Doe pled that she was deterred from speaking because she "reasonably fears prosecution for contempt of court for any violation of the [grand jurors'] oath." *Id.* ¶ 44,

LF 14. But, though she pled that she feared enforcement by "government officials," the only "government official" whom she named as a defendant was Respondent McCulloch. *See id.* ¶ 1, LF 6.

Because there are other "government officials," besides McCulloch, who have authority to enforce the requirements of grand-jury secrecy against Doe, the trial court concluded that "a declaratory judgment forbidding Defendant from enforcing sections 540.080 or 540.310 against Plaintiff would have no practical effect." Judgment, at 6, LF183 (citing *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003); *Brooks v. Land Clearance for Redevelopment Authority of St. Louis County*, 425 S.W.2d 481, 482-83 (Mo. App. 1968); and *Schaefer v. Koster*, 342 S.W.3d 299, 300 (Mo. banc 2011)).

The trial court's conclusion was correct. Because, as Doe herself pled, there are other "government officials" with power to enforce the grand-jury-secrecy statutes against Doe, and because she pled that she fears enforcement of those statutes by any and all such "government officials," a judgment declaring only that McCulloch lacks authority to enforce these statutes against her would not "have a conclusive effect and . . . lay to rest the parties' controversy." *Missouri Soybean Association*, 102 S.W.3d at 25 (internal quotation and citation omitted).

A. The St. Louis County Circuit Court has primary authority to enforce RSMo §§ 540.080 and 540.310 against Doe, and an equitable decree against McCulloch alone would not prevent the Circuit Court from exercising its inherent power.

As stated above, Doe fears enforcement under three Missouri statutes: RSMo §§ 540.080, 540.310, and 540.320. Of these three statutes, only section 540.320 carries explicit criminal penalties. *See* RSMo § 540.320. The others are enforceable through contempt proceedings. In the trial court, Doe sought equitable relief against McCulloch to prevent the enforcement of all three statutes because, according to Doe, "[McCulloch] is charged with enforcement of the statutes challenged here and is the individual responsible for initiating prosecutions for any violation of those statutes." LF 8. This argument is incorrect. Although McCulloch was the only defendant Doe sued, he is not the only official charged with enforcing these statutes against her.

Doe claims that "McCulloch has the authority to commence or prosecute a criminal contempt action against a grand juror who violates §§ 540.080 or 540.310." App. Br. 10-11. But McCulloch is not, in fact, principally responsible for enforcing those two statutes. Rather, as the St. Louis County Prosecuting Attorney, McCulloch is principally responsible for enforcing criminal laws. *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. banc. 2003) ("This Court reaffirms that a prosecutor has broad discretion to determine when, if, and how *criminal laws* are to be enforced") (emphasis added); *Jenkins & Kling, P.C. v. Missouri Ethics Comm'n*, 945 S.W.2d 56, 59 (Mo.App. E.D.

1997) (per curiam) ("a prosecutor is retained by the state for the prosecution of persons accused of crimes"); *State v. Goree*, 546 S.W.2d 785, 788 (Mo.App. 1977) (same).

As the trial court correctly held, the primary authority to enforce RSMo §§ 540.080 and 540.310 through contempt proceedings rests in the court where Doe served as a grand juror, *i.e.*, the St. Louis County Circuit Court. For this reason, Doe's "claims for relief must be addressed to the Missouri courts, and in particular, to the St. Louis County Circuit Court where [Doe] served." LF 202. It is indisputable that the St. Louis County Circuit Court possesses the inherent authority to bring contempt proceedings against a former grand juror, such as Doe, who refuses to comply with the grand juror's oath and statutory duty of secrecy. *See Smith v. Pace*, 313 S.W.3d 124, 129–30 (Mo. banc. 2010) ("Missouri courts have both an inherent power under the constitution to punish for contempt as well as authority to try contempt-of-court cases under the statutory crime of contempt").

Since the St. Louis County Circuit Court has the primary authority to enforce sections 540.080 and 540.310 against Doe, an equitable decree against McCulloch alone could not settle the controversy or grant Doe the relief she seeks. *See Brooks v. Land Clearance for Redevelopment Authority of St. Louis County*, 425 S.W.2d 481, 482-83 (Mo. App. 1968) (holding that equitable relief is not appropriate where such relief would "not have any practical effect."). "A declaratory judgment is not a general panacea for all real and imaginary legal ills," and "[i]t is not available to adjudicate hypothetical or speculative situations that may never come to pass." *Missouri Soybean Association*, 102 S.W.3d at 25. Rather, a declaratory judgment is only appropriate where there is "a

justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation." *Id.* For these reasons, it is axiomatic that "[a] declaratory judgment should have a 'conclusive effect and should lay to rest the parties' controversy.'" *Id.* (quoting *Jones v. Carnahan*, 965 S.W.2d 209, 214 (Mo. App. 1998)). Because Doe has not sued the government officials with enforcement power over her, a judgment against McCulloch alone would have no such "conclusive effect." *Id.*

Doe does not dispute that the St. Louis County Circuit Court can enforce sections 540.080 and 540.310 against her, but she contends that McCulloch, too, can bring criminal contempt charges against her. LF 155–57 (arguing "Sections 540.080 and 540.310 . . . [can be] enforced through criminal contempt actions" brought by McCulloch). Even if Doe is correct on this point, her argument still fails, because contempt proceedings to enforce sections 540.080 and 540.310 can certainly proceed without McCulloch, through the Circuit Court's inherent authority. And the St. Louis County Circuit Court can appoint any attorney, not just McCulloch, to commence criminal contempt proceedings. *See* Mo. R. Crim. P. 36.01 (allowing the circuit court to appoint any attorney to apply for show cause order for criminal contempt). Accordingly, it was improper and insufficient for Doe to seek injunctive any declaratory relief against only McCulloch with respect to RSMo. §§ 540.080 and 540.310. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003); *Brooks*, 425 S.W.2d at 482-83; *see also, e.g., Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 148-49 (4th Cir. 2009) (holding that, where "other adequate

grounds" for an adverse ruling existed, the claim was "not redressable because a ruling on that claim would not alter that conclusion").

B. McCulloch's authority to enforce RSMo § 540.320 is not exclusive, and an equitable decree against McCulloch would not prevent the St. Louis County Circuit Court from enforcing that statute.

For similar reasons, Doe's claim that McCulloch has exclusive authority to enforce the criminal provision, RSMo § 540.320, against her, is not correct. Section 540.320 prohibits a grand juror from disclosing evidence heard or names of witnesses who testified before the grand jury. RSMo. § 540.320. It is a criminal statute and is punished as a Class A misdemeanor. *Id.* Doe sought equitable relief to enjoin McCulloch from enforcing the criminal statute so that Doe may freely violate her grand juror's Oath. LF 6–7.

Doe has failed, however, to address the fact that the St. Louis County Circuit Court has inherent authority to punish her for violating RSMo § 540.320, as well as the other statutes. *See Smith*, 313 S.W.3d at 129–30 ("Missouri courts have both an inherent power under the constitution to punish for contempt as well as authority to try contempt-of-court cases under the statutory crime of contempt"). And, indeed, such contempt proceedings can proceed without McCulloch. *See* Mo. R. Crim. P. 36.01. Therefore, for the reasons stated above, a declaratory judgment against just McCulloch would not redress Doe's asserted injury of fearing government enforcement of the secrecy statutes.

II. The Trial Court Properly Exercised its Authority in Deciding the Constitutional Issues Raised in Doe's Petition Because Doe's First Amendment Claim Is Inextricably Intertwined With Her Claims Addressing the Interpretation of Missouri Statutes (Responds to Appellant's Second Point Relied On).

Standard of Review. The trial court's decision to dismiss Grand Juror Doe's petition is reviewed *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

In her second Point Relied On, Doe argues that the trial court erred by dismissing Count I of her Petition, alleging claims under the federal First Amendment, because she made an express "*England* reservation" of that claim to reserve it for the federal district court. App. Br. 12-14. This argument lacks merit for two reasons. First, because Doe repeatedly urged the trial court to construe and apply Missouri's secrecy statutes "against a backdrop" of her First Amendment claim, the federal constitutional issues are inextricably intertwined with the questions of state statutory interpretation. Second, Doe overlooks the Eighth Circuit's explicit instruction to the state courts to determine whether the state court was the proper or exclusive forum for Doe's claims.

A. Doe expressly urged the trial court to consider her state-law claims "against a backdrop" of her First Amendment claim, and thus her federal and state claims are inextricably intertwined.

In her Petition, Doe made an express "*England* reservation" seeking to reserve the ruling on Count I, her First Amendment claim, for the federal district court. *See* Petition,

at 10-11 nn. 2-3; LF15–16. But Doe also twice explicitly requested that the trial court "construe the relevant [Missouri] statutes against a backdrop of Plaintiff's federal constitutional challenge." *Id.* Moreover, the main thrust of Doe's Petition is that the trial court should hold that the Missouri statutes did not apply to her because such application would violate her rights to free expression under the First Amendment. *See* Petition, at 11; LF 16. Needless to say, if Doe were not asserting a right to speak under the First Amendment, there would be no question whether her disclosures are permissible under state law—they are not. *See infra*, Part III.A.

Similarly, in the very first sentence of her opposition to McCulloch's motion to dismiss in the trial court, Doe argued that "Missouri laws criminalizing and prohibiting speech by Doe, about Doe's experiences as a state grand juror . . . do not apply to Doe as properly construed *or are unconstitutional as applied.*" LF148 (emphasis added). She again urged the court "to construe the relevant [state] statutes against a backdrop of Plaintiff's federal constitutional challenge." *Id.* n.1.

For this reason, the trial court correctly held that "the resolution of [Doe]'s state law claims in Count II and III would necessarily require this Court to address the scope of [Doe]'s rights under the First Amendment because Missouri may not offer fewer protections to its citizens than required under the federal constitution." LF 190. Indeed, as the trial court explained, "article I, section 8 [of the Missouri constitution] has been found comparable to the First Amendment, *see State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc. 2012), and there is no reason to believe that the Missouri constitution was

meant to give any more rights to grand jurors [than] were available under federal law." LF 190.

Under such circumstances, it is proper for the state court to decide constitutional issues when the federal issues are "necessary to its judgment" on the state-law questions. *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 338, 342 (2005). *San Remo* recognized the limits of *England* reservations by holding that federal courts "are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum." *Id.* at 347.

In *San Remo*, like in the present case, the petitioner filed a lawsuit in federal court, the court abstained under the *Pullman* doctrine pending a state-court resolution of the relevant state-law issues, and the petitioner then filed suit in state court for a decision on those state-law issues. *Id.* at 330–31. The petitioner, much like Doe, notified the state court that he intended to reserve the right to return to federal court for adjudication of the federal claim. *Id.* at 331–32. The state court, however, construed the state law and federal law congruently. *Id.* at 332. The state court thus analyzed the petitioner's claims under the relevant state *and* federal law, and dismissed the petitioner's lawsuit. *Id.* at 332–34. The petitioner attempted to return to federal court for resolution of the federal claim that he had reserved but was barred by the doctrine of issue preclusion. *Id.* at 334–35.

The district court in *San Remo* stated that "28 U.S.C. § 1738 [Full Faith and Credit] requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was

rendered." *Id.* at 335. Because the state court had interpreted the relevant state law "coextensively with federal law"—as the trial court did here—"[the] petitioner's federal claims constituted the same claims that had already been resolved in state court." *Id.* The district court dismissed the petitioner's federal lawsuit, the court of appeals affirmed, and the U.S. Supreme Court granted certiorari and affirmed. *Id.* at 334–35.

The U.S. Supreme Court held in *San Remo* that federal courts "are not free to disregard 28 U.S.C. § 1738." *Id.* at 338. The Court emphasized the longstanding rule that parties should not be permitted to relitigate issues that have already been resolved by courts of competent jurisdiction. *Id.* at 336–38 (explaining that the full faith and credit clause "has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion.'") (internal citation omitted). Accordingly, the Court rejected the petitioner's argument that he had reserved his federal claim for the district court and that the district court should, review the federal issues regardless of what issues the state court may have decided. *Id.* at 338. The Court held that although the petitioner was entitled to reserve his federal claims, that reservation does not negate the preclusive effect of the state-court judgment. *Id.*

The *San Remo* court concluded that "[w]e have repeatedly held . . . that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court. . . . The relevant question in such cases . . . is whether the state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* at 342.

Pursuant to the U.S. Supreme Court's holding, as long as the state court's ruling "actually decided an issue of fact or law that was necessary to its judgment" it will be afforded preclusive effect. *Id.* Therefore, it was appropriate for the trial court to rule on the federal issues in the present case because those issues were necessary in order to reach a decision on the state-law claims.

B. The trial court's resolution of Doe's First Amendment claims is consistent with the federal courts' instruction that the state courts should determine whether the state court is the proper venue for Doe's claims.

Doe attempts to persuade this Court that "[t]he circuit court erred in reaching the merits of Doe's federal constitutional claim—and dismissing it with prejudice—because that claim was not before the circuit court." App. Br., 12. Doe's argument conflicts with the holdings of the federal courts that previously reviewed her claims.

The U.S. District Court for the Eastern District of Missouri found that Missouri's grand jury system is an area of "fundamental importance to a sovereign state" and "[f]ederal intervention would interfere with Missouri's procedures and policies in an area of special state interest." LF 140. Likewise, the Eighth Circuit recognized the importance of the state trial court's jurisdiction when it held that the federal courts should abstain from this case until state courts ruled on state-law issues. *Grand Juror Doe v. Robert P. McCulloch*, 835 F.3d 785, 786 (8th Cir. 2016) (holding that the district court "should have stayed the case while the state-law issues were decided by the Missouri state courts."). The Eighth Circuit not only held that federal court abstention was proper

in this case, but it also outlined the state-court issues that it invited the state trial court to consider.

Specifically, the Eighth Circuit asked the trial court to consider "whether Doe has sued the wrong party, [or] has filed suit in the wrong venue." *Grand Juror Doe*, 835 F.3d at 788 n.2. Doe disregards this statement by the Eighth Circuit, and she mistakenly argues that the federal issues can only be decided by the federal courts. App. Br., 12-14. She overlooks that the Eighth Circuit contemplated that the St. Louis County Circuit Court may be the only venue in which she could challenge the secrecy obligation, and the Eighth Circuit invited the state trial court to consider that issue and rule upon it. *Grand Juror Doe*, 835 F.3d at 788 n.2.

Rather than disregard the holdings of the federal courts in this case, the St. Louis County Circuit Court acted consistently with the Eighth Circuit's direction when it held that the state court was the only court that could fully resolve Doe's claims. LF 183 ("Plaintiff's claims for relief must be addressed to the Missouri courts, and in particular, to the St. Louis County Circuit Court where Plaintiff served."); LF 184 ("As such, this Court finds that Plaintiff's federal lawsuit was filed in the wrong venue, and that this Court has jurisdiction to hear all of Plaintiff's claims.").

This holding by the trial court was correct under well-established state and federal law. *See, e.g., Smith*, 313 S.W.3d at 129–30 ("Missouri courts have both an inherent power under the constitution to punish for contempt as well as authority to try contempt-of-court cases under the statutory crime of contempt"); *Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 718–19 (Mo.App. 1977) (holding that contempt proceedings

are triable only by the court against whose authority the contempts are charged and no other court may inquire into the charge); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 226 (1979) (holding that requests for disclosure of grand jury transcripts should generally be directed to the court that supervised the grand jury's activities); *Camiolo v. State Farm Fire and Cas. Co*, 334 F.3d 345, 357 (3rd Cir. 2003) (holding that "[p]rinciples of comity and federalism demand that a district court presented with a request to compel the disclosure of any matter occurring before a [state] investigating grand jury should direct the party to first formally petition the judicial officer who possesses the supervisory authority to grant or deny such access").

Therefore, the trial court clearly did not interfere with the federal courts in this case and, indeed, acted consistently with the federal courts' holdings when it ruled that "[Doe]'s federal lawsuit was filed in the wrong venue" and "[the circuit court] has jurisdiction to hear all of [Doe]'s claims." LF 184.

For these reasons, the circuit court properly ruled on the federal issues and properly dismissed Doe's claims.

III. The Trial Court Correctly Concluded That No Exception to Grand-Jury Secrecy Authorizes Doe's Planned Disclosures, Because Both the Plain Language of the Secrecy Statutes and the Long Tradition of Grand-Jury Secrecy Bind Doe to Her Oath of Secrecy. (Responds to Appellant's Third Point Relied On).

Standard of Review. The trial court's decision to dismiss Grand Juror Doe's petition is reviewed *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

Doe contends that the secrecy statutes are not enforceable against her because (1) McCulloch's court-authorized public disclosures under the Sunshine Law have supposedly undermined the interests in maintaining grand-jury secrecy; and (2) her interest in freedom of expression supposedly outweighs the public-policy reasons for enforcing grand jury secrecy here. These arguments have no merit. The plain language of the oath and secrecy statutes, the long tradition of grand-jury secrecy, the compelling reasons supporting the policy of secrecy, and all relevant appellate decisions confirm that the unmoored exception to grand-jury secrecy that Doe seeks does not exist.

A. Doe's disclosures would violate the plain language of the secrecy statutes, and no statutory language authorizes the exception that Doe requests.

First, it is undisputed that Doe's planned disclosures would violate the plain text of the secrecy statutes. Section 540.310 prohibits Doe from revealing any matter regarding how grand jurors voted: "No member of a grand jury shall be obliged or allowed to testify or declare in what manner he or any other member of the grand jury voted on any

question before them, or what opinions were expressed by any juror in relation to any such question." RSMo § 540.310. Section 540.320 prohibits Doe from disclosing "any evidence given before the grand jury, [or] the name of any witness who appeared before them." RSMo § 540.320. And the oath set forth in section 540.080, which Doe took twice, provides that *all* grand-jury matters are prohibited from disclosure: "the counsel of your state, your fellows and your own, you shall truly keep secret." RSMo § 540.080. Taken individually and collectively, these statutes plainly prohibit the disclosures contemplated by Doe.

Doe does not dispute this point. Doe proffers no basis in the statute's plain language for a judicially created exception to grand-jury secrecy in this context. Her arguments in Point III consist entirely of *policy* arguments, urging that she should be excused from her obligation of secrecy as a matter of policy. App. Br. 15-21. In fact, Doe expressly conceded in her Petition that the grand-jury-secrecy statutes do *not* permit her to make her desired disclosures. *See* Petition ¶ 52, LF15 ("The challenged laws operate to permanently and totally prohibit Plaintiff from engaging in any expressive activity related to evidence, witnesses, and counsel before the grand jury.").

Thus, Doe urges this Court to depart from the plain text of the secrecy statutes solely for policy reasons. This Court should not take such a step. The General Assembly did not enact a "policy exception" when it enacted the secrecy statutes, and fundamental principles of statutory interpretation oppose the judicial creation of such an exception. *See, e.g., State v. Bazell*, 497 S.W.3d 263, 266 (Mo. banc 2016) (holding that "the primary rule of statutory interpretation" is "to give effect to the plain and ordinary

meaning of the statutory language"). The Court should conclude that the plain language of the statutes bars Doe's disclosures and end its statutory inquiry there.

Moreover, if such a judicially-created exception to the plain text of the statutes were permissible at all, Doe faces a very high bar in convincing this Court to alter or vary the plain and ordinary meaning of the statutes that bind her to secrecy. *See id.* Her pleadings fall far short this high bar.

B. Doe planned disclosures would violate the core purposes of grand-jury secrecy by divulging witnesses' identities, the deliberations and voting decisions of other grand jurors, and facts about "hundreds" of unrelated investigations.

As the U.S. Supreme Court has recognized, there is a strong tradition and public policy in favor of grand-jury secrecy that stretches back centuries. "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." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979). "The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system." *Id.* Indeed, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* at 218.

"In particular," the Supreme Court has "noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings." *Id.* at 218–19. "First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify

would be aware of that testimony." *Id.* at 219. Likewise, if grand-jury proceedings were not secret, "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.* "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." *Id.* Permitting disclosure of proceedings before the grand jury would "compromise th[e] vital secrecy" that has attached to the grand jury for centuries. *Rehberg v. Paulk*, 566 U.S. 356, 374 (2012).

Doe argues that these strong policies in favor of grand-jury secrecy should be disregarded because the reasons underlying the policy are no longer applicable after the conclusion of the investigation and McCulloch's limited public disclosures. This argument has no merit. Doe selectively overlooks several areas in which her proposed disclosures would clearly violate the critical policies underlying grand-jury secrecy.

1. Doe's disclosures, unlike McCulloch's disclosures, would reveal specific identifying information about eyewitnesses and testimony before the grand jury.

First, one fundamental purpose of grand-jury secrecy is to ensure that witnesses feel free to testify openly, without fear of public opprobrium or retribution by suspected criminals who may go uncharged or remain at large pending investigation. *See Douglas Oil*, 441 U.S. at 219 ("[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony."). The purpose of this policy is not just to guarantee free testimony by the witnesses to the *current* investigation,

but also to give confidence to witnesses in *future* investigations that their confidentiality will be respected. "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958).

McCulloch's prior disclosures respected the confidentiality of witnesses who testified before the grand jury. Doe conceded in her Petition that McCulloch's disclosures of evidence contained extensive redactions to protect the identities of those who testified. *See* Petition ¶ 31, LF 11. Moreover, McCulloch's redactions were those authorized by Missouri's Sunshine Law, not by Doe's personal views on what is appropriate to keep secret and to divulge. Furthermore, in her opposition to the motion to dismiss below, Doe contended that she should not be bound by McCulloch's redactions of witness identities but should be allowed to disclose the identities of witnesses at her own discretion: "Allowing Doe to speak but requiring Doe to memorialize and adhere to every redaction or omission made by McCulloch would trap Doe in an untenable situation." LF 154. In fact, in her publicly-filed pleadings, she stated the identities of three witnesses who testified before her when she was a grand juror, even though those identities were redacted in McCulloch's disclosures and remain under the legal seal of grand-jury secrecy. *See* LF 154. Thus, Doe has made it abundantly clear that she does not and will not feel bound to protect the identities of witnesses in any public disclosures.

Doe's threat to reveal the identity of witnesses undermines a core purpose of grand-jury secrecy. It has long been recognized that grand-jury secrecy serves to address "the concern that some witnesses will be deterred from presenting testimony due to fears

of retribution" or other adverse action. *Butterworth v. Smith*, 494 U.S. at 633 (1990). Again, grand-jury secrecy addresses this concern, not only for the witnesses in the Darren Wilson investigation, but also for witnesses in future investigations who may be deterred from testifying freely if they are aware that grand-jury secrecy has not been fully respected in previous cases—especially high-profile investigations. *Procter & Gamble Co.*, 356 U.S. at 681.

For this reason, the Supreme Court in *Butterworth* declined to recognize any First Amendment right to disclose the testimony of *another* witnesses before the grand jury, even after the particular investigation had concluded. "[T]hat part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable under the ruling of the Court of Appeals." *Butterworth*, 494 U.S. at 633.

2. Doe's disclosures, unlike McCulloch's disclosures, would violate the confidentiality of the deliberations and votes of other grand jurors.

Another critical reason for the policy of grand-jury secrecy is to protect the freedom of deliberation of the grand jurors themselves. This policy is expressly codified in section 540.310, which specifically forbids any grand juror to "declare in what manner . . . any other member of the grand jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question." RSMo § 540.310. The same policy is also codified in the grand jurors' oath, by which the grand jurors swear to "truly keep secret" the "counsel" of "*your fellows* and your own." RSMo § 540.080 (emphasis added).

Numerous authorities have recognized this strong policy of protecting the confidentiality of the grand jurors' deliberations and voting decisions. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 629 (1990) ("The tradition of secrecy surrounding grand jury proceedings evolved, at least partially, as a means of . . . ensuring the impartiality of that body."). In fact, one of the most fundamental purposes of grand-jury secrecy is "to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors." *Douglas Oil*, 441 U.S. at 219 n.10 (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958)); *see also Palmentere v. Campbell*, 205 F. Supp. 261, 266 (W.D.Mo. 1962) (holding that grand-jury secrecy plainly extends to "what was said and done by the grand jurors themselves in regard to any indictment or other matter under investigation"); *Mannon v. Frick*, 295 S.W.2d 158, 163 (Mo. 1956) ("Some disclosures are still generally forbidden as, for instance, the votes of the respective grand jurymen, and their deliberations or expressions of opinion.").

In addition to the secrecy of deliberations and voting, there is also a powerful privacy interest in protecting the identities of the grand jurors themselves, which is maximal in a high-profile case like the Darren Wilson investigation. Grand-jury secrecy seeks to avoid "the subjection of grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand jury service." *Butterworth*, 494 U.S. at 637 (Scalia, J., concurring). In addition, grand jury secrecy "helps to assure . . . that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism to which they cannot

respond." *Id.* at 636. These interests unquestionably retain their importance even after the conclusion of the particular investigation.

Notably, McCulloch's limited disclosures respected the confidentiality of the grand-jury deliberations. Doe conceded in her Petition that McCulloch specifically advised the grand jurors that their deliberations would never be recorded or disclosed, and that only the *evidence* would be released to the public: "*Your deliberations are not recorded and never will be recorded, notes won't be released*, but every bit of evidence that you have . . . will be released to the public." Petition ¶ 15, LF9 (emphasis added). McCulloch thus assured the grand jurors that their individual deliberations would remain secret—an assurance, backed by Missouri statutes, on which they were entitled to rely. McCulloch's subsequent motion for leave to disclose redacted transcripts of *evidence* under Missouri's Sunshine Law reemphasized that his disclosures would respect the confidentiality of grand-jury deliberations and voting decisions. LF 31 ("In making these records open, as provided for under the Missouri Sunshine Law, Movant Robert McCulloch will not disclose or produce names of the grand jurors, minutes or notes of any grand juror, nor any documents of the Grand Jury.").

Doe, by contrast, explicitly seeks the freedom to disclose how *other* grand jurors, besides herself, deliberated and voted in the Darren Wilson investigation. Doe's Petition repeatedly emphasizes that she wishes to recount the other grand jurors' putative "views" regarding the evidence presented to the grand jury. *See* Petition ¶ 3, LF7 (alleging that Doe wishes to publicly discuss "the grand jury's views"); *id.* ¶ 33, LF 11 (alleging that Doe wishes to correct "the public characterization of the grand jurors' view of witnesses

and evidence"). Doe also pleads that she wishes to disclose how she and other grand jurors *voted* on whether to indict Darren Wilson, to rebut a public impression supposedly created by McCulloch that the vote against true bill was unanimous. *See id.* ¶¶ 21-22, LF 10 (alleging that nine out of twelve grand jurors must concur in returning an indictment, and that "[t]he decision of a grand jury to return no true bill of indictment means that as few as four out of twelve grand jurors did not concur in finding that an indictment should issue"). Indeed, she alleges that she wishes to publicly address how to properly "characterize the views of the grand jurors *collectively* toward the evidence." Petition ¶ 30, LF11 (emphasis added). Similarly, her opening brief on appeal clearly indicates that she wishes to disclose publicly how individual grand jurors voted. App. Br. 19-20 (arguing that Doe should be allowed to speak publicly because, "while McCulloch implied all twelve jurors, as a 'collective,' decided not to indict Wilson on any of the charges, the reality is that eight of the twelve jurors could have found that there *was* probable cause on any or all of the charges").

By seeking to excuse herself from the secrecy rule as to grand-jury deliberations and voting decisions, Doe threatens to upset the reasonable, settled expectations of her fellow grand jurors that their deliberations would be kept strictly confidential. Doe alleges that McCulloch personally guaranteed to the other grand jurors that their discussions would be neither recorded nor disclosed, and that each grand juror received a copy of the oath guaranteeing the confidentiality of their deliberations at the conclusion of their service. Petition ¶¶ 15, 26, LF 9–10. Doe's disclosures, therefore, would cast a

pall over the freedom of deliberation in all future grand juries, especially those considering high-profile or politically sensitive alleged crimes.

3. Unlike McCulloch, Doe seeks to make public disclosures about evidence and deliberations in "hundreds" of unrelated grand-jury investigations, to compare them to the Darren Wilson investigation.

Perhaps most troubling, Doe seeks blanket authorization to make disclosures about grand-jury evidence and deliberations in literally "hundreds" of *other* unrelated cases, for the purpose of comparing them to the Darren Wilson investigation. Doe's Petition repeatedly alleged this desire and intention. *See* Petition ¶ 17, LF 9 (asserting Doe's interest in publicly comparing the Wilson investigation to "how evidence was presented in the hundreds of matters presented to the same grand jury earlier in its term"); *id.* ¶ 18, LF9 (asserting Doe's interest in making public disclosures about "the State's counsel to the grand jury in the hundreds of matters presented to the same grand jury earlier in its term"); *id.* ¶ 19, LF 9 (asserting Doe's interest in making public disclosures about the amount of "focus on the victim [in] the other cases that had been presented to the same grand jury earlier in its term"); *id.* ¶ 20, LF 10 (asserting Doe's interest in making public disclosures comparing "the presentation of the law to which the grand jurors were to apply to the facts in Wilson's investigation . . . compared to the presentation of the law in other cases presented to the same grand jury earlier in its term").

Thus, as the federal district court aptly stated, Doe "wants to compare other grand jury proceedings in which she participated to the Wilson matter. Comparing other grand jury proceedings would require the disclosure of evidence, witness testimony, and other

confidential information from those other proceedings." *Doe v. McCulloch*, 106 F. Supp. 3d 1007, 1012 (E.D. Mo. 2015).

Though Doe argues that McCulloch's prior disclosures have undermined the rationale for secrecy from the Wilson investigation, she makes no argument that McCulloch's disclosures affected the need for secrecy from the "hundreds" of other investigations that she considered during her term as a grand juror in St. Louis County. *See* App. Br. 15-21. In effect, Doe seeks a green light to make unfettered disclosures about the investigation of unrelated cases for the purpose of illuminating the Wilson case, but she does not even consider the impact of her disclosures on grand-jury secrecy for those other cases. Her disclosures would potentially blindside her fellow grand jurors and the witnesses who testified in numerous unrelated investigations, none of whom has any reasonable expectation that Doe will be allowed to opine publicly on those cases.

C. The cases Doe cites recognizing limited exceptions to grand-jury secrecy have no application here.

Doe cites several cases recognizing exceptions to grand-jury secrecy in narrow, limited circumstances, but none of these cases supports finding an exception here.

First, Doe relies on *Butterworth v. Smith*, 494 U.S. 624 (1990), but *Butterworth* does not support Doe's position. *Butterworth* upheld the First Amendment right of a witness before a grand jury to speak publicly on the matters about which he himself had testified. "We hold that insofar as the Florida law prohibits a grand jury witness from disclosing *his own* testimony after the term of the grand jury has ended, it violates the First Amendment." *Id.* at 626 (emphasis added). In so holding, *Butterworth* made clear

that this First Amendment right extended only to information that the witness acquired separately from his involvement with the grand jury, and not to information that the witness obtained through his involvement with the grand jury. "Here, by contrast, we deal only with respondent's right 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 632 (emphasis added). Doe, by contrast, seeks to divulge *only* "information which [she] . . . obtained as a result of [her] participation in the proceedings of the grand jury," *id.*, and thus *Butterworth* provides no support for her argument.

Doe also relies on *Palmentere v. Campbell*, 205 F. Supp. 261 (W.D. Mo. 1962), but this case is unavailing. In *Palmentere*, the plaintiff had been arrested at the grand jury's location after appearing pursuant to a grand jury subpoena to testify. *Id.* at 262. He was never charged with a crime, and he alleged in his lawsuit that the individual grand jurors violated his constitutional rights by having him arrested without charges. *Id.* at 262-63. The grand jurors, as defendants, argued that they needed to be absolved of their duty of grand-jury secrecy for the limited purpose of revealing to their own lawyers what occurred in the grand-jury proceeding and defending the civil-rights lawsuit against them. *Id.* at 263. Emphasizing that a principal purpose of grand jury secrecy is "to protect the [grand] jurors themselves," the court concluded that the grand jurors could disclose matters by "revealing to counsel, embodying in pleadings, testifying concerning, or otherwise using in such manner as may be necessary to a proper defense of this action." *Id.* at 264, 268.

Needless to say, Doe does not allege that she is the defendant in any civil-rights lawsuit arising from her service as a grand juror, and thus *Palmentere* has no application here. On the contrary, *Palmentere* explicitly recognized that the rule of secrecy has never been "relaxed" as to "the secrecy imposed upon the grand jurors . . . with respect to what took place in the executive session and what was said and done by the grand jurors themselves in regard to any indictment or other matter under investigation." *Id.* at 266. Of course, unlike the grand jurors in *Palmentere*, Doe explicitly desires to reveal her perceptions of "what was said and done by the grand jurors themselves in regard to any indictment or other matter under investigation." *Id. Palmentere* thus directly contradicts Doe's position.

Finally, Doe cites cases holding that the *petit* jury's verdict may be impeached based on evidence of a juror's racial or religious bias, but her reliance on these cases is misplaced. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (holding that the petit jury's verdict may be called into question through evidence of racial bias by a petit juror); *Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 87-90 (Mo. banc 2010) (holding that a petit jury's verdict may be called into question through evidence of racial and religious bias by one of the petit jurors). Doe has not alleged that she wishes to impeach the Wilson grand jury's decision by revealing evidence of racial or religious bias among the other grand jurors, so these cases are inapplicable. Moreover, the long tradition of grand-jury secrecy and the compelling state interests that it advances simply do not apply to the same degree to the petit jury after the completion of a public criminal trial. Rather, our system has long emphasized but the importance of public access to information about

post-indictment criminal proceedings, especially the jury trials that actually determine guilt or innocence.

D. McCulloch's prior disclosures pursuant to the Sunshine Law do not authorize grand jurors like Doe to violate their oaths of secrecy.

Doe argues that McCulloch's opposition to Doe's planned disclosures is inconsistent with McCulloch's position in 2014, when he sought court authorization to disclose redacted versions of the evidence before the grand jury. *See* App. Br. 18. This is incorrect. In 2014, McCulloch sought court authorization for his own disclosures on the basis that the prosecuting attorney's transcript of the evidence before the grand jury constituted an "investigative report" within the meaning of Missouri's Sunshine Law, and thus it would become an open record and be subject to public disclosure in redacted form if the grand jury's investigation concluded without indictment. *See* LF 33-35 (arguing that the prosecutor's report is an "investigative report" under section 610.100.1(5), RSMo, which becomes an "open record" upon conclusion of an investigation, subject to redactions authorized by section 610.100.3).

In other words, McCulloch contended that the disclosure of the redacted transcripts was mandatory under the Sunshine Law, and that the secrecy statutes did not alter or vary the plain meaning of the Sunshine Law in this context. LF 35-38. Doe, by contrast, does not point to any other provision of law—such as Missouri's Sunshine Law—that mandates the disclosures she desires, or creates an express statutory exemption to the general policy of the secrecy statutes. Rather, she seeks to alter or vary the plain meaning of the secrecy statutes without any statutory basis, and she relies on

amorphous policy arguments that understate or ignore the grave reasons for maintaining grand-jury secrecy in this context. Accordingly, there is no inconsistency with McCulloch's prior disclosure of the redacted transcripts pursuant to the Sunshine Law.

E. Neither the First Amendment nor Article I, § 8 of the Missouri Constitution creates an exception to grand-jury secrecy for Doe.

As noted above, Doe urged the trial court to construe the Missouri statutes "against a backdrop of [her] federal constitutional challenge," *i.e.*, the First Amendment claim. Petition at 10–11 nn. 2–3, LF15–16. In other words, Doe urged the trial court to "construe" Missouri's statutes to avoid a conflict with her putative First Amendment right to speak in this context. *Id.* This argument has no merit, because Doe has no First Amendment right to break her grand-juror's oath. Nor does she have any such right under the equivalent provision in Missouri's Constitution, Article I, Section 8. *See State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc 2012) (holding that the federal First Amendment and Article I, Section 8 of the Missouri Constitution provide "comparable" protection to freedom of speech).

Every court to consider the issue has assumed that there is no First Amendment right to breach grand-jury secrecy when the disclosure would materially undermine the policies favoring grand-jury secrecy. For example, in *Butterworth*, the Supreme Court took great pains to emphasize that (1) there was no strong tradition of secrecy as to a witness's *own* testimony, and (2) a witness's disclosure of the contents of his own testimony would have no material adverse effect on the policies favoring grand-jury secrecy. *Butterworth*, 494 U.S. at 632-34 (holding that prohibiting the disclosure of a

witness's own testimony would not serve most of the interests favoring secrecy, and would only marginally serve the interest in protecting the reputation of an investigative target); *see also id.* at 631 (noting that 40 States did not prohibit the disclosure of a witness's own testimony before the grand jury).

On this point, *Butterworth* accords with a legion of cases recognizing and upholding the principle of grand-jury secrecy. *See, e.g., United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("Both Congress and this Court have consistently stood ready to defend [grand-jury secrecy] against unwarranted intrusion. In the absence of a clear indication . . . we must always be reluctant to conclude that a breach of this secrecy has been authorized."); *United States v. Johnson*, 319 U.S. 503, 513 (1943) (holding that "the indispensable secrecy of grand jury proceedings" is "as important for the protection of the innocent as for the pursuit of the guilty"); *State ex rel. Clagett v. James*, 327 S.W.2d 278, 283-84 (Mo. banc 1959) ("[I]t is the intent of our statutes to keep secret the proceedings of the grand jury concerning which the grand jurors are specifically prohibited from testifying and that transcripts, notes, and minutes cannot be used to disclose such matters."); *State ex rel. Roe v. Goldman*, 471 S.W.3d 814, 817 (Mo. App. E.D. 2015) (holding that "the public welfare would not be served by allowing this Grand Jury to continue its service" because "the veil of secrecy surrounding this Grand Jury has been punctured," and thus discontinuing the grand jury was "necessary to protect the integrity of the grand jury process").

Against this weight of authority, Doe cannot identify any case authorizing the open-ended First Amendment exemption to grand-jury secrecy that she seeks. Because

Doe's claim that the First Amendment authorizes her planned disclosures has no merit, her principal argument of statutory interpretation—*i.e.*, that the Missouri secrecy statutes should be interpreted to contain an implied exemption for her "against a backdrop" of her First Amendment claim—also has no merit. As the trial court correctly held, "the First Amendment has never been found to permit grand jurors to disclose information learned during the course of their grand jury service." LF 208.

To be sure, the Darren Wilson investigation touched upon matters of enormous public and media interest. But the high public profile of an investigation does not provide a reason to excuse grand jurors of their obligation of secrecy. Quite the contrary—the enormous media interest in the Wilson investigation makes the purposes of grand-jury secrecy all the more compelling. Protecting the ability of witnesses to testify freely without influence from outside sources, shielding the grand jurors themselves from media scrutiny and loss of privacy, and encouraging uninhibited deliberation among grand jurors—all of these goals become even more critical in a high-profile investigation. Moreover, breaches of grand-jury secrecy in high-profile cases that occur after the conclusion of an investigation are more likely to adversely impact future investigations, because future witnesses and grand jurors are more likely to become aware of them.

In short, Doe fails to identify any case that recognizes the sort of freewheeling exception to grand-jury secrecy that she claims in this case. For all these reasons, Doe's arguments in favor of abrogating grand-jury secrecy should be rejected, and the trial court's judgment should be affirmed.

IV. The Trial Court Carefully Considered and Correctly Rejected the Merits of Doe's Claims in a Well-Reasoned Order and Judgment. (Responds to Appellant's Fourth Point Relied On).

Standard of Review. The trial court's decision to dismiss Doe's petition is reviewed *de novo*. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. 2007).

In her fourth Point Relied On, Doe contends that the trial court did not even consider the merits of her claims because it supposedly viewed itself as "impotent to excuse Doe" from her oath, and thus (Doe contends) the trial court "did not address the issue of whether justice required that Doe be released from her oath," leading to a merely "superficial" treatment of Doe's claims. App. Br. 22-24.

This argument misconstrues the trial court's judgment. The trial court did not conclude that it lacked jurisdiction to address the merits of Doe's claims; on the contrary, the court concluded that her claims lacked merit. *See* Judgment 4-7, LF 181–84 (providing a detailed discussion of the trial court's jurisdiction and concluding that the court had jurisdiction to address all of Doe's claims); Judgment 8-14, LF 185-91 (discussing the merits of Doe's claims and concluding correctly that Doe's claims failed to state a claim for relief because she failed to plead a valid basis to excuse herself from the duty of secrecy).

In particular, the trial court's reasoning as to why no exception to grand-jury secrecy is applicable here was not "superficial," but detailed and correct. First, the trial court correctly noted that, unlike in other cases in which narrowly tailored disclosures

have been permitted, Doe seeks a very broad license to speak about the Darren Wilson investigation without any restraint. "Plaintiff is seeking an order completely invalidating Missouri's grand jury secrecy laws as applied to her, not an order that allows her to make certain disclosures for certain purposes." Judgment at 8, LF 185. The court noted that "under normal circumstances" grand jurors are bound by the oath and duty of secrecy, and concluded that Doe must demonstrate, at very least, "unique" circumstances to excuse herself from these grave obligations. *Id.*

The trial court then correctly concluded that Doe had failed to demonstrate such "unique" circumstances to absolve her of the duty of secrecy. The court noted that Doe did not rely on any express exception from the secrecy obligation in the statute. "Missouri law prohibits Plaintiff from sharing her experiences as a grand juror, including how she voted or what she said or discussed during the jury's deliberations, and no exception to these prohibitions exists." *Id.* at 9-10, LF 186–87 (citations omitted) (citing numerous cases). The trial court explicitly considered and rejected Doe's argument that "Missouri has no interest in continued secrecy in this case because her grand jury has already concluded its work and because [McCulloch] has already disclosed much of the information presented to the jury." *Id.* at 10, LF 187. The trial court rejected Doe's argument by citing numerous cases holding that "even where a grand jury has concluded its work, the state maintains a strong interest in secrecy." *Id.* at 11, LF 188 (citing cases). In particular, the trial court emphasized that "[t]he continued secrecy of such grand jury information would be justified by the state's need to encourage the participation of witnesses in future grand juries." *Id.*

Regarding Doe's claim that she has a First Amendment right to divulge information she obtained during her service as a grand juror, the trial court reviewed the case law and concluded that "the First Amendment has never been found to permit grand jurors to disclose information learned during the course of their jury service." *Id.* at 12, LF 189. The trial court specifically addressed *Butterworth*, the case which Doe cited in Paragraph 2 of her Petition. *Id.* at 12-13, LF 189–90. The trial court concluded that *Butterworth* indicates that the First Amendment does *not* authorize a grand juror to divulge "information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Id.* at 12, LF 189 (quoting *Butterworth*, 494 U.S. at 632).

In short, Doe's contention that the trial court gave only "superficial" consideration to her claims is plainly incorrect. The trial court gave them detailed consideration, and correctly concluded that Doe had failed to allege any circumstances that could justify excusing Doe from her solemn statutory obligation of grand-jury secrecy, or any factual basis to conclude that enforcing these statutes or her oath against Doe would violate the First Amendment. Accordingly, the trial court correctly concluded that Doe's Petition should be granted for failure to state a claim.

CONCLUSION

The Court should affirm the trial court's order and judgment dismissing the Petition with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on August 7, 2017, to all counsel of record in this case.

The undersigned further certifies that the foregoing brief complies Mo. R. Civ. P. 55.03 and with the word limitations contained in Mo. R. Civ. P. 84.06(b), as reduced by Local Rule 360, in that the brief contains 10,527 words, excluding those portions excluded by Mo. R. Civ. P. 84.06(b) and Local Rule 360(c).

/s/ D. John Sauer