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

Division: AG

DEFENDANT, CLERK AND COMPTROLLER OF PALM BEACH COUNTY'S, RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant, Joseph Abruzzo, as Clerk and Comptroller of Palm Beach County, Florida (the "Clerk"), by counsel, responds to Plaintiff, CA Florida Holdings, LLC, publisher of *The Palm Beach Post*'s ("*The Post*"), Motion for Summary Judgment (**DE # 58**) (the "Motion"), and states as follows:

I. INTRODUCTION AND BACKGROUND

The Post sued the Clerk and Palm Beach County State Attorney[1] to gain access to "confidential" records of "secret" grand jury proceedings that are "exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution" so it can disclose them to the public. *See* §§ 905.17, 905.24, *Fla. Stat.*; Motion (**DE # 58**) at p.34. Unfortunately, the Clerk (who inherited

[1] As noted in the Motion (**DE # 58** at p. 2, n. 1), *The Post* dropped the State Attorney, Dave Aronberg, as a party after he filed a Motion for Attorneys' Fees under Section 57.105 (**DE # 35**) and Motion for Summary Judgment (**DE # 38**), both of which argued that the State Attorney does not possess any of the records *The Post* seeks.

this case from his predecessor[2]) is the sole remaining "Defendant" in this case because his office is charged with the ministerial duty of keeping "stenographic records, notes, and transcriptions made by the court reporter or stenographer" of Palm Beach County grand jury proceedings "in a sealed container not subject to public inspection." *See* § 905.17(1), *Fla. Stat.*

Several statutes enforceable through criminal penalties require grand jury secrecy and *forbid* clerks of Florida's circuit courts from releasing grand jury materials except "on request by a grand jury for use by the grand jury or on order of the court pursuant to s. 905.27." *See* §§ 905.17(1), 905.27(1)-(2), (4)-(5), *Fla. Stat.* **Chapter 905 does not grant the Clerk any authority or discretion to release any grand jury materials to the press or public—regardless of the subject matter of the proceedings at issue or public sentiment about whether they should be released.**

Considering the Clerk's constitutional and statutory duties, lack of discretion, and role as a depository for grand jury materials, his defense to this lawsuit is necessarily limited to the issue of whether, under Florida law, clerks of the circuit courts can be sued by private parties seeking access to such records. The specific subject matter of the underlying grand jury proceedings is irrelevant to this preliminary question concerning the legality of *The Post's* suit against the Clerk. Consequently, the Clerk takes no position on most of the facts put forth in *The Post's* Motion.[3]

If the Court decides that private litigants can sue clerks for declaratory relief to gain access to grand jury materials under Section 905.27(1)(c) and/or the Court's "inherent authority," only then would the inquiry advance to whether *The Post* can demonstrate to the Court that releasing

[2] Clerk Abruzzo was sworn into office as Palm Beach County's Clerk and Comptroller on January 5, 2021.

[3] This should not, however, be construed as the Clerk's agreement with or adoption of any of the factual positions taken by *The Post*.

testimony, minutes, and other evidence related to the Jeffrey Epstein grand jury is appropriate to serve "the purpose of…furthering justice" and/or preserve the dignity of the judicial system. However, the Clerk's office is merely the statutorily designated depository for these materials and performs this function solely in a ministerial capacity as an arm of the Court, required comply with any directives from the Court concerning the materials *The Post* seeks. The Clerk is not aware of any authority or standing granted to his office to advocate for or against the release of any grand jury materials, including the specific materials at issue here. Accordingly, this response is limited to an overview of the law related to the "furthering justice" exception and the Court's inherent authority to help inform the Court's decision.

II. PROCEDURAL HISTORY

The Post's operative pleading is its January 17, 2020 Amended Complaint (**DE # 17**), which asserts a claim for declaratory relief (Count I) and attempted to state a private cause of action under section 905.27, Florida Statutes (Count II). Both counts sought the same relief: a court order granting *The Post* access to the testimony, minutes, and other evidence presented in 2006 to the Palm Beach County grand jury concerning Jeffrey Epstein so it can "use those materials for the purpose of informing the public." (**DE # 17** at pp. 20-21).

On January 24, 2020, the State Attorney and Clerk filed their respective Answers[4] and incorporated Motions to Dismiss Count II of the Amended Complaint (**DE ## 22, 24**); both arguing that Section 905.27 does not create a private cause of action. The State Attorney also argued that

[4] In its Answer (**DE # 24**), the Clerk asserted that it was without knowledge of all the Amended Complaint's factual allegations regarding Epstein and the 2006 grand jury proceedings, and therefore denied them and "demand[ed] strict proof thereof." *The Post's* Motion suggests (**DE # 58** at p.3) that the material facts are "uncontested" based in part on the Clerk's Answer, but that clearly is not accurate.

he was an improper party to the case because his office does not possess grand jury materials, which are filed with the Clerk's office under Section 905.17(1) (**DE # 22** at pp.11-12).

On June 8, 2020, the Court entered its *Order Granting Defendants' Motions to Dismiss Count II of Plaintiff's First Amended Complaint With Prejudice* (**DE # 33**). In pertinent part, the Court ruled:

> In sum, there is nothing in the text of section 905.27 from which one can deduce that the Legislature contemplated a member of the media, or anyone else for that matter, having a private cause of action to compel the State Attorney and Clerk to disclose grand jury records. Indeed, to the contrary, section 905.27 prohibits the State Attorney and Clerk (assuming that, as pleaded by the Post, they have the documents) from disclosing the documents without first being ordered to do so by the court. Reading section 905.27 as creating a private cause of action against the State Attorney and Clerk is, therefore, not only unsupported by the language of section 905.27, but is actually paradoxical to its plain language of the statute. As such, this Court lacks the power to construe the unambiguous language of section 905.27 in a way that would extend its express terms and create a cause of action where none exists. "To do so would be an abrogation of legislative power." (citation omitted).

Shortly thereafter, the State Attorney filed his Motion for Attorneys' Fees under Section 57.105 (**DE # 35**) and Motion for Summary Judgment (**DE # 38**). On October 21, 2020, The Post filed its Notice of Dropping the State Attorney as a party (**DE # 48**).

On April 22, 2021, without having sought reconsideration or rehearing of the June 8, 2020 Order, *The Post* filed its Motion seeking summary judgment against the Clerk (**DE # 58**). In its Motion, *The Post* relies upon nearly 20 pages of somewhat slanted and argumentative factual assertions about Epstein and the 2006 grand jury proceedings (**DE # 58** at pp. 1-19) to support the re-argument of its position that Section 905.27 creates a private right of action (**DE # 58** at pp. 20-25), and the argument that access should be granted to the Epstein grand jury materials attendant

to *The Post's* claim for declaratory relief premised on Section 905.27 and the Court's "inherent authority" (**DE # 58** at pp. 26-30).

III. SUMMARY JUDGMENT STANDARD

The Post's Motion pre-dates the effective date (May 1, 2021) of the Florida Supreme Court's amendment of Florida Rule of Civil Procedure 1.510 and adoption of the federal summary judgment standard. *See In re Amendments to Fla. Rule of Civil Procedure 1.510,* 317 So. 3d 72, 77-78 (Fla. 2021) ("amendment applies to pending cases and all motions filed on or after May 1, 2021"). Although *The Post* has not "file[d] a renewed[5] summary judgment motion under the new rule," the Supreme Court instructed that "the new rule must govern the adjudication of any summary judgment motion decided on or after that date, including in pending cases." *Id.* (citation omitted). Accordingly, even though *The Post's* Motion was filed pre-amendment, the Clerk assumes the new standards governing Rule 1.510 apply to its adjudication.

IV. ARGUMENT

Once filed with clerks of the circuit courts pursuant to Section 905.17(1), grand jury materials are "records of the judicial branch" governed by Rule 2.420 of the Florida Rules of Judicial Administration and subject to its procedures governing public access. *Times Pub. Co. v. Ake*, 645 So. 2d 1003, 1005 (Fla. 2d DCA 1994), *approved,* 660 So. 2d 255 (Fla. 1995). Under the facts of this case, Rule 2.420 is the mandatory procedural mechanism through which access to grand jury materials must be sought. However, *The Post* did not follow Rule 2.420 to request or challenge a denial of access to these materials.

[5] Florida's Supreme Court noted that, "[i]n cases where a pending summary judgment motion has been briefed but not decided, the court should allow the parties a reasonable opportunity to amend their filings to comply with the new rule." 317 So. 3d at 78

Even if that were not the case, *The Post* still could not obtain access to grand jury materials to disseminate them to the public by suing the Clerk because—for many of the same reasons explained in the Court's June 8, 2020 Order (**DE # 33**)—there is no private right of action under Section 905.27(1)(c) and no viable claim for declaratory relief based on Section 905.27 or the Court's "inherent authority." Accordingly, *The Post's* remaining claim is procedurally and legally deficient, its Motion should be denied, and this entire case should be dismissed with prejudice.

A. Overview of the Powers and Duties of Clerks of the Circuit Courts

The Second DCA explained in *Times Pub. Co. v. Ake*, 645 So. 2d at 1005, that the offices of the clerks of Florida's circuit courts serve two functions:

> The office of the clerk of the circuit court derives its powers and authority from two articles of the Florida Constitution. Article VIII, section 1(d), of the Florida Constitution provides that the clerk is a county officer who shall be "ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds." In the exercise of these nonjudicial duties, the clerk is an autonomous elected county officer not subject to the direction or control of the court. Article V, section 16, establishes the office of clerk of the circuit court within the judicial framework. That section further provides that the office may be divided into two offices by general or special law. Absent such division, the clerk must act in a dual capacity. *See Alachua County v. Powers,* 351 So.2d 32 (Fla.1977). In the performance of his duties as the court's record keeper, the clerk is a ministerial officer of the court devoid of discretion. *Corbin v. State ex rel. Slaughter,* 324 So.2d 203 (Fla. 1st DCA 1975). The court has the inherent and exclusive constitutional authority over its agencies who act in its behalf. *See The Florida Bar,* 398 So.2d 446 (Fla.1981). The clerk, when acting in the exercise of his duties derived from article V is acting as an arm of the court and, as such, is immune from the supervisory authority of the legislature. Thus, chapter 119 does not apply to the clerk in such capacity and the access to judicial records under his control is governed exclusively by rule 2.051.

In approving the Second DCA's decision in *Times Pub. Co. v. Ake*, Florida's Supreme Court recognized that "the clerks of the circuit courts, when acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and control

of the Supreme Court of Florida, rather than the legislative branch." 660 So.2d at 257. This is because the judiciary is a co-equal branch of government, not an "agency." *Id*.

Among other responsibilities, clerks of the circuit courts are charged with the duty of maintaining certain records of the judicial branch. In performing this duty, clerks are "ministerial officer[s] of the court devoid of discretion." *Times Pub. Co. v. Ake*, 645 So. 2d at 1005.

"**Records of the judicial branch**[6]" are "all records, regardless of physical form, characteristics, or means of transmission, made ***or received*** in connection with the transaction of official business by any judicial branch entity," and they include "court records" and "administrative records." *See* Rule 2.420(b)(1), *Fla. R. Jud. Admin* (emphasis added). "**Court records**…are the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings." *See* Rule 2.420(b)(1)(A), *Fla. R. Jud. Admin*. "**Administrative records**…are all other records made ***or received pursuant to*** court rule, ***law,*** or ordinance, or in connection with the transaction of official business by any judicial branch entity." *See* Rule 2.420(b)(1)(B), *Fla. R. Jud. Admin* (emphasis added).

"The custodian of ***all administrative records*** of any court is the chief justice or ***chief judge of that court***…" *See* Rule 2.420(b)(3), *Fla. R. Jud. Admin* (emphasis added). "As to all other records, the custodian is the official charged with the responsibility for the care, safekeeping, and supervision of such records." *Id.*

[6] "Judicial branch" is defined as including "the clerk of court when acting as an arm of the court." *See* Rule 2.420(b)(2), *Fla. R. Jud. Admin*; *see also Times Pub. Co. v. Ake*, 660 So.2d at 257.

B. The Framework for Keeping Confidential Grand Jury Materials

In establishing Florida's grand jury process, the Legislature directed that "[t]he chief judge of each circuit court shall regularly order the convening of the grand jury for a term of 6 months" and "[w]hen requested, the court shall advise the grand jury about its legal duties." *See* §§ 905.01, 905.18, *Fla. Stat.* Once the legislature established a grand jury process, its implementation became a "judicial administrative responsibility since the grand jury's operation is within the judicial branch." *See State ex rel. Reichle v. Edwards*, 409 So.2d 1043, 1044 (Fla. 1982).[7] The Court noted in its June 8, 2020 Order (**DE # 33** at p. 1) that this case "implicate[s] records of the Palm Beach County grand jury, over which the Chief Judge presides."

The Post alleges in its Amended Complaint that "in states such as Florida, where the grand jury is preserved, it is an important appendage of the court which impanels it…[and]…the judge of that court is equally important and he is generally charged with the supervision of the grand jury's activities…"[8] *The Post* also argued in its Opposition to the Clerk's Motion to Dismiss Count II (**DE # 27** at p. 13), and continues to argue in its Motion (**DE # 58** at p. 26), that the "Grand Jury is Under the Court's Supervision and Jurisdiction" and "a judicial proceeding in a court of justice…an appendage or adjunct to the circuit court."

Florida law requires grand jury proceedings to be kept "secret," making it "unlawful" and "criminal contempt of court" to "disclose, divulge, or communicate to any other person…in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof…" *See* §§ 905.24, 905.17(4), 905.27(2)-(5), *Fla. Stat.* The Legislature

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[7] By way of comparison, a Federal grand jury is governed by Rule 6 of the Federal Rules of Criminal Procedure and considered to be "an institution independent from the judicial branch." *See Pitch v. U.S.,* 953 F.3d 1226, 1237 (11th Cir. 2020).

[8] *See* Amended Complaint (**DE # 17** at ¶ 60) (citing *State v. Clemons*, 150 So.2d 231, 233-34 (Fla. 1963); *see also* Plaintiff's Opposition to Clerk's Motion to Dismiss Count II (**DE # 27**) at p. 14.

specifically addressed the confidentiality of grand jury materials in Section 905.17(1), which provides:

> The stenographic records, notes, and transcriptions made by the court reporter or stenographer [if any] shall be filed with the clerk who shall keep them in a sealed container not subject to public inspection. The notes, records, and transcriptions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and shall be released by the clerk only on request by a grand jury for use by the grand jury or on order of the court pursuant to s. 905.27.

It bears mentioning that there is no requirement that Florida grand jury proceedings be recorded. *See Thompson v. State*, 565 So.2d 1311, 1313 (Fla. 1990) (Sections 905.17 and 905.27 do not establish a duty to record grand jury proceedings, nor is there a constitutional basis to impose such a duty in all cases). In contrast, Federal Rule of Criminal Procedure 6(e) requires grand jury proceedings to be recorded and "[u]nless the court orders otherwise," for an attorney for the government to "retain control of the recording, the reporter's notes, and any transcript prepared from those notes." *See* Rule 6(e)(1), *Fed. R. Crim. P.*

Once a clerk of the circuit court receives grand jury materials pursuant to Section 905.17(1), they become **administrative records** of the judicial branch falling under the purview of Florida Rule of Judicial Administration 2.420, under which they continue to maintain their confidentiality protections under Section 905.17. Subdivisions (c)(7) and (c)(8) of Rule 2.420 provide that "all records made confidential under…Florida …law" and "all records presently deemed to be confidential…by Florida Statutes…" shall be confidential records of the judicial branch.

Rule 2.420(d)(1)(B) further provides that "[e]xcept as provided by court order, the clerk of the court shall maintain as confidential information subject to subdivision (c)(7) or (c)(8) of this rule that is currently confidential or exempt from section 119.07, Florida Statutes, and article I, section 24(a) of the Florida Constitution as specifically stated in any of the following

statutes:…(xvi) ***Grand jury records***. §§ 905.17, 905.28(1), Fla. Stat." *See* Rule 2.420(d)(1)(B), *Fla. R. Jud. Admin*. (emphasis added). Furthermore, because both "grand jury records" and "grand jury notes" are **administrative records** of the judicial branch, the Appendix to the Florida Rules of Judicial Administration ("Records Retention Schedule for Administrative Records") provides specific minimum record retention requirements for these materials:

GRAND JURY NOTES
This record series consists of stenographic records, notes, and transcriptions made by the court reporter or stenographer during the grand jury session. These records are normally kept in a sealed container and are not subject to public inspection pursuant to Section 905.17(1), Florida Statutes. A Court order must be obtained for disposition.
RETENTION: 10 years from closing of session.

GRAND JURY RECORDS
This record series consists of jury summons, requests for recusal, juror payments, information to jurors' employers, lists of jurors, juror questionnaires, and other records related to a grand jury. This record series includes records related to a grand jury and the statewide grand jury.
RETENTION: 2 years.

C. Procedural Mechanisms for Public Access to Judicial Branch Records

Florida Rule of Judicial Administration 2.420(m) establishes the procedure to obtain access to judicial branch records: "Requests for access to judicial branch records shall be in writing and ***shall be directed to the custodian***. The request shall provide sufficient specificity to enable the custodian to identify the requested records." *See* Rule 2.420(m)(1), *Fla. R. Jud. Admin*. (emphasis added). Once a proper request is made, the custodian responsible for providing access to the records of that custodian's entity "shall determine whether the requested record is subject to this rule and, if so, whether the record or portions of the record are exempt from disclosure." *See*

Rule 2.420(m)(2), *Fla. R. Jud. Admin*. If a request is denied, the custodian must respond to the request by stating in writing the basis for the denial. *Id.*

Where access to "**administrative records** of the judicial branch" is denied, Rule 2.420(l) provides that the party denied access must ***file an action*** for mandamus or other appropriate relief in: (1) the court having appellate jurisdiction, when a judge who has denied a request for access to records is the custodian; or (2) in all other cases, the circuit court of the circuit in which the denial of access occurs. Here, the grand jury materials *The Post* seeks are judicial **administrative records**, of which the Chief Judge would be the "custodian" under Rule 2.420(b)(3). Thus, *The Post* should have made a written request for these materials directed to Chief Judge under Rule 2.420(m) and, if that request was denied, filed an action for mandamus in the Fourth District Court of Appeal pursuant to Rule 2.420(l)(1).

Rule 2.420(j) establishes the procedure for obtaining access to **confidential court records**. Under Rule 2.420(j)(2), a party seeking access to confidential court records must ***file a written motion*** that identifies the court record(s) to which access is sought, specifies the basis for obtaining access, sets forth the legal authority for obtaining access, and certifies that it is made in good faith and supported by a sound factual and legal basis. Rule 2.420(j)(3)-(4) specifies the requirements for service of the motion (on all parties and reasonably ascertainable affected non-parties) and the findings which must be made in any order granting access to confidential court records. Rule 2.420(j)'s requirement of filing a "**motion**" to obtain access to "**confidential court records**" (as opposed to filing an "action" under Rule 2.420(l) when denied access to "administrative records") inherently contemplates that a court case is ***already pending*** in which confidential court records have been filed and in which the requesting party can file a "motion" for access to those records. Otherwise, Rule 2.420(j) would, like subsection 2.420(l), authorize the filing of an

"action" to seek "confidential court records." Thus, even if the grand jury materials *The Post* seeks could be considered "confidential court records," *The Post* would have been required to file a motion under Rule 2.420(j) in the grand jury proceeding or criminal case against Epstein based on the indictment.[9] If such a motion had been filed and denied, *The Post* could have sought appellate review under Florida Rule of Appellate Procedure 9.100(d) ("Orders Excluding or Granting Access to Press or Public").

D. *The Post* Failed to Comply with Rule 2.420

The Post does not allege compliance Rule 2.420 in its Amended Complaint and offers no proof of compliance in its Motion. In fact, it appears to be undisputed that *The Post* did **not** make a written request to the Chief Judge under Rule 2.420(m), did **not** file an action in the appellate court under Rule 2.420(l), and did **not** file a motion for access to "confidential court records" under Rule 2.420(j). Instead, *The Post* vaguely alleges that it requested the records from the Clerk and State Attorney [Amended Complaint (**DE # 17**) at ¶ 72] and filed this civil lawsuit in the circuit court against the Clerk and State Attorney.

As explained above, the grand jury materials *The Post* seeks are "administrative records" [records received "pursuant to…law…" under Rule 2.420(b)(1)(B)] of which the Chief Judge is the "custodian" [under Rule 2.420(b)(3)]. However, *The Post* offers no proof that it made a written request directed to the Chief Judge for the Epstein grand jury materials, nor any proof that such a request was denied. *See* Rule 2.420(m)(1), *Fla. R. Jud. Admin.* Moreover, even if such a request and denial had occurred, the only proper mechanism to challenge a Chief Judge's denial of access is an action for mandamus in the appellate court (which clearly did not happen). *See* Rule 2.420(l)(1), *Fla. R. Jud. Admin.* Likewise, *The Post* offers no proof that it filed a motion to

[9] See Motion (**DE # 58**) at ¶¶ 19, 36; Appendix (**DE # 59**) at 8.

obtain access to confidential court records under Rule 2.420(j), and obviously did not seek appellate review of the denial of any such motion under Rule 2.420(l) and Appellate Rule 9.100(d).

Florida's Supreme Court confirmed in *Times Pub. Co. v. Ake*, 660 So.2d at 257, that access to judicial records is governed ***exclusively*** by Rule 2.420. *The Post's* indisputable failure to request and pursue access to the grand jury records it seeks through the procedures established in Rule 2.420 conclusively establishes that this lawsuit is procedurally and legally defective. Consequently, the Motion should be denied, and this entire case should be dismissed with prejudice.

E. There is No Private Right of Action Against a Clerk to Obtain Grand Jury Records

Even assuming *arguendo* that the grand jury materials at issue are *not* "records of the judicial branch" exclusively subject to Rule 2.420, *The Post* still has no valid legal basis to sue the Clerk to obtain access to them. This Court already determined in its June 8, 2020 Order (**DE # 33**) that there is no private right of action against the Clerk under Section 905.27. *The Post* cannot use an action for declaratory relief to circumvent the Court's June 8, 2020 ruling or to invoke the Court's "inherent authority" to try to gain public access to grand jury materials.

The Court's June 8, 2020 Order (**DE # 33** at p. 5) correctly established hat "there is nothing in the text of section 905.27 from which one can deduce that the Legislature contemplated a member of the media, or anyone else for that matter, having a private cause of action to compel the State Attorney and Clerk to disclose grand jury records." *The Post's* Motion does not raise any new arguments or cite any new authorities to justify the Court's reconsideration and reversal of this well-reasoned decision.[10] There is no private right of action under Section 905.27.

[10] *The Post's* Motion repeats the same arguments about its alleged standing and the availability of a "private right of action" under Section 905.27 [Motion (**DE # 58**) at ¶¶ 81-90] that it alleged in

The Post cannot use a claim for declaratory relief under Chapter 86 to create substantive rights which the plain language of Section 905.27 clearly demonstrates do not exist. On its face, the Section 905.27 does not expressly or impliedly grant the public or members of the media any right to obtain access to grand jury materials. To the contrary, Chapter 905 explicitly denies public access to "secret" grand jury proceedings and prohibits access to grand jury materials.

Nevertheless, *The Post's* cause of action for declaratory relief is based on a "request that the Court declare that pursuant to Fla. Stat. Section 905.27(1), it is entitled to access the testimony, minutes, and other evidence presented to the 2006 Palm Beach County grand jury because such disclosure and access would be in the furtherance of justice" (**DE # 17** at ¶ 70). *The Post* "further seeks a declaration that disclosure of the testimony, minutes, and other evidence presented in the 2006 Palm Beach County grand jury 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" (**DE # 17** at ¶ 71).

However, the Declaratory Judgment Act is a procedural mechanism that confers subject matter jurisdiction—it does not offer any substantive rights. *See Gilbert v. State Farm Mut. Auto. Ins. Co.*, 95 F.Supp.3d 1358, 1364, n. 5 (M.D. Fla. 2015). Under Section 86.011, a court only has jurisdiction to render declaratory judgments on the existence or nonexistence of any immunity, power, privilege or right, and any fact upon which the existence or nonexistence of such immunity, power, privilege or right may depend.

Courts play an important "gatekeeping" role in declaratory relief actions. *See Ribaya v. Board of Trustees of City Pension Fund for Firefighters and Police Officers in the City of Tampa*,

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the Amended Complaint [**DE # 17** at ¶¶ 56-59], and which it argued in its Opposition to the Clerk's Motion to Dismiss Count II [**DE # 27** at pp. 9-13].

162 So.3d 348, 353 (Fla. 2d DCA 2015). In particular, courts must be leery of attempts to "pervert" the statute by those attempting to use it as a "catch-all." *Id.* "To ensure that this does not occur, the courts have developed requirements to invoke the act that go beyond the wording of the act itself: that there is a 'bona fide dispute' between the parties and a 'bona fide…need for [a] declaration.'" *Id.* (citations omitted). Where circumstances beyond the pleadings demonstrate that there is not a bona fide need for declaratory relief, trial courts should exercise their authority to decline to adjudicate the claim. *Id.*

Here, this authority should be exercised because *The Post* has not alleged or proven that its claim for declaratory relief involves a determination of the existence or non-existence of its substantive rights. Rather, *The Post* is improperly asking the Court to create a **new** substantive public right of access to grand jury materials under the guise of declaratory relief. *Gilbert*, 95 F.Supp.3d at 1364. As discussed above, there is no public right of access under Section 905.27. Similarly, the Court's "inherent authority" does not confer any rights, privileges, or powers to *The Post* that could be adjudicated under Chapter 86. There is no "bona fide" dispute over the existence of the Court's "inherent authority." *Rose v. Palm Beach County,* 361 So.2d 135, 136 n. 3 (Fla. 1978) (Court's powers are "inherent in the sense ***they exist*** because the ***court exists***...." (emphasis added)). Instead, *The Post* is using its claim for declaratory relief as pretense to try to tell the Court how its "inherent authority" should be used.

With respect to Section 905.27, *The Post* appears to be trying to use a claim for declaratory relief the same way it is often used in cases involving violations of the Sunshine Law and Chapter 119. *See e.g., Ribaya*, 162 So.3d at 355. As noted in *Ribaya*, because section 286.011 does not contain an "express right of action…it has become common for litigants to file actions for claims under the Sunshine Law that allege a claim for a violation of the statute and a claim for declaratory

relief," which "in effect…alleges a claim under 286.011 and seeks a remedy under chapter 86." *Id*. at 355. However, it is important to note that Section 286.011—***unlike Sections 905.17 and 905.27***—grants the public a right to access government meetings and has provisions recognizing the public's right to pursue legal actions to enforce that right:

> Section 286.011 creates broad public access to governmental meetings. This statute implements the constitutional right of access created in Article I, section 24, of the Florida Constitution. Subsection 286.011(4) ***clearly contemplates legal actions by members of the public to enforce the Sunshine Law***. See § 286.011(4) (providing for attorney's fees where "an action has been filed…to enforce the provisions of this section" and the trial court determines that a violation has occurred).

See Ribaya, 162 So.3d at 355 (emphasis added).

Similarly, Chapter 119 implements the policy "of this state that all state, county, and municipal records are open for personal inspection and copying by any person," thus creating a public right to access records "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." *See* § 119.01(1), *Fla. Stat*. (agency records are "open for personal inspection and copying by any person"); §119.07(1)(a), *Fla. Stat*. ("Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records"); *see also Times Pub. Co. v. Ake*, 660 So.2d at 257, n. 1. Like Section 286.011, Chapter 119 contains several provisions "clearly contemplating" legal actions by members of the public to enforce their rights under Chapter 119. *See* §119.07(1)(g), *Fla. Stat*. ("In ***any civil action*** in which an exemption to this section is asserted, if the exemption is alleged to exist under or by virtue of s. 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), the public record or part thereof in question shall be submitted to the court for an inspection in camera…") (emphasis added); § 119.11(1), *Fla. Stat.* ("Whenever ***an action is filed***

to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending case") (emphasis added); § 119.12(1), *Fla. Stat*. ("If ***a civil action is filed against an agency to enforce the provisions of this chapter,*** the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that…") (emphasis added).

Conversely, Chapter 905 establishes that there is **no public right to access** grand jury proceedings or materials. In fact, Section 905.24 implements the public policy that "[g]rand jury proceedings are secret," and Section 905.17(1) makes records of grand jury proceedings "exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution." **Moreover, Chapter 905 does not contain an express right of action nor any provisions "clearly contemplating" (or even recognizing) the public's right to pursue legal actions to obtain access to grand jury records.** To the contrary, as this Court recognized in its June 8, 2020 Order (**DE # 33** at p. 5): *"[T]here is nothing in the text of section 905.27 from which one can deduce that the Legislature contemplated a member of the media, or anyone else for that matter, having a private cause of action to compel the State Attorney and Clerk to disclose grand jury records. Indeed, to the contrary, section 905.27 prohibits the State Attorney and Clerk (assuming that, as pleaded by the Post, they have the documents) from disclosing the documents without first being ordered to do so by the court. Reading section 905.27 as creating a private cause of action against the State Attorney and Clerk is, therefore, not only unsupported by the language of section 905.27, but is actually paradoxical to its plain language of the statute.*"

Similarly, any argument that a substantive right of public access to grand jury materials can be derived from a court's "inherent authority" collapses because that authority does not grant any rights or powers to anyone except the courts. Moreover, even if some private right of action

could somehow emanate from courts' inherent authority, it still could only be exercised "subject to, or not in conflict with, valid existing laws." *See Jimenez v. Bondi*, 259 So. 3d 722, 725 (Fla. 2018); *Rose*, 361 So.2d at 137; *Weinberg v. Siemens Fin. Services, Inc.*, 88 So. 3d 220, 222 (Fla. 3d DCA 2011) (A "court's inherent power does not permit a court to ignore existing law, such as writ of replevin statutes."). Given the existing laws[11] surrounding the secrecy of grand jury proceedings, the Court's inherent powers could not be used as a basis to grant the relief *The Post* seeks.

Ultimately, *The Post*'s declaratory relief claim is analogous to the claim asserted in *MacNeil v. Crestview Hospital Corp.*, 292 So.3d 840, 843-45 (Fla. 1st DCA 2020), in which the First DCA affirmed the trial court's dismissal of a claim for declaratory relief where the plaintiff "asserted no other cause of action below that would show that a justiciable controversy exists on which to predicate a declaratory judgment claim." After citing *Ribaya* for the elements of a declaratory relief claim and its warning that "chapter 86 is a statute with 'special objectives' that should not be 'perverted' by permitting its use as a 'catch-all,'" the court in *MacNeil* recognized that "[a]besnt a showing of at least a colorable right which would be affected by the requested declaration, dismissal is required." *Id.* at 842, 845 (citing *Webster v. Inch*, 286 So.3d 847, 848 (Fla. 1st DCA 2019).[12]

[11] These laws include Sections **905.17(1)** (prohibiting the clerk from releasing grand jury records except on request by grand jury or on order of the court under s. 905.27), **905.24** (grand jury proceedings are "secret," and grand jurors and interpreters are prohibited from disclosing the nature or substance of the deliberations or vote of the grand jury), and **905.27(1)** (prohibiting the disclosure of the testimony of a witness examined before the grand jury or other evidence received by it except under the enumerated exceptions).

[12] *MacNeil* discusses *all* the required elements of a claim for declaratory relief, including the "extrastatutory elements requiring a 'bona fide dispute' between the parties and a 'bona fide need' for the declaration [which] ensure that the proceeding is 'judicial in nature' and falls 'within the constitutional powers of the courts.'" *Id.* at 843 (citing *Ribaya*, 162 So.3d at 353).

In *MacNeil*, the plaintiff attempted to bootstrap a claim for declaratory relief to an alleged violation of Section 627.736(5)(a) (the PIP statute), which (like Section 905.27) "lacks an express or implied private cause of action to enforce its provisions." *Id.* at 842. *The Post* is trying to do the same thing using Section 905.27 and the Court's "inherent authority." Thus, The Post's declaratory relief claim seeks an improper advisory opinion and must suffer the same fate as MacNeil's (dismissal with prejudice). *MacNeil*, 292 So.3d at 841, 845; *see also Collier v. State, Dept. of Highway Safety & Motor Vehicles*, 943 So. 2d 945, 946 (Fla. 4th DCA 2006) (affirming dismissal of action seeking declaratory relief where no private right of action existed under the Driver's Privacy Protection Act, 18 U.S.C. § 2721, et seq.); *Kunz v. Sch. Bd. of Palm Beach County*, 237 So. 3d 1026, 1030 (Fla. 4th DCA 2018) (affirming dismissal of action seeking declaratory relief where no private right of action existed under the Class-Size Amendment to the Florida Constitution).

The Post's only remaining claim in this action (Count I) seeking declaratory relief based on Section 905.27 and the Court's "inherent authority" fails to state a claim upon which relief can be granted. Accordingly, *The Post's* Motion should be denied, and Count I should be dismissed with prejudice.

F. Overview of the Law if the "Furthering Justice" Inquiry is Needed

If this Court determines that *The Post* has the legal right to seek declaratory relief against the Clerk to obtain access to the Epstein grand jury materials based on Section 905.27, the Clerk does not believe he has the authority to advocate for or against *The Post's* requested relief. The Clerk does, however, believe that he has an obligation to apprise the Court of the relevant law surrounding its decision.

The Post only seeks the Epstein grand jury records under the "furthering justice" exception to Section 905.27. *See* § 905.27(1)(c), *Fla. Stat.* Specifically, *The Post* seeks these grand jury materials to use them "for the purpose of informing the public" (**DE # 17** at p.20) and concedes that it "is not seeking these materials in connection with either a civil or criminal case, it seeks a declaration that the scope of ***its use of the disclosed materials is not limited***" (**DE # 17** at ¶ 70 (emphasis added)).

Section 905.27(2) explicitly states that, "[w]hen [a] disclosure is ordered by a court pursuant to subsection (1) … the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever." *See* § 905.27(2), *Fla. Stat.* This provision seems to be at odds with *The Post's* requests for the Epstein grand jury materials to use them "for the purpose of informing the public" (**DE # 17** at p.20) and a "declaration that the scope of its use of the disclosed materials is not limited" (**DE # 17** at ¶ 70).

The Court is certainly aware of the important reasons for grand jury secrecy. *Minton v. State*, 113 So. 2d 361, 365 (Fla. 1959) ("to protect the jurors themselves; to promote a complete freedom of disclosure; to prevent the escape of a person indicted before he may be arrested; to prevent the subornation of perjury in an effort to disprove facts there testified to; and to protect the reputations of persons against whom no indictment may be found").[13] While the Court has discretion to relax the rule of secrecy when the "purposes of the secrecy rule are accomplished and a disclosure becomes essential to the attainment of justice and the vindication of the truth," the

[13] Based on the facts asserted in *The Post's* Motion, preventing the escape of a person indicted before he may be arrested, preventing the subornation of perjury in an effort to disprove facts there testified to, and protecting the reputations of persons against whom no indictment may be found do not appear to be an issue in this case.

Court must be mindful of "the effect on subsequent grand jury proceedings-on jurors, on witnesses, on the privacy of the system itself-of indiscriminate disclosure." *Id.*

Those who serve on grand juries and the witnesses appearing before them have a justifiable expectation that their identities will be protected. *Minton*, 113 So. 2d at 365. Releasing grand jury materials to a member of the press could set a dangerous precedent that grand jury members and witnesses can no longer trust the government officials who assured them that their identities would be protected when they participated in the grand jury process. *See Grand Jury Fall Term, A.D. v. City of St. Petersburg, Fla.*, 624 So. 2d 291, 293 (Fla. 2d DCA 1993) (finding State Attorney's argument that disclosure of grand jury records would result in "the destruction of the grand jury as an investigative body if the state could no longer inform witnesses that their testimony would be secret" persuasive).[14]

"To obtain access to grand jury testimony, a proper predicate must be laid." *Jent v. State*, 408 So. 2d 1024, 1027 (Fla. 1981), holding modified by *Preston v. State*, 444 So. 2d 939 (Fla. 1984). Then, once a proper predicate is laid, the trial judge must examine the grand jury records sought to be disclosed to determine the materiality of the records." *Minton*, 113 So. 2d at 364. "[I]t is crystal clear that something more than a mere surmise or speculation" about what the grand jury records may contain is needed to lift the veil of secrecy from the grand jury proceedings. *Id.* at 365.

[14] If disclosure of the Epstein grand jury materials is ordered, the Clerk presumes, but in an abundance of caution also requests, that the Clerk only be ordered to provide the materials to the Court for an *in camera* review so that the Court can determine whether records revealing the identifies of any grand jurors or witnesses should not be disclosed or should be redacted to protect these individuals' identities.

In *State v. Tillett*, 111 So. 2d 716, 724 (Fla. 2d DCA 1959), the Second DCA discussed the uncertainty surrounding the "furthering justice" exception to grand jury secrecy:

> The concept of furtherance of justice is inherently difficult of precise definition. The application of such principle also is difficult and is necessarily dependent upon the peculiar factual circumstances of each particular case. A court of competent jurisdiction, before granting the use of grand jury testimony upon the furtherance of justice doctrine, should require the satisfactory establishment of the right to its use. The onus must be borne by the person seeking to gain access to and use of the testimony.

While there is a paucity of case law controlling the Court's inquiry on the "furthering justice" issue, it does appear that appellate courts have been fairly consistent in denying private civil litigants access to grand jury records under the "furthering justice" exception; including in civil actions for libel and slander based on grand jury testimony (See e.g., *Tillett*, 111 So. 2d 716) and actions for malicious prosecution (See e.g., *Widener v. Croft*, 184 So. 2d 444, 445 (Fla. 4th DCA 1966); *Dworetzky v. Monticello Smoked Fish Co.*, 256 A.D. 772 (App. Div. 1939)). Courts have also denied access to grand jury records under the "furthering justice" exception where the party seeking the materials fails to establish a proper predicate to obtain them. *See* e.g., *James v. Wille*, 480 So. 2d 253 (Fla. 4th DCA 1985) (even where "hypothetically, discovery might affect the achievement of justice" a proper predicate must still be laid); *State v. Meeks*, 610 So. 2d 647, 648 (Fla. 3d DCA 1992) (quashing trial court's order requiring the disclosure of grand jury records because the motion seeking disclosure "did not contain any facts which supported his allegations that the State had withheld critical facts from the grand jury").

G. Overview of the Law if the "Inherent Power" Inquiry is Needed

As explained by the Florida Supreme Court in *State ex rel. Davis v. City of Avon Park*, 117 Fla. 565, 158 So. 159, 164 (Fla. 1934): "Every court has inherent powers to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction,

subject to, or not in conflict with, valid existing laws and constitutional provisions." *See also Jimenez*, 259 So. 3d at 725; *Rose*, 361 So.2d at 137. "Inherent powers" of courts have been described as "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense they exist because the court exists...." *Rose*, 361 So.2d at 136 n. 3 (quoting CARRIGAN, INHERENT POWERS OF THE COURTS 2 (1973)).

With respect to the requirement that courts exercise their inherent authority "subject to, or not in conflict with, valid existing laws," courts should be mindful of the limits the Legislature placed on the disclosure of grand jury records. *See Weinberg*, 88 So. 3d at 222 (A "court's inherent power does not permit a court to ignore existing law, such as writ of replevin statutes."). As noted above, the existing laws surrounding the disclosure of grand jury proceedings and records weigh against any disclosure, and even where disclosure is permitted can only be "used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever." *See* § 905.27(2),

As a rule, where the Legislature enacts a general prohibition and enumerates limited exceptions to that prohibition, courts are not at liberty to expand the enumerated exceptions by judicial fiat. *See e.g.*, *Smith v. State*, 215 So. 3d 113, 115–16 & n.1 (Fla. 1st DCA 2017) (invoking the principle of *expressio unius est exclusio alterius* as requiring courts to respect the separation of powers doctrine because "where a statute enumerates the things on which it is to operate, ... it is ordinarily to be construed as excluding from its operation all those not expressly mentioned") (quoting *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976)); *see also Buzzard v. Buzzard*, 412 So. 2d 388, 390–91 (Fla. 2d DCA 1982) (recognizing the general rule that "a court is not authorized in the construction of a statute, to create exceptions not specifically made." (quoting *Ogle v. Heim*, 69 Cal.2d 7, 69 Cal.Rptr. 579, 442 P.2d 659, 660 (1968)).

The Post relies upon several federal cases in support of its argument concerning the Court's inherent authority to publicly disclose grand jury records (Motion (**DE # 58**) at pp. 27-28). In reviewing these cases, it is important to note the differences between Florida and Federal grand juries. As discussed above, Rule 6 of the Federal Rules of Criminal Procedure governs matters related to a federal grand jury and provides the framework for recording and disclosing proceedings, including the exceptions to the generally applicable rule of secrecy. *See* Rule 6(e), *Fed. R. Crim. P.* While Rule 6 is materially different from Section 905.27, Florida Statutes, they are intended to accomplish the same goal—protecting the secrecy of grand jury proceedings.

There is a split amongst the Federal circuit courts concerning whether Federal district courts have the "inherent authority" to order the disclosure of grand jury records. In *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020), *cert. denied,* 141 S. Ct. 624 (2020), the Eleventh Circuit overturned its own precedent, holding that district courts have no inherent, supervisory power to authorize the disclosure of grand jury records outside of the enumerated exceptions provided by Rule 6(e). At issue in *Pitch* was whether a district court could order the release of grand jury materials related to "Moore's Ford Lynching—a horrific event involving the murders of two African American couples for which no one has ever been charged" based on circumstances not explicitly covered by Rule 6(e). *Id.* at 1229. Author Anthony Pitch petitioned for the release of the grand jury transcripts related to the crime so he could use them to inform the public about the unsolved crimes. *Id.* Mr. Pitch's request did not meet any exception provided by Rule 6(e), but the district court granted the petition, relying on a previous 11th Circuit decision holding that "a district court may, pursuant to its inherent, supervisory power over the grand jury, authorized the disclosure of grand jury records outside of Rule 6(e)'s enumerated exceptions in certain 'exceptional circumstances.'" *Id.* An Eleventh Circuit panel initially affirmed the lower court's

decision, before the case was reheard *en banc*. *Id*. Considering the import of the "long-established policy that grand jury proceedings in federal courts should be kept secret" and the purposes of such secrecy, the Eleventh Circuit ultimately decided to recede from precedent, holding that Rule 6(e) "by its plain terms limits disclosures of grand jury materials to the circumstances enumerated therein." *Id*. at 1233-34.

Other circuits have arrived at the same conclusion, while some continue to allow disclosure under the Court's inherent authority. *See*, *e.g. McKeever v. Barr*, 920 F.3d 842, 844 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991) ("[W]ithout an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule."); *United States v. McDougal*, 559 F.3d 837, 840–41 (8th Cir. 2009) ("'Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside,' ... courts will not order disclosure absent a recognized exception to Rule 6(e) or a valid challenge to the original sealing order or its implementation." (alteration omitted); *In re 38 Studios Grand Jury*, 225 A.3d 224, 240 (R.I. 2020) (Rhode Island courts have no inherent authority to release grand jury records); compare *Carlson v. United States*, 837 F.3d 753, 767 (7th Cir. 2016); *In re Petition of Craig*, 131 F.3d 99, 107 (2d Cir. 1997). Notably, *The Post* cites *Carlson* in its Motion (**DE # 58** at ¶ 95).

V. CONCLUSION

For the foregoing reasons, *The Post's* Motion for Summary Judgment should be denied, and this case should be dismissed with prejudice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of October, 2021, I caused a true and correct copy of the foregoing to be served via the Florida Court's E-Filing Portal upon the following counsel of record:

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