

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

v.

ONIS GLENN, III,
Defendant.

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CASE NUMBER: CC18-4025

DEFENDANT’S MOTION TO DISMISS BASED ON SELECTIVE AND VINDICTIVE
PROSECUTION OR, IN THE ALTERNATIVE, FOR DISCOVERY

This case is littered with irregularities. As detailed in the Defendant’s Motion to Dismiss Based on Violations of Statutory Safeguards in the Alabama Ethics Act (hereinafter, “the Statutory Safeguards Motion”), Ethics Commission Staff ignored multiple mandatory requirements in the Ethics Act, depriving Mr. Glenn of his right to notice and a hearing before the Ethics Commission who would then have to vote to find probable cause before his matter could be referred to a district attorney or the Attorney General for potential presentation to a grand jury. As set forth in the Statutory Safeguards Motion, the Commission Staff’s trampling of Mr. Glenn’s rights is incurable and requires dismissal of the Indictment.

But these irregularities also evidence that this case is also due to be dismissed for selective and vindictive prosecution. This prosecution involves a disturbing attempt by the State to selectively - and improperly - charge conduct the likes of which has not only never been charged before, but which also was engaged in by multiple individuals who have never even been questioned, much less indicted, for doing exactly that which formed the basis of the indictment sought against Mr. Glenn. Accordingly, Mr. Glenn now respectfully moves this to

dismiss this case on the grounds that the State has deprived him of his constitutionally guaranteed right to equal protection by selectively and vindictively prosecuting him.

As set forth below, Glenn has identified - and, if this Court deems it necessary, seeks an evidentiary hearing so he may present to the Court - information which demonstrates that his indictment was borne of improper considerations, bias and animus, rather than resting on legitimate legal and factual grounds. At a minimum, Glenn submits that he has met the threshold showing and is entitled to discovery regarding selective and vindictive prosecution claims articulated by the Supreme Court in *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Accordingly, his motion is due to be granted.

BACKGROUND¹

A. The Indictment

On November 9, 2018, the Staff of the Alabama Ethics Commission (“the Commission Staff”) obtained from the grand jury a 20-count Indictment (“the Indictment”) charging Glenn with violating the Ethics Act. As detailed in the Statutory Safeguards Motion, the process by which the Commission Staff secured the Indictment violates the law. The Indictment contains four counts which charge Mr. Glenn with conspiring with Willie S. Phillips (“Mr. Phillips”) in Mr. Phillips’ alleged efforts to violate certain provisions of the Ethics Act. The remaining sixteen counts allege that Mr. Glenn somehow aided or abetted Mr. Phillips in those efforts. The Indictment does not allege that Mr. Glenn took any official act or received any improper financial benefit, nor did it charge that he committed any substantive offense.

¹ Mr. Glenn believes that most, if not all, of the details set forth in this section are beyond dispute and would be conceded by the State. To the extent that is not the case, or should the Court desire, Glenn would welcome the opportunity to present evidence in support of the facts referenced herein (and others which may become relevant) at an evidentiary hearing on this motion.

The Indictment rests on a theory of prosecution which, from publicly available information, appears to be unprecedented. In essence, the State appears to have charged Mr. Glenn with violating the Ethics Act because he had an interest in an entity - Southeast Engineering & Consulting (SE&C”) - in which Mr. Phillips also had an interest, and through which Mr. Phillips was compensated.² The State’s theory against Mr. Phillips appears to be that he misused his official position as a member of the Alabama Environmental Management Commission (“AEMC”) by maintaining a consulting agreement (“the Consulting Agreement”) with the law firm of Balch & Bingham, LLP (“Balch”) acting on behalf of Drummond Company, Inc. (“Drummond”). Without articulating the underlying details, the indictment against Mr. Phillips suggests that his receipt of money under the Consulting Agreement amounted to his use of his official position for personal gain.

The Indictment appears to present a more tenuous theory against Mr. Glenn. It effectively alleges that Mr. Glenn’s interest in SE&C - the entity which received the funds paid by Drummond through Balch - suffices to warrant prosecution under the Ethics Act based on the theories of conspiracy and aiding and abetting. To better understand the nature of Mr. Glenn’s connection to SE&C, and the existence of others similarly situated, it is helpful to delve deeper into his background and the organization’s structure and operations.

B. Mr. Glenn and SE&C

² The indictment against Mr. Glenn is remarkably thin, containing multiple counts that are essentially identical to one another. As a result, Mr. Glenn has contemporaneously filed a Motion for More Definite Statement. Mr. Glenn respectfully reserves the right to supplement the present motion, if necessary, based upon the State’s response to his Motion for More Definite Statement. Mr. Glenn also expects Mr. Phillips to file a Motion for More Definite Statement related to the indictment against him and likewise respectfully reserves the right, to supplement the present motion, if necessary, based on the State’s response to Mr. Phillips’ motion.

By education and training, Mr. Glenn is an engineer. He received his undergraduate engineering degree in 1994, graduating *summa cum laude* from Auburn University. In 1999, he obtained an MBA from the University of Alabama at Birmingham. Since 1999, he has been a licensed professional engineer, and his experience includes working in private industry as the Division Director for the Alabama Office of Water Resources from 2001 to 2005 and later as the Director of the Alabama Department of Environmental Management for the period from February 2005 to December 2009.

After his service with the State of Alabama, Mr. Glenn served as a consulting engineer providing services to clients in the environmental and water fields. Mr. Glenn's work during that period involved work for a broad range of clients, including preparing and submitting a detailed affidavit on behalf of the State of Alabama in the so-called "Water Wars" litigation. *See State of Alabama v. United States Army Corps of Engineers*, Civil Action No. 1:15-CV-00696-EGS (D. D.C.) (Doc. No. 83-1). In August 2017, Mr. Glenn began serving as the presidentially appointed Region 4 Administrator for the United States Environmental Protection Agency. In that role, he led the EPA's environmental protection efforts in the southeastern United States - the agency's largest region, serving approximately 63 million people - and oversaw approximately 850 employees. Mr. Glenn resigned his presidentially appointed position soon after he learned that he had been indicted.

During the period relevant to the allegations in the Indictment, SE&C was wholly owned by Blue Ridge Partners, LLC ("BRP"), which was, in turn, owned in equal shares by four separate entities which were connected to four individuals: Mr. Glenn, Mr. Phillips, Individual 1

and Individual 2 (hereinafter, “the SE&C Four”).³ The SE&C Four - all of whom were registered professional engineers - worked for, and received salaries from, SE&C.

In the fall of 2013, SE&C entered into discussions to provide consulting services to Balch and Drummond in connection with an environmental matter in North Birmingham. These discussions ultimately resulted in the execution of the Consulting Agreement. Because SE&C was a small consulting firm, the SE&C Four all provided services to clients as well as performing various administrative tasks. SE&C provided engineering services to a range of clients, and the SE&C Four, all of whom had extensive experience in environmental regulatory matters, were regularly requested to provide billable services to existing clients, as well as handling functions such as strategic planning and oversight, finance, business development, and, of particular significance in this prosecution, invoicing.

Each month, after services were provided under the Consulting Agreement, Individual 1 would prepare a draft invoice for review and comment by Mr. Glenn and others at SE&C. The process typically involved Individual 1 coordinating with various SE&C employees (including the SE&C Four) and compiling an invoice based on the information he gathered. Once the invoice was prepared, Individual 1 would send it to the individual(s) at SE&C most directly involved with a particular client in order to allow for any final review.

Once finalized, the invoices at the core of this case would be submitted to Balch for payment (with Drummond as the ultimate source of those payments). Upon receipt of payment, those funds were deposited into the SE&C bank account, where the money was commingled among revenues received from other SE&C clients. The expenses of SE&C, including the

³ Individuals 1 & 2 are referred to generically herein at this stage of the proceedings. When appropriate, Mr. Glenn expects to provide further detail concerning these individuals. In the event the Court desires additional information regarding their identity before that time, Mr. Glenn is prepared to provide that information *in camera*.

salaries of the SE&C Four, were paid from this account. Neither Mr. Glenn, Mr. Phillips nor any other individual received funds directly under the Consulting Agreement, nor did any member of the SEC Four take or claim entitlement to a greater percentage of the entity's profits.

C. The Robinson Prosecution

In June 2017, former Alabama legislator Oliver Robinson agreed to plead guilty to federal charges relating to his efforts and receipt of payments from Balch and Drummond in connection with the North Birmingham project which was also the subject of the Consulting Agreement. Soon thereafter, in July 2017, Mr. Glenn was subpoenaed by the U.S. Attorney's Office to testify before the federal grand jury investigating the potential involvement by others in the activity which led to Robinson's plea. He did so, and that investigation ultimately led to the indictment of three individuals: David Roberson, a Drummond executive, and Joel Gilbert and Steve McKinney, then partners at Balch. The three men were tried in June and July 2018, and Mr. Glenn testified at trial, again at the request of the U.S. Attorney's Office. Gilbert and Roberson were convicted; the charges against McKinney were dismissed. At no time was Mr. Glenn ever identified as a target of the federal investigation or accused of wrongdoing in connection with the matter.

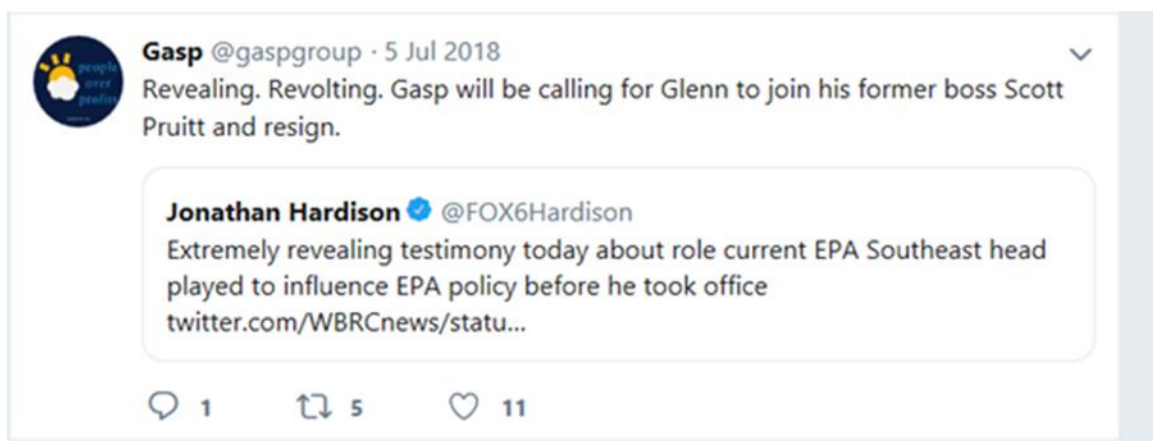
D. The Underlying Theory of Prosecution, Leaking of Information About the Indictment in Violation of Alabama Law, and an Environmental Group That Publicly Targeted Mr. Glenn Claims Credit for the Indictment.

In the history of the Ethics Act, there is no publicly available information which would demonstrate that the State, acting through one of its District Attorneys, the Attorney General, or even the Alabama Ethics Commission, has ever so much as suggested, much less charged, the theory underlying this case as violation of the Ethics Act. As noted in the Statutory Safeguard

Motion, prior to the return of the Indictment, Mr. Glenn had no notice or opportunity to be heard on the validity of that theory - despite being guaranteed that right by the Ethics Act, and the Ethics Commission was similarly deprived of performing its statutory duty of voting on whether there was probable cause to believe the allegations against Mr. Glenn violated the Ethics Act.

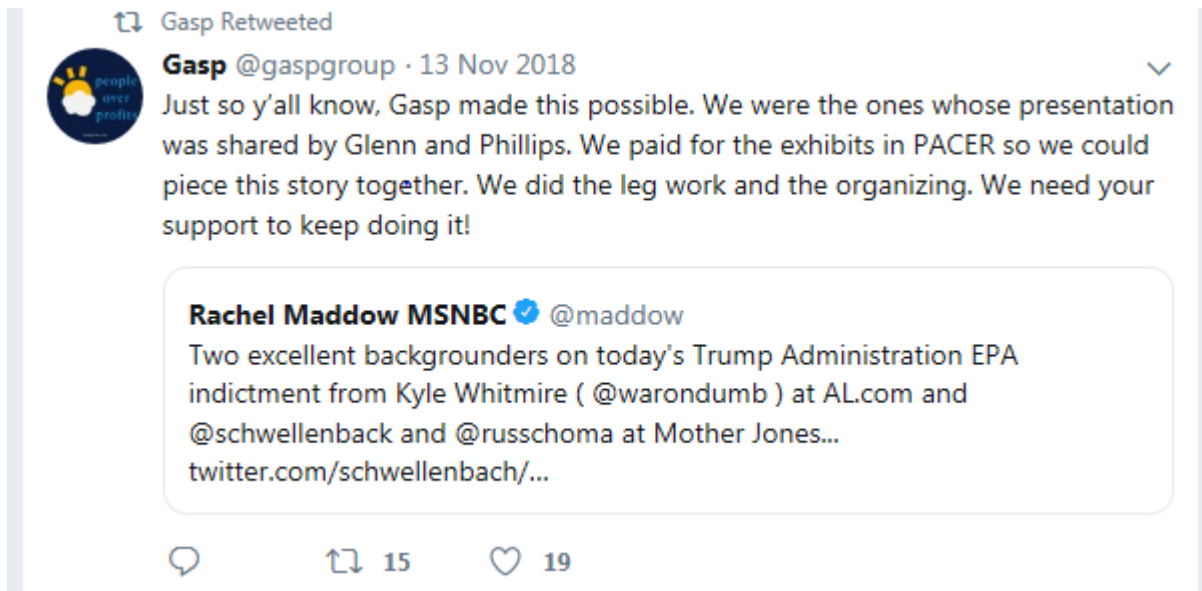
The Indictment rests on nothing more than prosecutorial creativity, untethered to precedent or other existing authority. The State's invention of this theory of prosecution appears to have been spurred, or at least aided, by a desire to attack Mr. Glenn's status and political affiliation. Available information shows that the push to indict Mr. Glenn was initiated and bolstered by individuals employed by or otherwise associated with GASP, formerly known as the Greater Birmingham Alliance to Stop Pollution, an advocacy organization headquartered in Birmingham.

GASP's efforts to target Mr. Glenn pre-date the indictment in this case by at least four months. As far back as July 5, 2018, GASP announced its intention to try to remove Mr. Glenn as Region 4 Administrator, in a tweet that read:



On November 13, 2018, the day news reports of the charges against Mr. Glenn were first published; GASP not only celebrated, but repeatedly took credit for, the Indictment. After

issuing a press release and retweeting a cluster of others' tweets announcing the news, GASP posted the following:



Soon thereafter, GASP tweeted again, making clear that it was due credit for pushing the State to obtain the Indictment:



Numerous additional GASP tweets and retweets rejoicing in the news of the indictment of Mr. Glenn followed, including those highlighting his role as a member of the Trump administration. A sampling of these tweets follows:



Gasp @gaspgroup · 13 Nov 2018

Trump EPA official indicted in Alabama



Trump EPA official indicted in Alabama

An Environmental Protection Agency (EPA) official in the Trump administration was indicted Tuesday on charges stemming from a previous job.

thehill.com



Gasp @gaspgroup · 13 Nov 2018

Yes!

Nick Schwellenbach @schwellenbach

Read @WarOnDumb's thread on the senior Trump EPA official who was just indicted & the article by me & @russchoma featuring the same official: motherjones.com/politics/2018/... [twitter.com/WarOnDumb/stat...](https://twitter.com/WarOnDumb/status...)

Show this thread



↳ Gasp Retweeted



Gabriel Joseph @gavi_kaplan · 15 Nov 2018

Thank you @gaspgroup !!

Ed Krassenstein @EdKrassen

BREAKING: Trump Administratin EPA official Trey Glenn has been arrested on charges of violating Alabama ethics law.

It's as if the entire Trump administration is made up of criminals.



Again highlighting the highly unusual, selective, and vindictive nature of Mr. Glenn's indictment, neither Mr. Glenn nor his counsel had been served with the indictment against him at the time the prosecution was issuing press releases about it and GASP was sending out its celebratory tweets. While Mr. Glenn was indicted on November 9, 2018, he was not served with a copy of the indictment against him until November 16, 2018 – a full week later. Instead of serving the indictment on Mr. Glenn, as one reporter summarized, the Ethics Commission Staff who had obtained it “took the true bill from the grand jury and headed straight to the press,” reportedly leaking the fact of the indictment to an al.com columnist so that he could publish an article on Tuesday, November 13, 2018.⁴ See Bill Britt, “Jefferson County Indictments Raise Serious Questions About Ethics Commission's Actions,” *Alabama Political Reporter* (November 14, 2018), available at <https://www.alreporter.com/2018/11/14/jefferson-county-indictments-raise-serious-questions-about-ethics-commissions-actions/>.⁵ The Commission Staff's actions in running to the press to announce Mr. Glenn's indictment before he was served with it violated the Alabama Grand Jury Secrecy Act, Ala. Code § 12-16-210. Further, the press release they issued on the same day the story broke in the media failed to include any mention of Mr. Glenn's constitutionally protected presumption of innocence in violation of Alabama Rule of Professional Conduct 3.6(b)(6).⁶

⁴ A copy of the November 13, 2018 article appearing on al.com regarding Mr. Glenn's indictment is available here: <https://www.al.com/news/2018/11/trumps-southeast-regional-epa-administrator-indicted-on-alabama-ethics-charges.html>.

⁵ As also reported in Britt's article, Commission Staff told the Alabama Political Reporter that they were moving so quickly to indict Mr. Glenn that they did so without consulting with the Chief of the Attorney General's Special Prosecution Division, a division created to prosecute white collar and Ethics Act cases.

⁶ The Commission's press release reads as follows:

In sum, the Ethics Commission Staff trampled Mr. Glenn's rights in obtaining the indictment without giving him his required notice and an opportunity to be heard as required by the Alabama Ethics Act, and then after indictment denied him notice as guaranteed by the Grand Jury Secrecy Act and failed to protect his presumption of innocence as required by the Rules of Professional Conduct. All this while an organization that had publicly targeted Mr. Glenn for months took credit for and reveled in his indictment. These circumstances show the indictment and this prosecution is not about justice but is instead an improperly motivated vendetta against Mr. Glenn.

On November 9, 2018, the Grand Jury of Jefferson County, Alabama indicted Willie Scott Phillips, Jr. on multiple counts of violations of Alabama's Ethics Act and separately indicted Onis Glenn, III on multiple counts of conspiracy and/or complicity with Willie Scott Phillips, Jr. to violate the Ethics Act. The charges include violations of Ala. Code §§ 36-25-5(a) and (c) (use of office for personal gain, 36-25-5.1 (soliciting and/or receiving a "thing of value" from a principal, lobbyist, or subordinate of a lobbyist), and 36-25-7(d) (receiving money in addition to that received in one's official capacity).

The Alabama Ethics Commission is committed to working with Alabama's District Attorneys, and all enforcement agencies, whenever needed and asked to do so, to ensure enforcement of Alabama's Ethics laws on behalf of the citizens of Alabama; and these indictments are evidence of that. I want to recognize the hard work from the Jefferson County DA's office which requested our assistance in this important matter; and from our office, Cynthia Raulston, the Commission's General Counsel, as well as Special Agents Dustin Lansford, Byron Butler and Chief Special Agent Chris Clark for their hard work and dedication to the enforcement of our Ethics laws.

DISCUSSION

I. The Indictment is Due to Be Dismissed as a Violation of Mr. Glenn’s Equal Protection Rights Because It Is the Product of Selective and Vindictive Prosecution.

A. Legal Standard

i. Selective Prosecution

Prosecutors are forbidden from engaging in selective prosecution, which denies defendants equal protection of the law. *See Wayte v. United States*, 470 U.S. 598, 608 (1985) (selective prosecution claims judged according to “ordinary equal protection standards”). Indeed, while prosecutors have discretion in their decision making, that discretion is “subject to constitutional restraints.” *United States v. Batchelder*, 442 U. S. 114, 125 (1979). Further, where “a fundamental right is implicated or a suspect class targeted,” prosecutorial discretion will be subject to strict equal-protection scrutiny. *State v. \$223,405.86*, 203 So.3d 816, 827 (Ala. 2016) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

An indictment must be dismissed where it is shown that a prosecution “had a discriminatory effect and that it was motivated by a discriminatory purpose”. *Wayte*, 470 U.S. at 608. A “discriminatory effect” exists where the government fails to prosecute other “similarly situated individuals” under the same statute. *See Armstrong*, 517 U.S. at 466. A discriminatory purpose exists when a defendant is prosecuted because of race, religion, or other arbitrary classification. *See Wayte*, 470 U.S. at 608 (“the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification”) (citation and internal quotation omitted).

The “arbitrary classification” category of discriminatory purpose applies where fundamental rights - including First Amendment rights of expression and affiliation - are

implicated, and where capricious reasons are used to make charging decisions. *See* Gresham, *Prosecutorial Misconduct*, § 4.15 (2d. ed. 2018) (“Selectively prosecuting persons in order to inhibit their organizational activities can result in dismissal as an infringement of their First Amendment freedom of association); *Id.*, §4.19 (“Political activities and membership in a political party is an arbitrary and improper factor in making charging decisions”).

The Supreme Court recognized long ago that political affiliation was an arbitrary classification, holding in the context of a tax collection dispute that if discrimination in that setting was

purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, *political affiliations*, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes.

American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 92 (1900) (emphasis added).

Consistent with this holding, numerous cases have since recognized that political affiliation constitutes an “arbitrary classification” in the selective prosecution context. *See, e.g., United States v. Jacobs*, 4 F.3d 603, 605 (8th Cir. 1993) (recognizing that political affiliation is an impermissible basis for selective prosecution); *United States Schmucker*, 721 F.2d 1046, 1049 (6th Cir. 1983), *cert. granted, judgment vacated*, 471 U.S. 1001, 105 S. Ct. 1860, 85 L. Ed. 2d 155 (1985) (“[I]t is obvious that the government cannot selectively enforce a law prosecuting only Republicans, or only Caucasians, or only Southerners who violate the law”); *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979) (noting, in dicta, that prosecutorial decisions based on a defendant's membership in one political party or another is an arbitrary classification); *United States, v. Slawick*, 1993 U.S. Dist. LEXIS 11020, at *10 (D. Del. Aug. 3, 1993) (if government's motive in prosecuting defendant and not another suspect was related to

political affiliation, then it would be unconstitutional selective prosecution); *cf. Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 17 (D. D.C. 1997) (finding that religious organization challenging revocation of its tax exempt status “made a colorable showing sufficient to justify discovery that their political and/or religious beliefs may have played an impermissible role in the revocation of their tax exempt status”).

ii. Vindictive Prosecution

Prosecutors are also prohibited from engaging in vindictive prosecution. Vindictive prosecution occurs where, as here, a prosecutor uses “the charging process” in a way that “penalizes the exercise of constitutional or statutory rights.” *Turner v. State*, 924 So. 2d 737, 750 (Ala. Crim. App. 2002) (quoting *Hunt v. State*, 642 So.2d 999, 1030 (Ala. Crim. App. 1993), *aff’d*, 642 So.2d 1060 (Ala. 1994). Stated slightly differently, vindictive prosecution occurs where “(1) the prosecutor acted with genuine animus toward the defendant, and (2) the defendant would not have been prosecuted but for that animus.” *Baker v. Thomas*, No. CIV.A. 206CV201-MHT, 2008 WL 2225753, at *8 (M.D. Ala. May 27, 2008) (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). While the ordinary case for this vindictive prosecution is when a prosecutor re-indicts a defendant on more serious charges following a successful appeal or motion to dismiss, Mr. Glenn respectfully submits it also applies in this highly unusual case where the prosecution broke multiple laws to indict him and notify the press about his indictment before he even received a copy of it while an organization that had targeted him based at least in part on his political position took credit, as spelled out more fully below.

B. Commission Staff Selectively Prosecuted Mr. Glenn.

Mr. Glenn has demonstrated both elements of a selective prosecution claim. The government’s ill-conceived theory of prosecution, newly minted for the purposes of this case,

was applied only to him, despite the fact that at least two other individuals had precisely the same connection to Mr. Phillips, SE&C and the conduct at issue. Moreover, numerous individuals were involved in the submission, receipt, approval and payment of SE&C invoices, yet only Mr. Glenn was charged on the State's untested theory. While most selective prosecution claims struggle to meet the burden of showing that others similarly situated were not prosecuted, Mr. Glenn hurdles it easily.

Mr. Glenn has also satisfied the need to show that the decision to prosecute him was motivated by improper purposes. While it would certainly be helpful to further develop this point through access to documents and communications that are currently in the exclusive control of the prosecutors who moved forward with the Indictment, Mr. Glenn has identified evidence which supports the notion that he was prosecuted because of his political affiliation. In particular, Mr. Glenn's status as Republican official - the EPA's Regional Administrator, appointed by President Trump - appears to have been a major factor in the State's decision to indict. Because that affiliation constitutes an arbitrary characteristic, factoring it into prosecutorial decision making, even as secondary consideration, implicates equal protection concerns and necessitates dismissal.

i. **Controlling Authority does not Refute Mr. Glenn's Selective Prosecution Claim**

None of the decisions by Alabama appellate courts addressing selective prosecution claims compel a contrary conclusion. In *Hunt v. State*, 642 So. 2d 999 (Ala. Crim. App. 1993), former governor Guy Hunt appealed his conviction "for using his office for direct personal financial gain in violation of Ala. Code 1975, § 36-25-5." *Id.* at 1002. He contended that "the trial court committed reversible error by failing to dismiss the indictment on the grounds that he was selectively prosecuted in violation of his constitutional rights." *Id.* at 1003. After reviewing

the law of selective prosecution, the court found Hunt failed to state a valid claim because his argument rested on a theory of prosecution which was different than that presented against him.

The court explained:

His first contention is that he was charged with a violation of the Fair Campaign Practices Act, § 17-22A-23, Code of Alabama 1975, for personal use of "excess campaign funds." Second, he contends that the state did not prosecute other public office holders for their personal use of excess campaign funds. Specifically, Hunt contends that legislative candidates should have been prosecuted under the Fair Campaign Practices Act for misusing excess campaign funds. *However, Hunt was not charged with violating the Fair Campaign Practices Act, and this case does not involve excess campaign funds.*

Id. at 1005-06 (emphasis added); *see id.* at 1006 ("No evidence was presented or offered, or offer of proof made, to show that anyone else subject to the Ethics Law had done the acts with which Hunt was charged and convicted of doing").⁷ In light of the misalignment between Hunt's argument and the charges actually brought against him, it is not surprising that his contention failed. Nothing in *Hunt* forecloses Mr. Glenn's claim here.

Nor does the Alabama Supreme Court's recent decision in *State v. \$223,405.86* undercut Mr. Glenn's claim. There, the State appealed a circuit court's ruling that the seizure and forfeiture of certain gambling devices, records and money constituted selective prosecution. After a four-day trial, the circuit court "entered an order dismissing the forfeiture action on equal-protection grounds, i.e., on the basis that the State tolerated at other locations in Alabama the operation of casinos that used the same type machines at issue in this forfeiture case." 203 So. 3d at 821. On appeal, the Supreme Court reversed, finding that the basis for the lower court's ruling - a demonstrative chart showing a disparity between the days the casino at issue

⁷ The Alabama Supreme Court affirmed the convictions, noting again the disparity between Hunt's selective prosecution claim and the actual charges against him. *See Ex parte Hunt*, 642 So. 2d 1060, 1064-65 (Ala. 1994).

was permitted to operate versus other casinos in Alabama - was an insufficient evidentiary foundation. *Id.* at 825.

In addressing the legal basis for the finding, the Court recognized the longstanding principle that a fundamental right needed to be implicated or suspect class targeted in order to trigger equal-protection scrutiny. *Id.* at 827 After first recognizing that “[g]ambling is not a fundamental right,” *id.*, the court noted that “[the appellant] did not argue, and the trial court did not find, that [the casino] has been targeted for prosecution on the basis that it is part of a suspect class, e.g., race, religion, or nationality.” *Id.* In addition, the court held that while the appellant had shown selectivity in enforcement, it failed to demonstrate that selectivity was based on “intentional discrimination against a suspect class.” *Id.*

Thus, \$223,405.86 stands for the unremarkable proposition that failure to satisfy the required elements of a selective prosecution claim necessitates denial of that claim. By contrast, as detailed above, Mr. Glenn has met his burden of demonstrating both selectivity in enforcement and an underlying discriminatory purpose. Accordingly, his motion is due to be granted.

C. Commission Staff Vindictively Prosecuted Mr. Glenn.

While ordinarily defendants have difficulty showing prosecutor’s charging decisions are the product of animus that is simply not the case here. To recount, the Ethics Commission Staff:

- (1) purposefully evaded the requirements of the Ethics Act, including notice, hearing by the Ethics Commission, and a vote prior to the case being referred to another agency for prosecution;
- (2) charged Mr. Glenn using novel theories that, upon information and belief, are unprecedented under the facts and circumstances present here;
- (3) upon obtaining the indictment against Mr. Glenn, fed the fact of the indictment and information about the indictment to the media so as to enable the

media to publish a story before Mr. Glenn was served with the indictment as required by the Alabama Grand Jury Secrecy Act;

(4) contemporaneously with the publication of the media story and, again, before Mr. Glenn was served with the indictment, issued a press release about the indictment in violation of the Grand Jury Secrecy Act;

(5) omitted the disclaimer required by the Alabama Rules of Professional Conduct stating that Mr. Glenn was innocent until proven guilty from the press release.

Prosecutors motivated to seek justice and impartially enforce the law would not run roughshod over Mr. Glenn's rights at every turn, violating two statutes and one rule of Professional Conduct in their zeal to indict him and secure favorable press coverage before he even received a copy of the indictment against him. In addition to the Staff's actions, an environmental organization that had targeted Mr. Glenn for months based at least in part upon his political affiliation and position immediately took credit for his indictment when it was made public.

As set out in Section I.B above, the Ethics Commission Staff's decision to Indict and prosecute Mr. Glenn was to punish him for exercising his right of political affiliation while he was an official with the EPA. As a result, the decision to indict rests upon improper motives that violate Mr. Glenn's constitutional right to equal protection mandating dismissal.

Alternatively, while the facts here do not involve a re-indictment of Mr. Glenn on more serious charges following his successful assertion of his rights as is the typical situation for vindictive prosecution, they do involve a situation where Mr. Glenn testified to a federal grand jury and in a federal criminal trial in relation to the subject matter that is the subject of the Indictment here. Further, while Mr. Glenn cooperated with the federal investigatory efforts, he was never named as a target of the investigation and was never charged with any federal offenses related to it or the subject matter of the investigation. Upon information and belief, the decision by federal prosecutors that Mr. Glenn was not a target and should not be indicted motivated the

Commission Staff here to ignore the Ethics Act's mandatory requirements to obtain an indictment against him based on a novel theory and then illegally leak the fact of the indictment to the press before he or his counsel were served with it so that the Commission Staff could shape the press coverage and an organization that had targeted him for months based at least in part on his political affiliation and position could claim credit for the indictment. Thus, the Indictment here is not the product of any reasoned or defensible decision making, but is instead the product of vindictiveness and animus.

II. At a Minimum, Mr. Glenn is Entitled to Discovery on His Selective and Vindictive Prosecution Claims.

Even if this Court determines Mr. Glenn has not yet made a showing of selective or vindictive prosecution sufficient to entitle him to dismissal, he has clearly met the standard set out by the Supreme Court in *United States v. Armstrong*, 517 U.S. 456 (1996) to obtain discovery related to his claims. Under *Armstrong*, a defendant is entitled to discovery where he presents "some evidence tending to show the existence of the essential elements of the defense." *Armstrong*, 517 U.S. at 468-69 (1996). While *Armstrong* itself addressed selective prosecution claims, courts also apply its discovery standards to vindictive prosecution claims. *See United States v. Rasco*, No. CR 4:08-100, 2010 WL 2160836, at *5 (S.D. Ga. May 27, 2010) (noting "most Circuits to address the issue have held that the standard for discovery is the same for both selective and vindictive prosecution cases" and adopting the "some evidence" standard to guide vindictive prosecution discovery).

For the reasons detailed above, Mr. Glenn has met this standard and is therefore entitled to discovery on both his selective and vindictive prosecution claims. On the selective prosecution claim, he has credibly demonstrated that others similarly situated - including two individuals who engaged in precisely the same activity which formed the basis of the Indictment

- have never been charged with any offense, much less the ones he faces; and has identified credible evidence demonstrating that the State's decision to single him out stems from his political affiliation and status. As to his vindictive prosecution claim, Mr. Glenn has shown that the Ethics Commission Staff broke multiple laws, as well as a Rule of Professional Conduct, in its zealous efforts to indict him and shape press coverage before he even received a copy of the indictment while an organization that had targeted him for months publicly claimed credit for the indictment. Having met his burden to bring forth some evidence in support of the elements of his defenses, he is now entitled to discovery in order to permit the Court to make a fully informed assessment of the merits of his claims.

A. Requested Discovery

In order to allow him to further develop his selective and vindictive prosecution claims, Mr. Glenn respectfully requests that the Court order the State to produce the following discovery:

1. All communications, including emails and text messages, with GASP (formerly known as "the Greater Birmingham Alliance to Stop Pollution"), including any current or former employee or agent of that entity, regarding Mr. Glenn, any other individual investigated pursuant in relation to the matters set forth in the complaint.

2. All communications, including emails and text messages, with GASP (formerly known as "the Greater Birmingham Alliance to Stop Pollution"), including any current or former employee or agent of that entity, regarding the complaint filed by GASP.

3. The names of any individuals investigated under the theory charged in this case, and all materials related to those investigations. To the extent those investigations have resulted in prosecutions, the locations, dates and docket numbers for those prosecutions.

4. All communications, including emails and text messages, relating to the decision to prosecute Mr. Glenn in this case.

5. All communications, including emails and text messages, relating to the decision not to charge other individuals employed by or associated with Southeast Engineering and Consulting.

6. All communications, including emails and text messages, relating to the decision not to charge any other individuals known to have participated in the manner Mr. Glenn is alleged to have participated in this case.

7. All documents demonstrating, relating to, or tending to reflect that political affiliation was considered in the decision to charge Mr. Glenn in this case.

8. All documents demonstrating, relating to, or tending to reflect that political affiliation was considered in the decision to charge or decline to any defendant under the Ethics Act.

In addition to gathering this material from the State, Mr. Glenn plans to take further steps to collect information from other sources and present it to the Court, in order to allow for a fully informed assessment of the legitimacy of this prosecution. As part of that effort, Mr. Glenn plans to issue subpoenas to certain individuals and entities to provide the Court further information and, as necessary and appropriate, to request that this Court order an evidentiary hearing in order to receive documentary evidence and testimony on the issue. Moreover, in accordance with the approach followed in other selective prosecution cases, were such a hearing ordered, Mr. Glenn anticipates calling as witnesses former Jefferson County District Attorney Michael Anderton as well as the prosecutor(s) who obtained the Indictment and various individuals associated with the Alabama Ethics Commission, including its executive director,

any investigators who were involved in this investigation, and any Commission members or staff, past or present, who may have information relevant to the decision to target Mr. Glenn for prosecution.

CONCLUSION

For all of the foregoing reasons, defendant Onis Glenn, III respectfully requests that this Court grant his motion to dismiss or alternatively, orders the State to provide discovery in response to the categories set forth in Section II.A above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on counsel of record for the State by electronic filing with Alafile on this the 11th day of February, 2019.

/s/ John A. Lentine