**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff/Appellee,**

**-vs-**

**KEITH ERIC WOOD,**

**Defendant/Appellant.**

**SC NO.: 159063**
**COA NO.: 342424**
**CIRCUIT CT. NO.: 17-24073-AR**
**DISTRICT CT. NO.: 15-45978-FY**

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# BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT KEITH ERIC WOOD

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## INTEREST OF AMICUS CURIAE

Founded in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. Toward that end, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and submits amicus briefs to the United States Supreme Court and courts across the nation.

Cato regularly advocates for both robust free speech rights and the importance of community participation in the criminal justice system through independent juries.

No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

## SUMMARY OF ARGUMENT

As a general matter, the State of Michigan may certainly prohibit—and punish—jury tampering. But it must do so within constitutional limits. Here, the prosecution of Keith Wood fails not because it is categorically impermissible to punish people for seeking to influence potential jurors, but rather because the application of MCL 750.120a(1) in this particular case violates the First Amendment. That is because:

1. As the Court of Appeals correctly recognized but the State does not, this case involves a content-based restriction on speech.
2. As such, binding Supreme Court precedent mandates the application of strict scrutiny.
3. The attempt to enforce MCL 750.120a(1) against Mr. Wood does not satisfy strict scrutiny, and in fact it flunks that test in every way that it is possible to do so: (a) as applied here, the statute is both over- and underinclusive; (b) it fails to use the least restrictive means of advancing the government's end; and (c) it does not advance *any* legitimate government interest, let alone a compelling one.

Any one of those shortcomings suffices to defeat this prosecution. Taken together, they thoroughly undermine the State's attempt to punish Mr. Wood for engaging in classic political advocacy on a matter of substantial public concern that has played a key role in our system of justice since before Magna Carta.

## ARGUMENT

### I. MCL 750.120A(1) IS A CONTENT-BASED REGULATION OF SPEECH AND SUBJECT TO STRICT SCRUTINY.

The United States Constitution and Michigan state constitution protect the free speech rights of individuals and prevent the state from enacting laws that abridge or restrain that speech. US Const, Am I; Const 1963, art 1, § 5. In light of these constitutional protections, the state "has

no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v Mosley*, 408 US 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v Town of Gilbert*, 135 S Ct 2218, 2226 (2015).

The Supreme Court's recent decision in *Reed v Town of Gilbert* provides the most comprehensive analysis of what it means for a law to be content-based. Determining whether a restriction on speech is content-neutral requires courts to "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 2227 (quoting *Sorrell v IMS Health Inc*, 564 US 552, 564 (2011)). Facially content-based restrictions include those that "define[] regulated speech by particular subject matter" as well as those that "define[] regulated speech by its function or purpose." *Id.* Even laws that are facially neutral will still be considered content-based, and thus subject to strict scrutiny, if they "cannot be 'justified without reference to the content of the regulated speech.'" *Id.* (quoting *Ward v Rock Against Racism*, 491 US 781, 791 (1989)).

Under these principles, and as correctly acknowledged by the Court of Appeals below,[1] MCL 750.120a(1) is plainly a content-based regulation of speech. This statutory provision makes it a crime for any person to "willfully attempt[] to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case." Thus, on its face, the statute regulates speech ("argument or persuasion") by reference to a

[1] App. 179a-180a (quoting *Schenk v Pro-Choice Network of Western New York*, 529 US 357, 377 (1997) for the proposition that "'Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment.'").

particular subject matter ("the decision of a juror in any case"), as well as by function or purpose (attempts "to influence" this decision).

Perhaps anticipating the rigors of strict scrutiny, the State repeatedly asserts that what it is really seeking to punish here is simply the *act* of jury tampering and not the speech by which that act was purportedly accomplished.[2] This a common ploy for government defendants who find themselves in the uncomfortable position of prosecuting people for the content of their speech, and the Supreme Court has rebuffed it time and again. See, e.g., *Holder v Humanitarian Law Project*, 561 US 1, 27-28 (2010) ("The Government is wrong that the only thing actually at issue in this litigation is conduct.") (citing *R.A.V. v St. Paul,* 505 US 377 (1992) (cross burning); *Texas v Johnson,* 491 U.S. 397 (1989) (flag burning); *Cohen v California*, 403 US 15 (1971) (wearing jacket bearing the words "Fuck the Draft")).[3]

It appears the State's failure to appreciate that this is a content-based restriction on speech may flow from its fundamental misconception of MCL 750.120a(1). Contrary to the State's erroneous assertion, it is emphatically not the case that "[t]he Michigan legislature has created a law that criminalizes *any* attempts to influence a juror's decision."[4] Nor is it accurate to say, as the State does later in its brief, that "[i]t does not matter where *or how* an attempt to influence the juror

[2] State's Brief at 25 ("In this case, it was Appellant's conduct which was criminal, not the pamphlet"); 30 ("Here, Appellant used speech to commit a crime"); ("The statute [MCL 750.120a(1)] regulates the use of speech to commit the criminal *act* of attempting to improperly influence a jurors) (emphasis added).

[3] Lower courts have rebuffed the speech-is-conduct gambit as well. See, e.g., *Wollschlaeger v Governor of Florida*, 848 F3d 1293, 1308 (CA 11, 2017) (en banc) (rejecting the "'enterprise of labeling certain verbal or written communications "speech" and others "conduct" [because it] is unprincipled and susceptible to manipulation.'") (quoting *King v Governor of New Jersey*, 767 F3d 216, 228 (CA 3, 2014)).

[4] State's Brief at 20 (emphasis added).

occurs, the criminal act is the attempt."[5] This is flatly incorrect and further underscores the State's fundamental misunderstanding of the statute at issue in this case.

In reality, there are any number of ways that people may seek to influence a juror's decision in a particular case without running afoul of MCL 750.120a(1). For example, the wife of a defendant could bring their young children to court every day in the hopes of winning jurors' sympathy and making them reluctant to convict a father whose family depends on him for support. Similarly, the victim of a violent assault might choose to wear an outfit that reveals the scars she received in the attack for the specific purpose of encouraging jurors to convict her alleged assailant. Contrary to the State's misconception, neither of those acts, even if done for the specific purpose of influencing jurors in particular case, would violate MCL 750.120a(1) because that statute only covers attempts to influence jurors using *speech*—and not just that, but a *particular kind* of speech: "argument or persuasion."

The State argues that use of "argument or persuasion" is "not the offense proscribed by the statute," but "merely the means by which offenses . . . are committed."[6] But this distinction is illusory when the "offense" at issue is "influencing" another person with respect to a particular subject matter; in such a circumstance, the prohibited speech and the allegedly unlawful conduct are one and the same. In contrast, the State uses the example of a person who threatens to injure a congressman's family if he does not abide by the demands of a pamphlet to illustrate the unremarkable point that a true threat is not protected just because it relates to the content of a political pamphlet.[7] But in that example, the criminal act—the true threat—is separate from and

[5] *Id*. at 37 (emphasis added).

[6] State's Brief at 27.

[7] State's Brief at 33.

independent of the contents of the pamphlet, and the threat could be punished no matter what the pamphlet says.

In Mr. Wood's case, however, the application of MCL 750.120a(1) is content-based because it required the state to examine the content of his pamphlets to determine whether they did, in fact, constitute argument or persuasion on the subject of jury decision-making. A regulation of speech that requires "'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred" is the essence of a content-based restriction of speech. *McCullen v Coakley*, 134 S Ct 2518, 2531 (2014). See also *Cincinnati v Discovery Network, Inc*, 507 US 410, 429 (1993) ("[W]hether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'").

If Mr. Wood had been distributing pamphlets about any other topic—for example, proselytizing on behalf of his faith, recommending that citizens vote in the next election, or making neighbors aware of an upcoming fundraiser—his speech would not be deemed criminal, and he would not be subject to MCL 750.120a(1)'s regulations. Likewise, if he had sought to influence jurors using some mode of expression besides "argument or persuasion"—singing an upbeat song near the entrance to the courthouse, say, or displaying a reproduction of Brueghel's painting "Hell Scene, With Devils Tormenting the Souls of the Damned"—then he would not have been within the ambit of MCL 750.120a(1) and not subject to prosecution. Only by examining the content of Mr. Wood's speech is it possible to know whether his particular attempt to influence jurors was or was not unlawful. And that is the very essence of a content-based restriction on speech, as the

Court of Appeals tacitly recognized when it subjected MCL 750.120a(1) to strict scrutiny.[8] Where the Court of Appeals erred, however, was in its application of that standard to the facts of this case.

## II. THE APPLICATION OF MCL 750.120A(1) CANNOT WITHSTAND STRICT SCRUTINY.

"For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45 (1983). The application of MCL 750.120a(1) to Mr. Wood fails across the board. First, the statute is not narrowly drawn because it manages to be simultaneously underinclusive and massively overbroad; second, rather than using the least restrictive means to advance the government's stated interest, as required by narrow tailoring, the statute uses the most restrictive means—a criminal prohibition on a particular category of speech; and finally, the State not only lacks a compelling interest in censoring the speech at issue here, but rather has no legitimate interest at all in preventing people like Mr. Wood from educating their fellow citizens about the injustice-preventing role that juries have played in our system of government for more than eight centuries.

### A. MCL 750.120a(1) is not narrowly tailored.

In order to satisfy strict scrutiny, a restriction on speech must be narrowly tailored to advance a compelling government interest. A speech restriction can flunk narrow tailoring by being overinclusive—that is, regulating substantially more speech than necessary to achieve the government's end; or by being underinclusive—that is, "when it leaves appreciable damage to th[e] supposedly vital interest unprohibited." *Reed*, 135 S Ct at 2232 (internal quotation and citation omitted). As demonstrated below, MCL 750.120a(1) does both.

[8] App. 179a-180a.

***1. MCL 750.120a(1) is massively overinclusive***. Michigan, like all states, undoubtedly has a compelling interest in protecting the integrity of jury trials, and thus may freely prohibit the crime of jury tampering without running afoul of constitutional limitations. As explained in more detail by the Fully Informed Jury Association ("FIJA"), jury tampering is an anciently recognized crime, and traditionally consists of "acting to influence a jury's verdict in a specific case by threats, violence, bribery or other criminal pressure." *Amicus Curiae* Brief of FIJA, at 3. Michigan has several statutory provisions guarding against exactly this sort of offense, which are not at issue in Mr. Wood's case, nor implicated by his constitutional arguments on appeal. *See, e.g.*, MCL 750.120 (criminalizing a juror's acceptance of bribes); MCL 750.120a(2) (criminalizing attempts to influence jurors by intimidation); MCL 750.120a(4) (criminalizing retaliation for a juror's decision).

By contrast, MCL 750.120a(1) sweeps far beyond the boundaries of this traditional offense; by its plains terms, it covers *all* speech on *any* aspect of a jury's decision in *any* case, so long as the speaker intends that a juror might hear and be influenced by it. It is not limited to fraudulent, misleading, or harassing speech. It is not limited to speech regarding the details or subject-matter of a particular case (as opposed to general principles of jury decision-making, like those advocated by Mr. Wood here). It is not limited to speech made in the presence of or directed to individual jurors. And on the Court of Appeals' interpretation of the statute, it is not even limited to actual, sworn jurors in specific cases; rather, it extends even to *potential* jurors—i.e., anyone called for jury duty.[9]

[9] App. 175a-179a.

To illustrate just how far-reaching this provision is—and how much protected speech it purports to criminalize—consider that all of the following would constitute violations of the statute, so long as the speakers know and intend that actual or potential jurors might hear them:

- An op-ed writer who has been following a criminal case and publishes in a local newspaper that "the accused was clearly framed" and "the jury should vote to acquit";
- A radio personality who hosts a segment on the unintended consequences of the War on Drugs, who urges those who have been called for jury duty to stop convicting their fellow citizens for nonviolent crimes in the interest of community stability and decreased prison costs;
- A wife whose husband is selected for jury duty, who urges him to remember that local police have recently been caught perjuring themselves and planting evidence, and he should therefore not assume that government witnesses are necessarily more credible than defense witnesses.

Indeed, such examples need not be limited to hypotheticals. Countless columnists, bloggers, op-ed writers, and radio hosts spoke out against the federal government's recent prosecution of activist Scott Warren for "harboring" illegal immigrants by leaving water for them in the desert.[10] And at least some of those commentators appeared to suggest that Warren should be acquitted against the evidence if necessary to avoid an unjust conviction—which appears to be precisely what happened. Less than two weeks before the start of Warren's second and final trial, one Arizona columnist wrote that "[i]t'll be up to a jury—again—to decide whether . . . to convict and imprison a man who acted not out of a profit motive but out of a Christian motive, a belief that coming to the aid of his fellow man is the good and right thing to do."[11]

[10] See, e.g., Jenn Budd, *Border-aid volunteer shouldn't have been charged*, Arizona Republic, Nov 7, 2019; David Blair, *A Good Samaritan*, New Hampshire Union Leader, Nov 8, 2019.

[11] Laurie Roberts, *The "Crime" Is Treating Migrants As Humans*, Arizona Republic, Nov 13, 2019.

The State breezily concedes that "[a] letter to the editor of a newspaper advocating for a right of jury nullification would unquestionably be protected speech under the First Amendment."[12] But of course, as the Warren trial illustrates, such letters will often be motivated not by wholly abstract views on jury nullification, but rather by concerns about a jury's decision in *particular* cases. And naturally, individuals writing op-eds on public events hope and intend that their speech will *influence* their readers, including actual and potential jurors. If the State is correct that the only factor distinguishing protected political advocacy from criminal conduct is the *intent* to influence a jury's decision, then any public commentator on a jury trial is at risk of criminal prosecution, so long as the government can prove the nearly tautological proposition that the speaker intends their persuasive arguments to have persuasive effect.

Application of this statute therefore risks making criminals out of a wide range of speakers engaging in presumptively protected speech. Content-based regulations like MCL 750.120a(1) are impermissible if they are overbroad and unnecessarily burden more speech than required to accomplish the government's purpose. *Ward*, 491 US at 791. Even assuming that this particular provision could plausibly be understood as seeking to target actual jury tampering, it clearly and unnecessarily reaches far beyond the set of concerns that make the prohibition of jury tampering a compelling state interest in the first place.

The overbreadth of MCL 750.120a(1) is underscored by the fact that it is a clear outlier among the states' varied attempts to address jury tampering. Sixteen states—Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming—manage without statutes specifically outlawing attempts to communicate with or influence jurors. Of those states

[12] State's Brief at 34.

that do address attempts to influence or persuade jurors, six limit their scope to attempts to do so "corruptly" or with a "fraudulent purpose";[13] thus, they would not cover a situation like the one here, where a speaker peacefully distributes accurate, generalized information on the history of the jury trial, jury independence, and the rights and duties of jurors. Pennsylvania also defines jury tampering narrowly, limiting it to situations where a person has "ascertained the names of persons drawn from the master list of prospective jurors," and thereafter discusses with them "the facts or alleged facts of any particular suit or cause then listed for trial." 42 Pa Cons Stat 4583 (1980).

Of the remaining 26 states' "jury tampering" provisions, 23 of them are limited to attempts to "communicate" with specific individuals drawn as jurors, as opposed to "situations where a person intends to inform the public or express a public opinion, regardless of whether jurors—drawn, summoned, or sworn—may be among the public." *State v Springer-Ertl*, 610 NW2d 768, 777 (SD 2000).[14] Regardless of whether such provisions themselves raise constitutional concerns, they clearly demonstrate that Michigan has one of the most sweeping "jury tampering" statutes in the nation, which strongly suggests that MCL 750.120a(1) is far broader than necessary to achieve any compelling state interest.

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[13] See Cal Pen Code 95 (Deering 2011); Fla Stat Ann 918.12 (LexisNexis 1997); Idaho Code 18-1304 (1972); La Stat Ann 14:129 (2002); Md Code Ann, Crim Law 9-305 (LexisNexis 2005); NJ Rev Stat 2C:29-8 (2017).

[14] See Ala Code 13A-10-128 (LexisNexis 1977); Alaska Stat 11.56.590 (1978); Ariz Rev Stat 13-2807 (LexisNexis 1977); Ark Code Ann 5-53-115 (1975); Colo Rev Stat 18-8-609 (1989); Del Code Ann tit 11, § 1266 (1997); Ga Code Ann 16-10-91 (1968); Haw Rev Stat Ann 710-1075 (LexisNexis 1993); 720 Ill Comp Stat Ann 5/32-4 (LexisNexis 2005); Ky Rev Stat Ann 524.090 (LexisNexis 2002); Miss Code Ann 97-9-123 (2006); Neb Rev Stat Ann 28-919 (LexisNexis 1994); NY Penal Law 215.25 (Consol 1990); NC Gen Stat 14-225.2 (1994); ND Cent Code 12.1-09-04 (2001); Okla Stat tit 21, § 388 (2014); SC Code Ann 16-9-350 (1980); SD Codified Laws 22-12A-12 (2005); Tenn Code Ann 39-16-509 (1989) (limited to "private[]" communication); Tex Penal Code Ann 36.04 (West 1994) (limited to "private[]" communication); Utah Code Ann 76-8-508.5 (LexisNexis 1992); Wash Rev Code Ann 9A.72.140 (LexisNexis 2011); Wis Stat 946.64 (2001).

***2. MCL 750.120a(1) is substantially underinclusive as well***. Besides sweeping far more broadly than the Constitution permits, MCL 750.120a(1) also manages to be substantially underinclusive by allowing vast quantities of speech that raise precisely the same concerns the State invokes as its justification for silencing Mr. Wood.

By the State's own admission, it would have been perfectly lawful for Mr. Wood to distribute the exact same jury-nullification brochure in the exact same place at the exact same time if he had only done so for general informational purposes, instead of with the intent to influence the jury's verdict in a particular case.[15] Indeed, the State readily concedes that "If Appellant's . . . argument were that it is unconstitutional to convict a person for distribution of information when that person has no intent to influence a particular juror in a specific case, the People would agree wholeheartedly with that proposition."[16]

But if information about jury nullification is genuinely injurious to the State's interest in a fair trial, then its effect on potential jurors hardly depends on the motive of the speaker. By way of contrast, consider the rule against informing jurors about a defendant's criminal history. There are exceptions to that rule, see MRE 404(b), but none of them turns on the personal motives of the party seeking to make the disclosure. A law that allows potential jurors to hear purportedly prejudicial speech (whether relating to juror nullification or a defendant's criminal history) from

[15] See State's Brief at 19 ("The issue is whether Appellant acted with an intent to sway the opinions of jurors."); 21 ("It must be stressed that the People are *not* attempting to construe this statute so broadly as to encompass any speech that might tend to influence a person summoned for jury duty. . . . Providing information which 'may' or even 'does' influence a particularly juror in a case is not illegal."); 32-33 ("The law . . . was never interpreted to criminalize the general distribution of ideas . . . . The issue is whether the pamphlet was used in an attempt to persuade jurors in a specific case to agree with Appellant's point of view and vote accordingly.").

[16] *Id.* at 32.

one speaker but not from another—as the State unambiguously concedes that MCL 750.120a(1) does—is demonstrably underinclusive and not narrowly tailored.

### B. The State has chosen the most restrictive means of advancing its purported interest here, rather than the least restrictive means, as strict scrutiny requires.

In order to satisfy strict scrutiny as it applies to a content-based restriction on speech, the government must use the least restrictive means of achieving a compelling state interest. *McCullen v Coakely*, 573 US 464, 478 (2014). Here, the State has chosen the *most* restrictive means of regulating speech—a content-based ban on certain speech backed by criminal prosecution—when there is a much less restrictive way of addressing whatever concerns the State has about potential jurors receiving information about jury nullification on their way into the courthouse; namely, a curative instruction from the trial judge. As discussed immediately above, the State has conceded that it does not prohibit people from distributing jury-nullification literature to potential jurors so long as it is done for general informational purposes. If a prosecutor were to see a jury-nullification brochure in the hands of a venire member or empaneled juror, she would presumably ask the court for some sort of instruction in order to address whatever problem the prosecutor thinks that might cause. It is difficult to understand how the efficacy of that instruction would depend in any way upon the motivation of the person who distributed the brochure. Under strict scrutiny, it is for the government, "presented with a less restrictive alternative, to prove the alternative to be ineffective." *United States v Playboy Entm't Group*, 529 US 803, 823 (2000). A curative instruction is the obvious response to whatever concerns the State has with the speech at issue here, and the State has utterly failed to carry its burden of showing why such an instruction would be ineffective. That alone is fatal to its case.

### C. Michigan has no legitimate interest in restricting Mr. Wood's speech about the historical role of juries, jury rights, and jury independence.

Even aside from its facial overbreadth, MCL 750.120a(1) fails any level of heightened scrutiny as applied to Mr. Wood's speech in this case. Michigan has no interest, compelling or otherwise, in preventing the dissemination of truthful information about juror rights and jury independence—cornerstones of the American criminal justice system—to any member of the public, whether they are or may be called as a juror in any matter before any court.

The right to a jury trial developed as a necessary "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v Louisiana*, 391 US 145, 151, 156 (1968) (right to trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); see also *Jones v United States*, 526 US 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

Scholars have long debated the origin of so-called "jury nullification," but something resembling our notion of an independent jury refusing to enforce unjust laws pre-dates the signing of Magna Carta, and probably even the Norman Conquest. See Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* (2d ed 2014), p 13.[17] In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself. This understanding of the right was firmly established prior to the American revolution, as "[e]arly American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the colonies." Conrad, *supra*, p 4. In the British common law tradition, juries had been granted independence to acquit against the wishes of the Crown in 1670; America's Founders thus "inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation." *Id.*

[17] See also Lysander Spooner, *An Essay on The Trial by Jury* (1852), pp 51-85.

The community's central role in the administration of criminal justice has been evident since our country's founding. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v Utah*, 170 US 343, 349-350 (1898) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1779. As Alexander Hamilton observed, "friends and adversaries of the plan of the convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government." The Federalist No. 83 (Alexander Hamilton). This "insistence upon community participation in the determination of guilt or innocence" directly addressed the Founders' "[f]ear of unchecked power." *Duncan*, 391 US at 156.

It is thus no surprise that the right to trial by jury occupies a central role in our nation's founding documents. The Declaration of Independence included among its "solemn objections" to the King his "'depriving us in many cases, of the benefits of Trial by Jury,' and his 'transporting us beyond Seas to be tried for pretended offenses.'" *Id.* at 152. Against the backdrop of those protestations, the Constitution was drafted to command that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed," US Const, art III, § 2; that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," US Const, Am VI; and that no person be "twice put in jeopardy of life or limb," US Const, Am V. Together, these guarantees reflect "a profound judgment about the way in which law should be enforced and justice administered," *Duncan*, 391 US at 155; namely, with the direct participation of the community.

Indeed, the jury is expected to act as the ultimate conscience of the community, and any system prohibiting the "discretionary act of jury nullification [. . .] would be totally alien to our notions of criminal justice." *Gregg v Georgia*, 428 US 153, 199 n 50 (1976). In particular, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v Washington*, 542 US 296, 306 (2004); see also, e.g., Letter XV by the Federal Farmer (Jan 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (Herbert J. Storing ed 1981) (the jury "secures to the people at large, their just and rightful control in the judicial department"). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v Ohio*, 499 US 400, 406-07 (1991), and "places the real direction of society in the hands of the governed," Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998), p 88 (quoting Alexis De Tocqueville, *Democracy in America* (Phillips Bradley ed 1945), pp 293-94).

By applying a content-based speech restriction to Mr. Wood, the state's position must necessarily be that it has a compelling interest in precluding him from educating potential jurors about the history and propriety of jury independence, including the so-called power of nullification: that is, the refusal to convict a defendant whose legal guilt has been proven beyond a reasonable doubt but whom the jury believes it would be unjust to punish. As the above illustrates, however, the position for which Mr. Wood was advocating is as firmly established in the American legal tradition as the jury trial itself. Prohibiting someone from discussing jury independence with a potential juror is no different in principle than impressing upon a potential juror the sanctity of the burden of proof in criminal cases—yet one can hardly imagine that the state would be demanding the authority to prosecute people for speech on *that* subject.

Mr. Wood's conviction is all the more troubling because the jury trial itself—though the very bedrock on which our criminal justice system is founded—is nevertheless dwindling to the point of a practical nullity. Recent developments—most notably, the proliferation of plea bargaining, which was largely unknown to the Founders—have reduced the country's robust "system of trials" into a "system of pleas." *Lafler v Cooper*, 566 US 156, 170 (2012); see also George Fisher, *Plea Bargaining's Triumph*, 109 Yale LJ 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance"). The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 US at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. See *Lafler*, 566 US at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, p 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

In short, criminal juries have been marginalized to the point of near extinction. The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a prosecutor-driven conviction machine.

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But the least that states can do is not exacerbate the situation by singling out for punishment protected speech meant to inform jurors of their rights, obligations, and historical role as the conscience of the community. Such an approach should be rejected as contrary to the Supreme Court's First Amendment

jurisprudence and inimical to the community's vital role in safeguarding our liberty through its ongoing participation in the administration of criminal justice.

## CONCLUSION

For the foregoing reasons, and those described by the Defendant/Appellant, Mr. Wood's conviction should be vacated.

Respectfully submitted,

DATED: January 24, 2020.

*/s/ Eric Misterovich*

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