**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

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**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff/Appellee,**

**-vs-**

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

**KEITH ERIC WOOD,**

**Defendant/Appellant.**
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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

It is difficult to overstate the extent to which the decision below, upholding the conviction of Keith Eric Wood, strikes at the core of the First Amendment. Mr. Wood was arrested and convicted for engaging in classic political advocacy (peacefully distributing pamphlets) in the quintessential public forum (the sidewalk in front of a courthouse) on a matter of public concern more ancient than Magna Carta, and at the heart of Anglo-Saxon law (the rights, duties, and independence of citizen jurors). One can well imagine why an English monarch might wish to suppress efforts to inform potential jurors of their power to resist tyranny by refusing to convict fellow citizens who had incurred the sovereign's enmity; what is—or should be—more surprising is American courts allowing American sovereigns to suppress such speech on American soil.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v Town of Gilbert*, 135 S Ct 2218, 2227 (2015). That is exactly the case here. Had Mr. Wood been handing out brochures for his church or advertisements for his car, he would not have been guilty of violating the statute under which he was convicted, MCL 750.120a(1); the violation necessarily turned on the content of the pamphlets he was distributing. The statute is therefore a content-based speech regulation, and its application to Mr. Wood must receive strict scrutiny, *Reed*, 135 S Ct at 2227, which the lower court failed to apply.

The Circuit Court sidestepped these First Amendment concerns by holding that § 750.120a(1) "does not regulate content of any speech" and that "the pamphlet's content is simply not the issue." Exhibit A, at 3. This position is simply impossible to reconcile with the Supreme Court's decision in *Reed v Town of Gilbert*, given that the statute at issue prohibits attempts to use "argument or persuasion" with respect to a specific subject matter (juror decision-making), and

that Mr. Wood's conviction necessarily depended on the fact that the pamphlets he was distributing concerned this exact subject matter.

To be sure, the government has a compelling interest in protecting the integrity of the jury decision-making process, and may prohibit acts that constitute the traditional crime of jury tampering. But § 750.120a(1) sweeps far beyond this legitimate purpose and implicates massive volumes of speech entitled to the highest degree of First Amendment protection. Overbreadth aside, MCL 750.120a(1) cannot constitutionally be applied to Mr. Wood's speech, as Michigan has no legitimate interest—compelling or otherwise—in preventing Mr. Wood from discussing the history of jury independence with any member of the public, whether or not they have been or may be called as a juror in any action.

## 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, amend 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*, 135 S Ct at 2226.

The Supreme Court's recent decision in *Reed v Town of Gilbert*, 135 S Ct 2218 (2015), 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*. at 2227 (quoting *Ward v Rock Against Racism*, 491 US 781, 791 (1989)).

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

The Circuit Court nevertheless held, without explanation, citation to supporting case law, or any attempt to distinguish the Supreme Court's binding decision in *Reed*, 135 S Ct at 2227, that this statute "does not regulate content of speech in any way." Exhibit A, at 3.[1] But it would be impossible to decide whether a violation of this statute was made out except by looking at the content of the "argument or persuasion" to see if it did, in fact, concern "the decision of a juror in any case." This evasion of strict scrutiny is typical of the kind of analysis that the *Reed* decision

[1] The Circuit Court's opinion suggests in a footnote that "Appellant concedes" that the statute is not content-based. Exhibit A, at 3 n 1 (citing Appellant's Brief on Appeal, pp 15-16). But that is a mischaracterization of Mr. Wood's position. His brief below does clarify that he was not challenging the facial validity of the statute itself, but rather its application to his particular case. But Mr. Wood's strategic decision to make an as-applied challenge certainly does not mean he has therefore conceded that the statute itself is content-neutral, nor did the Circuit Court cite any authority to support that proposition.

was intended to address and correct. *See, e.g.*, *Norton v City of Springfield*, 806 F3d 411, 412 (7th Cir 2015) (Easterbrook, J.) ("*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation."); *Wagner v City of Garfield Heights*, 675 F App'x 599, 604 (6th Cir 2017) ("[O]ur holding that the fact that a regulatory scheme requires a municipality to 'examine the content of a sign to determine which ordinance to apply "should merely be seen as indicative, not determinative, of whether a government has regulated for reasons related to content"' appears to run afoul of *Reed*'s central teaching." (quoting *Wagner v City of Garfield Heights*, 577 F App'x 488, 494 (6th Cir 2014))).

By way of comparison, consider a hypothetical statute, nominally designed to prevent "legislative tampering," which made it a crime for anyone to "willfully attempt to influence, by argument or persuasion, the vote of a member of the state legislature on any legislative matter, other than as part of sworn testimony in hearings before the legislative body, or a subdivision thereof." Such a statute would obviously be subject to strict scrutiny, and would almost certainly be at odds with the First Amendment. Of course, there may be different *interests* at stake in the realm of jury decision-making than with legislative decision-making; it might well be that an appropriately tailored "jury tampering" statute would survive strict scrutiny, while the parallel "legislative tampering" statute would not. But both statutes equally "define[] regulated speech by particular subject matter" and by "function or purpose," *Reed*, 135 S Ct at 2227, and thus would both trigger strict scrutiny.

Mr. Wood does not raise a facial challenge to the constitutionality of § 750.120a(1) itself, but the inherently content-based nature of the statute is equally evident as applied to Mr. Wood's particular case. A restriction is content-based if one must examine the substance of what was said to determine whether the speech is subject to regulation. *McCullen v Coakley*, 134 S Ct 2518, 2531 (2014). 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. *Id.* (citing *FCC v League of Women Voters of Cal*, 468 US 364, 383 (1984)); 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.'").

The application of § 750.120a(1) to Mr. Wood is content-based because it required "enforcement authorities" 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. 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, disseminating information about the opening of a new public library, urging everyone to convert from gas to electric vehicles, or making neighbors aware of an upcoming fundraiser—his speech would not be deemed criminal, and he would not be subject to § 750.120a(1)'s regulations. The alleged violation necessarily turned on the content of the pamphlets he distributed including material concerning a distinct issue.

The Circuit Court nevertheless held that "[t]he pamphlets' content is simply not the issue," and that "[t]he statute relates solely to when a person attempts to 'influence' a juror's decision, not to 'influence' them as to any topic whatsoever, let alone whether 'juror rights' are prohibited or permitted." Exhibit A, at 3. But this reasoning conflates the question of whether a regulation is *content*-neutral as opposed to *viewpoint*-neutral. MCL 750.120a(1) does not, on its face, regulate speech based on *viewpoint*—the Circuit Court was correct that it does not specifically target

particular disfavored arguments, such as the propriety of jury independence.[2] But it necessarily regulates speech based on *content*—and thus is still subject to strict scrutiny—because it places an entire subject matter off-limits for "argument or persuasion." Whether the state has a sufficient justification for enforcing that regulation is, of course, a separate question. But it cannot be avoided by simply pretending as though the statute in question does not regulate speech on the basis of its content.

Returning to the hypothetical "legislative tampering" statute discussed above, one could as well say "this statute isn't content-based, because it doesn't specify what *particular* arguments you are not allowed to make in your attempt to influence state legislatures." Such level-of-generality slippage would permit almost any regulation of speech, because there will always be some *more* specific subject-matter or viewpoint restriction that a regulation does not cover. To establish that a regulation is content-based, it is sufficient to show that it turns on the content of the speech at issue. *Reed*, 135 S Ct at 2227. MCL 750.120a(1)—both on its face and as applied to Mr. Wood—is exactly such a regulation, and the Circuit Court abdicated its obligation under the First Amendment to subject this regulation to strict scrutiny.

## 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 § 750.120a(1) to Mr. Wood fails on both accounts. The statute is massively overbroad,

[2] In his merits brief, Mr. Wood presents substantial evidence that his conviction was, in fact, the result of viewpoint discrimination by both the trial court judge and the prosecutor. See Def/Appellant's Br on Appeal, at 24-25, 28-29. But even if this animus toward Mr. Wood's viewpoint had not been present, the application of MCL 720.120a(1) to him would still be content-based discrimination (if not viewpoint discrimination).

criminalizing a vast array of protected speech beyond any conceivable state interest; and the state has no legitimate interest, compelling or otherwise, in silencing Mr. Wood's advocacy on the subject of juror rights and jury independence.

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

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* Br of FIJA, at 5. 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, § 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 related to 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 lower court's

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 selected for jury duty. See Exhibit A, at 4.[3]

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;
- Parents worried about their children's safety in the aftermath of a grisly murder, who post a sign in front of their house saying "Protect our kids—vote to convict <Defendant>!";
- 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.

Application of this statute therefore risks making criminals out of a wide range of speakers engaging in presumptively protected speech. Content-based regulations like § 750.120a(1) are impermissible if they are overbroad and unnecessarily burden more speech than required to

[3] *Amicus* does not take a position on whether the Circuit Court interpreted the word "juror" correctly under this statute. But either way, Mr. Wood's conviction cannot stand: either the statute is limited to actual, sworn jurors (in which case Mr. Wood did not violate the statute in the first place), or it includes potential jurors as well (which simply drives home the massive overbreadth of the provision).

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 § 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 that do address attempts to influence or persuade jurors, six limit their scope to attempts to do so "corruptly" or with a "fraudulent purpose";[4] 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,

[4] 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).

777 (SD 2000).[5] 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 § 750.120a(1) is far broader than necessary to achieve any compelling state interest.

### B. 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, § 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").

[5] 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).

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 the Magna Carta, and probably even the Norman Conquest. See Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* (2d ed 2014), p 13.[6] 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.*

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 addresses the Founders' "[f]ear of unchecked power." *Duncan*, 391 US at 156.

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

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.'" *Duncan*, 391 US 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 amend VI; and that no person be "twice put in jeopardy of life or limb," US Const amend 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: April 6, 2018.

*/s/ Eric Misterovich*

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## PROOF OF SERVICE

I, Eric Misterovich, hereby affirm that on the date stated below I delivered a copy of the above BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLANT KEITH ERIC WOOD upon the parties below via the True Filing File and Serve System or, if noted, by U.S. First Class Mail, postage prepaid from Portage, Michigan, and by email to all email addresses below:

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