IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
(Murray, C.J., and Murphy and Cameron, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ERIC WOOD,

Defendant-Appellant.
_____/

MSC No. 159063
COA No. 342424
Circuit Court No. 17-024073-AR
District Court No. 15-45978-FY

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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INTEREST OF AMICUS CURIAE[1]

In its order dated October 4, 2019, this Court invited the American Civil Liberties Union of Michigan ("ACLU") to file an amicus curiae brief in this case. The ACLU is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the rights guaranteed by the United States Constitution. The ACLU has long been committed to protecting the right to freedom of speech protected by the First Amendment. Even when speech is unpopular or wrong, the ACLU opposes government efforts to suppress or penalize it. If the government has discretion to punish speech it doesn't like, none of us truly enjoys the freedom of speech.

ACLU briefs are particularly important in free speech cases because, unlike a party whose speech is at issue, the ACLU has no particular interest in supporting or agreeing with the ideas expressed. Rather, the ACLU's interest is that of supporting the guarantees of the First Amendment so that the freedom of expression remains protected for all of us. To that end, the ACLU has filed numerous lawsuits and amicus curiae briefs supporting First Amendment rights, including in cases where the ACLU in no way endorses or celebrates the content of the speech itself. See, e.g., *Bible Believers v Wayne Co*, 805 F3d 228 (CA 6, 2015) (en banc) (anti-Islam speech); *Coleman v Ann Arbor Transp Auth*, 904 F Supp 2d 670 (ED Mich, 2012) (anti-Israel speech); *Barber v Dearborn Pub Schs*, 286 F Supp 2d 847 (ED Mich, 2003) (anti-Bush speech).

This case raises serious First Amendment concerns because the defendant was convicted of a crime engaging in pure speech, on a matter of public concern, in a traditional public forum,

[1] Pursuant to MCR 7.312(H)(4), amicus states that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amicus, its members, or its counsel made such a monetary contribution.

and his conviction was content-based. The ACLU believes that, given its expertise on First Amendment issues and the nature of this case, this amicus curiae brief will be of assistance to the Court.

BACKGROUND AND FACTS

The criminal justice system, with all its virtues and flaws, is rightfully a topic of intense public debate within the United States. In the national media and in local communities, some citizens call for tough-on-crime policies, while others question the criminalization of seemingly innocuous conduct and overincarceration that drains public resources.

One element of this national conversation is the concept of "jury nullification." Jury nullification refers to a juror's ability to vote against conviction in a criminal case, or against liability in a civil trial, even when the evidence or jury instructions support such a finding. Typically jury nullification occurs when a juror believes that the law itself is unjust, or is being applied unjustly, and votes their conscience notwithstanding their recognition that the law was probably broken. Jury nullification can thus invalidate a civil or criminal statute as applied in a specific case; if juries develop a pattern of nullification regarding a specific law, that law may be effectively unenforceable.

Given the importance of public debate about issues of crime and punishment, jury nullification is a significant point of discussion and deliberation. However, judges themselves do not inform juries about jury nullification, and attorneys are not permitted to do so in the courtroom. That leaves it up to individual citizens and advocacy groups to inform the public of jury nullification through websites, pamphlets, and other information tools. It is against this backdrop that the instant prosecution took place.

In 2015, Andy Yoder, a Michigan citizen living in Mecosta County, was charged with multiple misdemeanors concerning the conversion of land on his property. Mr. Wood learned of this trial and, on the day that the trial was scheduled, stood on a public sidewalk near the courthouse, distributing what have been referred to as "jury nullification pamphlets." The pamphlets described jury nullification and the process of applying it in a trial. Mr. Wood had discussed these issues with others prior to the date of the Yoder trial, but he had no personal connection to Yoder and no stake in the outcome of the Yoder trial.

When the magistrate, the judge, and the prosecutor learned of Mr. Wood's distribution of the material on the public sidewalk, they had him arrested. No jury had been selected, empaneled, or sworn in at that time, or at any point that day. Mr. Wood was arraigned on a felony charge of obstruction of justice and a misdemeanor charge of jury tampering; the obstruction of justice charge was later dismissed, though the jury tampering charge was not. Mr. Wood was convicted on the charge of jury tampering, which the circuit court upheld. The Court of Appeals affirmed by a vote of 2-1, and this Court granted leave to appeal.

ARGUMENT

Mr. Wood was convicted of a crime for pure speech. Such a conviction must be subjected to the highest level of judicial scrutiny, for "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v American Civil Liberties Union*, 535 US 564, 573; 122 S Ct 1700; 152 L Ed 2d 771 (2002).

Mr. Wood's conviction is the result of distributing lawful written material in a public place, and it is based on the content of the material he was distributing. As argued below, a content-based restriction such as this violates the First Amendment because even if the state has a compelling

interest in preventing jury tampering, charging Mr. Wood with a crime for distributing his pamphlets on a public sidewalk is not the least restrictive means of furthering that interest. Additionally, the statute used to convict Mr. Wood, as interpreted by the state and the lower courts, cannot survive constitutional scrutiny because it would criminalize or chill a vast amount of constitutionally protected speech. Accordingly, Mr. Wood's conviction should be reversed.

I. As an expression of ideas on issues of public concern in a traditional public forum, Mr. Wood's speech is entitled to the highest level of First Amendment protection, and its content-based restriction is presumptively unconstitutional.

The First Amendment's strong protection for speech on matters of public concern means that Mr. Wood's conviction here raises grave constitutional concerns. Jury nullification, the subject of Mr. Wood's speech, is a public issue, as it relates "to any matter of political, social, or other concern to the community." *Snyder v Phelps*, 562 US 443, 453; 131 S Ct 1207; 179 L Ed 2d 172 (2011). As such, it "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Dun & Bradstreet v Greenmoss Builders*, 472 US 749, 759; 105 S Ct 2939; 86 L Ed 2d 593 (1985). Indeed, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc v Virginia*, 448 US 555, 575; 100 S Ct 2814; 65 L Ed 2d 973 (1980).

Mr. Wood's expression is also entitled to especially rigorous First Amendment protection because of its manner and location. "[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v Ohio Elections Comm'n*, 514 US 334, 347; 115 S Ct 1511; 131 L Ed 2d 426 (1995). And sidewalks are the archetypal example of a traditional public forum, where "the government's ability to permissibly restrict expressive conduct is very limited." *United States v Grace*, 461 US 171, 177;

103 S Ct 1702; 75 L Ed 2d 736 (1983). Accordingly, as summarized in *Schenck v Pro-Choice Network of Western New York*, 519 US 357, 358; 117 S Ct 855; 137 L Ed 2d 1 (1997), restricting Mr. Wood's speech represents

> a broad prohibition, both because of the type of speech restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

Finally, the restriction on Mr. Wood's speech is presumptively unconstitutional because it is based on the content of his message. *Reed v Town of Gilbert*, __ US __; 135 S Ct 2218, 2226; 192 L Ed 2d 236 (2015). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson*, 491 US 397, 414; 109 S Ct 2533; 105 L Ed 2d 342 (1989). "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*, 135 S Ct at 2227. As the Court of Appeals majority recognized, see Appendix 181a, the restriction here was content-based because the state sought to criminalize Mr. Wood's expression based on the content of the materials he was distributing. In this case, Mr. Wood would not have been arrested, charged or convicted of jury tampering (or any other offense) had his pamphlets advocated the election of a candidate for public office or adherence to a religious faith. He was convicted because of the content of his speech: information about jury nullification.

II. The restriction on Mr. Wood's speech cannot survive strict scrutiny.

Content-based restrictions on speech trigger strict scrutiny under the First Amendment. *Reed*, 135 S Ct at 2228. Strict scrutiny of content-based restrictions requires a determination of whether the state (1) had a compelling interest in regulating speech and (2) used the least restrictive

means to achieve that interest. *United States v Playboy Entm't Group*, 529 US 803, 813; 120 S Ct 1878; 146 L Ed 2d 865 (2000). "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v Flores*, 521 US 507, 534; 117 S Ct 2157; 138 L Ed 2d 624 (1997). Additionally, "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entm't Group*, 529 US at 816. Thus, it is the state's burden to come forward with a compelling interest and prove that criminalizing Mr. Wood's conduct is the least restrictive means of advancing that interest.

Mr. Wood's brief concedes that preventing jury tampering is a compelling state interest.[2] But assuming that is true, promoting that state interest by prosecuting Mr. Wood for distributing his leaflets on a public sidewalk does not satisfy the second prong of the strict scrutiny test. As applied in this case, Michigan's prohibition on jury tampering violates Mr. Wood's First Amendment rights, as the state did not prove that criminally prosecuting him for distributing truthful written material on a public sidewalk was the least restrictive means of preventing jury tampering.

The jury tampering statute states: "A person who willfully attempts 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, is guilty of a misdemeanor." MCL 750.120(a)(1). At the time of Mr. Wood's conduct, no jury had yet been impaneled, as discussed extensively in his brief arguing

[2] The import of this concession may turn, in part, on precisely what is meant by "jury tampering." The ACLU agrees that the state has a compelling interest in ensuring that "the jury's verdict be based on *evidence* received in open court, not from outside sources." *Sheppard v Maxwell*, 384 US 333, 351; 86 S Ct 1507; 16 L Ed 2d 600 (1966) (emphasis added). The ACLU does not agree that the state has a compelling interest in preventing citizens who may become jurors from learning about the abstract concept of jury nullification.

for a narrow construction of the word "juror" in the statute. Appellant Br, pp 9–19. If the defendant's interpretation is correct, he did not violate the statute, so his conviction must be reversed on that basis. And if the state's broader interpretation of the statute is accurate as a matter of state law, the implications of that interpretation demonstrate that the state is not using the least restrictive means available to further its interest in preventing jury tampering, as a less restrictive means would be to apply the statute only when an actual juror is involved.

Similarly, the statute as written appears to contemplate attempting to influence a juror's decision in a particular case, and is silent regarding the means of communication used to exercise such influence. Mr. Wood was distributing factual, objective, and legal material in a traditional public forum about a general concept, jury nullification. He did not mention anything specific regarding the Yoder trial, either party, or the merits of the case, nor did he make personal contact with jurors in a nonpublic forum where expression on matters of public concern receives less First Amendment protection. Therefore, a less restrictive means of furthering the government's interest is to apply the statute only when an individual contacts a juror in a nonpublic forum (for example, by direct telephone or email communication, at their home, or inside the courthouse) or to discuss the specifics of a particular case.

As for the state not wanting jurors to be improperly influenced by leafleters such as Mr. Wood standing outside the courthouse, it could easily use less restrictive methods than content-based criminal prosecution for engaging in speech in a traditional public forum. For example, a less restrictive alternative is to create a content-neutral "time, place or manner" regulation limiting the ability to directly approach jurors near the perimeter or entrance to the courthouse. Similar regulations have been upheld as permissible restrictions on speech in public venues precisely because of their content-neutral application, rather than the content-based restriction employed by

the state here. *Hill v Colorado*, 530 US 703, 719–723; 120 S Ct 2480; 147 L Ed 2d 597 (2000). Had the state promulgated a valid content-neutral time, place, or manner regulation similar to what was upheld in *Hill*, the restriction on Mr. Wood's speech would have been a less restrictive alternative than criminally prosecuting him for handing out leaflets in a traditional public forum where no such regulation applied. See *RAV v City of St Paul*, 505 US 377, 395–396; 112 S Ct 2538; 120 L Ed 2d 305 (1992) (striking down content-based restriction on speech when an "ordinance not limited to the favored topics would have precisely the same beneficial effects").

Other examples of effective alternatives that are obviously less restrictive of First Amendment rights involve taking reasonable measures to partially sequester a jury that is deemed vulnerable to being improperly influenced by constitutionally protected speech. See *Nebraska Press Ass'n v Stuart*, 427 US 539, 563–564; 96 S Ct 2791; 49 L Ed 2d 683 (1976). Jurors and potential jurors could be instructed not to accept pamphlets from individuals on their way to or from the courthouse. They could be asked under oath, during voir dire, whether they were exposed to such materials, and struck from the jury for cause if such exposure took place. They could be instructed to park in a private lot and enter the courthouse through a private entrance. They could be escorted to or from their cars or taxis. All of these measures further the state's interests in preventing jury tampering and are considerably less restrictive than criminalizing speech in a traditional public forum based on its content.

"When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 US at 816. Here, the state failed to prove that the alternatives identified above would be ineffective.

The Court of Appeals majority's focus on the "intent" element of the jury tampering statute does not save Mr. Wood's conviction from invalidation under the First Amendment. Most people who distribute leaflets on public sidewalks "intend" to influence people in some way, but speech does not lose First Amendment protection for that reason alone. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Hustler Magazine, Inc v Falwell*, 485 US 46, 53; 108 S Ct 876; 99 L Ed 2d 41 (1988). As explained in *FEC v Wisconsin Right To Life, Inc*, 551 US 449, 468–469; 127 S Ct 2652; 168 L Ed 2d 329 (2007):

> A test focused on the speaker's intent could lead to the bizarre result that identical [speech] [communicated] at the same time could be protected speech for one speaker, while leading to criminal penalties for another. See M. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001) ("[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection"). "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). An intent test provides none.

Accordingly, in a case such as this one, what would otherwise be protected speech—sidewalk leafleting on a matter of public concern—does not lose its protection merely because the speaker's intent is judged to be nefarious. For these reasons, Mr. Wood's conviction fails strict scrutiny and should be reversed.

III. The jury tampering statute, as interpreted in this case, is unconstitutionally overbroad because it prohibits or risks chilling a broad swath of speech protected by the First Amendment.

In order to justify its prosecution and conviction of Mr. Wood, the state and the Court of Appeals majority proffered an interpretation of the jury tampering statute that runs afoul of the First Amendment, not only for Mr. Wood, but for countless other situations involving constitutionally protected expressive activity. Under the overbreadth doctrine of the First

Amendment, a statute is unconstitutional on its face if it prohibits a substantial amount of protected speech. *United States v Stevens*, 559 US 460, 473; 130 S Ct 1577; 176 L Ed 2d 435 (2010); *People v Rapp*, 492 Mich 67, 73; 821 NW2d 452 (2012). Similarly, a statute is unconstitutionally overbroad under the void-for-vagueness doctrine when "it is unclear whether it regulates a substantial amount of protected speech." *United States v Williams*, 553 US 285, 304; 128 S Ct 1830; 170 L Ed 2d 650 (2008). Even if a defendant's conduct in a particular case could have been restricted under a more narrowly tailored statute, a conviction must be reversed when obtained pursuant to a law that is unconstitutionally overbroad. *City of Los Angeles v Taxpayers for Vincent*, 466 US 789, 798; 104 S Ct 2118; 80 L Ed 2d 772 (1984).

The interpretation of the jury tampering statute proffered by the state and approved in the Court of Appeals majority opinion risks criminalizing a substantial amount of expression protected by the First Amendment. Consider whether citizens committed to legalizing possession of controlled substances, or reducing sentencing disparities in criminal convictions for defendants of different racial backgrounds, would risk being charged with jury tampering if they pass out materials regarding these issues on a public sidewalk outside a courthouse when future jurors may be present. Would a group advocating for tort reform risk criminal prosecution by protesting outside a courthouse on days when products liability cases were being tried? What about a women's rights organization that wants to hold a rally across the street when sex discrimination cases or domestic violence prosecutions are on the docket? As these examples demonstrate, it is difficult to determine what limiting principle, if any, exists under the position advanced by the state and approved in the Court of Appeals majority opinion.

When the government creates regulations implicating speech, it must make clear what speech is protected and what is not, in order to avoid having a chilling effect on speech that the

Constitution protects. *Reno v ACLU*, 521 US 844, 871–872; 117 S Ct 2329; 138 L Ed 2d 874 (1997). Interpreting the jury tampering statute as broadly as advocated by the state, and as approved in the Court of Appeals majority opinion, risks a chilling effect on protected speech in a traditional public forum that is intolerable under the First Amendment, even if Mr. Wood's own conduct could have been restricted under a more narrowly tailored statute.

Again, the state and the Court of Appeals majority's attempt to save the statute by emphasizing its "intent" element should not persuade this Court that the law as interpreted survives strict scrutiny. Under the approach taken by the Court of Appeals majority, if a local newspaper published an editorial calling for acquittal in an unjust prosecution, the editor of the paper could be criminally prosecuted for jury tampering so long as it could be shown that the editor was hoping that some future jurors (along with the general public) would read the editorial. Protesters holding a rally in a public square weeks before a highly publicized trial was scheduled to begin could be criminally prosecuted for jury tampering so long as it could be shown that they were hoping future jurors (along with the general public) would see or hear about the protest. Given that the state can take measures to avoid seating jurors who have been influenced by such events, a law that makes such otherwise innocuous acts a crime merely because they are accompanied by the requisite intent is unconstitutionally overbroad.

In fact, the jury instructions provided in this case prove that an "intent" element does not save the statute from overbreadth. The jury was instructed that there are three elements to the offense:

> First, that Jennifer Johnson and/or Theresa DeVries was a juror/were jurors in the case of *People v. Yoder*.
>
> Second, that the defendant willfully attempted to influence that juror by the use of argument or persuasion.

> Third, that the defendant's conduct took place outside of the proceedings in open court in the trial of the case. [Appendix 166a.]

Based on these instructions, the jury was evidently permitted to convict if Mr. Wood attempted to influence a juror about *any matter*, regardless of its relevance to jury service or the case for which the juror was summoned to serve. Such a broad interpretation of the statute is far from narrowly tailored to serve a compelling interest in preventing jury tampering, as individuals who are known to be jurors can be influenced by the use of argument or persuasion on many matters unrelated to jury service without posing "a serious and imminent threat to the administration of justice." *Craig v Harney*, 331 US 367, 373; 67 S Ct 1249; 91 L Ed 2d 1546 (1947). The statute as interpreted here thus prohibits a substantial amount of protected speech.

The overbreadth of the jury tampering statute, as interpreted by the state and approved by the courts below, is therefore sufficient to reverse Mr. Wood's conviction on First Amendment grounds. Distributing information in a public space is a time-honored tradition, and the courts have consistently upheld individuals' rights to express themselves on matters of public concern in public fora. *Hague v Comm for Indus Org*, 307 US 496; 515; 59 S Ct 954; 83 L Ed 2d 1423 (1939). If the jury tampering statute is given or allowed the interpretation urged by the state and approved by the Court of Appeals majority in this case, it is unconstitutionally overbroad and therefore invalid on its face.

CONCLUSION

For the reasons set forth above, Mr. Wood's speech was protected by the First Amendment, and the jury tampering statute as interpreted and applied in this case is unconstitutional. Accordingly, his conviction should be reversed.

Respectfully submitted,

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