

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

COA Case No. 342424

vs.

Circuit Ct. No. 17-24073-AR

KEITH ERIC WOOD,

District Ct. No. 15-45978-FY

Defendant/Appellant.

**AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN**

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Michigan (“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 extremely unpopular, offensive or disturbing, the ACLU strenuously 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).

In this case, the prosecution of defendant Keith Wood raises serious First Amendment concerns because he was convicted for pure speech. Moreover, Mr. Wood’s speech was regarding a matter of current public debate, making his conviction even more overreaching and unwarranted. 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 is a topic of intense debate within the United States. Questions regarding the criminalization of particular behavior, police and prosecution practices in specific populations, and sentencing disparities are frequently discussed in venues ranging from national media to local communities.

One of the elements 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 public debate regarding how criminal justice is applied in this country, jury nullification is an important area 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 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.

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 (2002).

Mr. Wood's conviction is the result of distributing lawful 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 government has a compelling interest in preventing jury tampering, prohibiting the distribution of pamphlets on a public sidewalk is not the least restrictive means of furthering that interest. Additionally, the statute used to convict Mr. Wood, if interpreted as proscribing his conduct, cannot survive constitutional scrutiny because it would criminalize a vast amount of constitutionally protected speech. Accordingly, Mr. Wood's conviction should be reversed.

I. THE EXPRESSION OF IDEAS ON ISSUES OF PUBLIC CONCERN IN A TRADITIONAL PUBLIC FORUM IS ENTITLED TO THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION.

The First Amendment’s strong protections for nearly all speech means that Mr. Wood’s conviction here raises grave constitutional concerns. As the United States Supreme Court famously stated in *Texas v Johnson*, 491 US 397, 414 (1989), “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.” 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 (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 (1985). Further, “handing 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 (1995). Mr. Wood’s distribution of jury nullification pamphlets, therefore, receives the highest protection under the First Amendment.

Moreover, the venue where Mr. Wood distributed the pamphlets is a classic venue for First Amendment expression. 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 (1983). Content-based restrictions on speech in a traditional public forum triggers strict scrutiny under the First Amendment. *McCullen v Coakley*, 134 S Ct 2518, 2529 (2014).

Because the state sought to criminalize Mr. Wood’s expression based on the content of the materials he was distributing, its restriction here was content-based. “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). 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.

The troubling implications of content-based government restrictions have led to the Supreme Court requiring a strict scrutiny analysis in this area. *McCullen*, 134 S Ct at 2530. In this context, the government’s prosecution of Mr. Wood cannot satisfy this rigorous constitutional test.

II. THE GOVERNMENT’S CONDUCT IN ARRESTING, PROSECUTING, AND CONVICTING MR. WOOD CANNOT SURVIVE STRICT SCRUTINY.

Strict scrutiny analysis of content-based restrictions requires a determination of whether 1) the government had a compelling interest in regulating speech and 2) that it used the least restrictive means to achieve that interest. *Id.*; *United States v Playboy Ent Group*, 529 US 803, 813 (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 (1997).

Additionally, “When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *Playboy Ent 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. The State does not come close to satisfying that burden because the State’s brief on appeal does not even identify a compelling interest, let alone prove there is no less restrictive alternative.

Mr. Wood’s brief nonetheless concedes that preventing jury tampering is a compelling government interest. However, even if that is true, promoting that government interest by prohibiting the distribution of 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 prosecuting him for distributing truthful written material on a public sidewalk was not the least restrictive means of preventing jury tampering.

The state argues that “context matters” for the First Amendment analysis, strangely proposing that Mr. Wood’s conduct is analogous to threatening harm to a legislator’s family or robbing a bank. Appellee Br. at 29–30. However, that is not the appropriate legal standard as articulated by *McCullen*, *Reed*, and other recent U.S. Supreme Court cases applying strict scrutiny to content-based restrictions on expressive activity in a traditional public forum. Here, rather than the vague “context” rationale, the relevant inquiry is whether the means chosen by the government was the least restrictive means. It was not.

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 appellant discusses extensively in his brief arguing for a narrow reading of the word “juror” in the statute. Appellant Br. at 7-16. If the defendant’s interpretation is correct, he did not violate the statute, so his conviction must be reversed on that basis. However, even if the state’s broader interpretation of the statute is the correct one, 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 regarding the specific 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) to discuss the specifics of a particular case.

Further, if a court is concerned about jurors being improperly influenced by leafleters standing outside the courthouse, it could 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/manner regulation limiting the ability to directly approach jurors near the perimeter or entrance to the courthouse. Similar regulations have been upheld as lawful 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, 719–23 (2000); *McCullen*, 134 S Ct at 2529. Had the court promulgated a content-neutral time/place/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 time/place/manner regulation applied.¹

Other examples of alternatives that are less restrictive of First Amendment rights involve taking reasonable measures to partially sequester a jury that is deemed vulnerable to being improperly influenced by protected speech. Jurors and potential jurors could be instructed not to accept pamphlets from individuals standing near the courthouse. They could be asked, 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 less restrictive than criminalizing speech in a traditional public forum based on its content.

For these reasons, the state's prosecution of Mr. Wood fails strict scrutiny and his conviction should be reversed.

III. THE JURY TAMPERING STATUTE, AS INTERPRETED BY THE STATE, IS UNCONSTITUTIONAL BECAUSE IT WOULD PROHIBIT A BROAD SWATH OF FIRST AMENDMENT PROTECTED EXPRESSION.

In order to justify its prosecution and conviction of Mr. Wood, the state proffers an interpretation of the jury tampering statute that causes grave First Amendment concerns, 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

¹ Such regulations must also be narrowly tailored to appropriately limit speech. Narrow tailoring requires that "alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S Ct at 2540. However, because the government never promulgated any such regulation setting out a standard governing conduct such as distributing information in order to prevent jury tampering, it cannot satisfy this prong.

its face if it prohibits a substantial amount of protected speech. *United States v Stevens*, 559 US 460, 473 (2010); *People v Rapp*, 492 Mich 67, 73 (2012). 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 (1984). 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 (2008).

The state’s interpretation of the jury tampering statute criminalizes a great variety of First Amendment protected expression. Under the state’s view, Mr. Wood’s interest in the case and distribution of material that could have been received by future jurors was sufficient to charge and convict him with jury tampering. It is not difficult to imagine a great deal of other speech that would fall within this interpretation.

Consider whether a citizen committed to decriminalizing possession of controlled substances, passing out material regarding the issue outside a courthouse, would be charged with jury tampering if a prospective juror received the material. Would a group advocating for tort reform be prevented from protesting outside the court on days when products liability cases were being tried? Can the court prevent a women’s rights organization from holding a rally when sex discrimination cases are on the docket? As these examples demonstrate, it is difficult to determine what limiting principle, if any, exists under the state’s position. When the government creates regulations implicating speech, it is particularly important that it specifies what speech is protected and what is not, in order to avoid chilling effects. *Reno v ACLU*, 521 US 844, 871–72 (1997).

It is possible that the state believes that distributing information regarding civil or criminal procedure, rather than on substantive charges, is the heart of Mr. Wood's alleged unlawful conduct. Yet, there are many procedural topics, like jury nullification, that rise to the level of public concern, such as sentencing disparities in criminal convictions for defendants of different racial backgrounds. Under the government's view, the state can charge an individual, stationed on a sidewalk outside a courthouse, who distributes objective information on these areas of public debate to individuals who *may* be jurors in current trials.

Many facts or opinions may be considered to be material to a trial, either from a substantive or procedural perspective, and the state has offered no basis or limiting principle (such as a content-neutral, narrowly tailored time/place/manner restriction) to help citizens determine what speech is permissible and what isn't. The vagueness and overbreadth of the state's position regarding the scope of the jury tampering statute is sufficient to invalidate it on First Amendment grounds. Distributing information in a public space is a time-honored tradition in this country, and the courts have consistently upheld individuals' rights to express themselves on matters of public concern in public fora, despite the state's cramped and vague understanding of those rights. If the jury tampering statute is given the interpretation urged by the state 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 by the state is unconstitutional. Accordingly, his conviction should be reversed.

Respectfully submitted,

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