COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Colorado Court of Appeals Case No. 2016CA0211 District Court, City and County of Denver Case No. 2015CR4212	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ERIC PATRICK BRANDT, Respondent.	**▲ COURT USE ONLY ▲**
Counsel for Amicus Curiae: Joseph Greenlee, #48023 Millennial Policy Center 3443 S. Galena Street, Suite 120 Denver, CO 80231 Phone: (970) 485-3303 Email: josephgreenlee@gmail.com Clark M. Neily III Jay R. Schweikert Autumn E. Billings Cato Institute 1000 Mass. Ave., N.W. Washington, DC 20001 Phone: (202) 216-1461	Supreme Court Case No. 2018SC35
BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT AND AFFIRMANCE	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

- The brief contains 4,690 words. It therefore complies with the word limits set forth in C.A.R. 29(d).
- The brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that the document may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.AR. 29, and C.A.R. 32.

/s/ *Joseph G.S. Greenlee*
Joseph Greenlee, #48023
Counsel for the Cato Institute

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

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. 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 government's attempt to prosecute Eric Brandt and Mark Iannicelli strikes at the core of the First Amendment. The two men were 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-American law (the rights, duties, and independence of citizen jurors). One can well imagine why an English monarch would 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 prosecutors claiming such authority under the Constitution.

"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 Brandt and Iannicelli been handing out brochures for their church or advertisements for a car, they could not have been guilty of violating the statute under which they were charged, C.R.S. § 18-8-609(1); the violation necessarily turned on the content of the pamphlets they were distributing. The statute—whether or not it is limited to actual jurors chosen to serve on a particular case—is therefore

a content-based speech regulation, and its application to defendants like Brandt and Iannicelli must receive strict scrutiny. *Reed*, 135 S. Ct. at 2227.

The state's brief sidesteps these First Amendment concerns by arguing that § 18-8-609(1) "does not regulate the content of speech so much as the time, place, and manner of that speech." Br. at 22. 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 "directly or indirectly . . . communicate with a juror" with respect to a specific subject matter (juror decision-making), and that the charges against Brandt and Iannicelli necessarily depended on the fact that the pamphlets they were 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 it may prohibit acts that constitute the traditional crime of jury tampering. But the state's interpretation of § 18-8-609(1) sweeps far beyond this legitimate purpose and implicates massive volumes of speech entitled to the highest degree of First Amendment protection. Overbreadth aside, the statute cannot constitutionally be applied to the speech of the defendants, as Colorado has no legitimate interest—compelling or otherwise—in preventing Brandt and Iannicelli 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. UNDER ANY REASONABLE INTERPRETATION, C.R.S. § 18-8-609(1) IS A CONTENT-BASED RESTRICTION ON SPEECH SUBJECT TO STRICT SCRUTINY.

The government, unlike the defendants and the Court of Appeals, interprets Colorado's jury-tampering statute to cover any attempt to influence any actual or potential juror, regardless of whether that attempt to influence was specific to a particular case. *See* Br. at 6-10. *Amicus* does not take a position on this question of statutory interpretation. But regardless of whether the state's interpretation is correct, the statute—both on its face and as applied to the defendants here—effects a content-based regulation of speech, and therefore must be subjected to strict scrutiny.

The United States Constitution and Colorado state constitution protect the free speech rights of individuals and prevent the state from enacting laws that abridge or restrain that speech. U.S. Const., amend. I; Colo. Const., art. II, § 10. 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* 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 U.S. 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 U.S. 781, 791 (1989)).

Under these principles, it is clear that C.R.S. § 18-8-609(1) is a content-based regulation of speech. The statute provides in relevant part: "A person commits jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the trial of the case." Colo. Rev. Stat. §18-8-609(1) (2018). Thus, on its face, the statute regulates speech ("direct[] or indirect[] . . . communicat[ion]") by reference to particular subject matter ("a juror's vote, opinion, decision, or other action in a case"), as well as by function or purpose (attempts "to influence" this decision).

The state attempts to elide the content-based nature of § 18-8-609(1), never once mentioning strict scrutiny in its brief, much less attempting to show that the statute would pass this exacting standard. In fact, the only time the state mentions "content" at all is when it asserts that the statute "does not regulate the content of speech so much as the time, place, and manner of that speech." Br. at 22. But of course, many content-based regulations of speech *also* regulate the time, place, and manner of that speech, and are still subject to strict scrutiny. For a speech regulation to be upheld as a time, place, or manner restriction, it must be, among other conditions, "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). To assert that § 18-8-609(1) is content neutral *because* it regulates time, place, and manner gets the analysis backwards.

For example, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court invalidated various campaign finance provisions that made it a crime for corporations "to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election." *Id.* at 337. The state's argument in this case is functionally identical to the argument made by the *dissent* in *Citizens United*, which argued that "[i]n many ways, . . . § 203 functions as a source restriction or a time, place, and manner restriction." *Id.* at 419 (Stevens, J., dissenting). Yet the majority

clearly held that the regulations at issue could not be saved simply because they regulated speech with respect to time, place, and manner *in addition to* content. *See id.* at 339 ("If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.").

Similarly, the Supreme Court clarified the confusion that may surround a content-based regulation that imitates a time, place, and manner regulation in *Burson v. Freeman*, 504 U.S. 191 (1992). *Burson* concerned a statute that prohibited campaign signs within one hundred feet of a polling place while voting was occurring. *Id.* at 193-94. Though this regulation obviously involved time and place restrictions, the Court held that it was "not a facially content-neutral time, place, or manner restriction" because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on *whether their speech is related to a political campaign*." *Id.* at 197 (emphasis added). Just so here—though § 18-8-609(1) does include time and manner restrictions, whether it restricts communication with actual or potential jurors depends entirely on whether the speech is related to juror decision-making.

To further illustrate the point, consider a hypothetical statute, nominally designed to prevent "legislative tampering," which said that "a person commits legislative tampering if, with intent to influence a legislator's vote, opinion, decision,

or other action in a matter before the state legislature, he attempts directly or indirectly to communicate with a member of the state legislature, other than as sworn testimony in hearings before the legislative body, or a subdivision thereof." Such a statute would obviously be subject to strict scrutiny, and it 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, and 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.

Furthermore, § 18-8-609(1) is also content-based as applied to Brandt and Iannicelli. 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 U.S. 364, 383 (1984)); *see also Cincinnati v. Discovery Network, Inc*, 507 U.S. 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 is this case is 'content based.'").

The application of § 18-8-609(1) to Brandt and Iannicelli is content-based because it required "enforcement authorities" to examine the content of the pamphlets to determine whether they did, in fact, constitute an attempt to directly or indirectly influence a juror's vote, opinion, decision, or other action in a case. If Brandt or Iannicelli had been distributing pamphlets about any other topic—for example, information regarding the local church, recommending that citizens vote in the next election, disseminating information about the opening of a new public library, or making neighbors aware of an upcoming fundraiser—their speech would not be deemed criminal would not be subject to § 18-8-609(1)'s regulations. The alleged violation necessarily turned on the content of the pamphlets they distributed.

II. THE STATE'S READING OF C.R.S. § 18-8-609(1) CRIMINALIZES A BROAD RANGE OF PROTECTED SPEECH.

"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 tailored drawn to achieve that end." *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Colorado, like all states, undoubtedly has a compelling interest in protecting the integrity of jury trials, and thus may freely prohibit the traditional crime of jury tampering—that is, acting to influence a jury's verdict in a specific case by threats, violence, bribery, or other criminal pressure—

without running afoul of constitutional limitations. Colorado has several statutory provisions guarding against exactly this sort of offense, which are not at issue in this case, nor implicated by defendants' arguments on appeal. *See, e.g.*, C.R.S. § 18-8-606 (criminalizing offering bribes to jurors); C.R.S. § 18-8-607 (criminalizing solicitation of or receipt of bribes by jurors); C.R.S. § 18-8-608 (criminalizing intimidation of jurors); C.R.S. § 18-8-609(2) (criminalizing fraudulent processing or selection of jurors).

But § 18-8-609(1), as interpreted by the state, is massively overbroad and sweeps far beyond the boundaries of this traditional offense. The statute covers *any* communication, direct or indirect, about *any* aspect of a juror'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 the defendants here). It is not limited to speech made in the presence of or directed to individual jurors. And according to the state, it is not even limited to attempts to influence actual, sworn jurors with respect to particular cases. *See* Br. at 6-10.

To illustrate just how far-reaching this provision is—and how much protected speech it criminalizes—consider that all of the following communications would

constitute violations of the statute, so long as the speakers *intend* that actual or potential jurors might hear and be influenced by 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.

The state argues that the statute "has little effect on public speech," Br. at 22, mostly because of its assertion that "the tampering statute implicitly requires proof that the actor knowingly attempted to communicate with a juror." For example, the state approvingly quotes *Turney v. State*, 936 P.2d 533, 541 (Ala. 1997), for the

proposition that "hypothetical TV ads about jury nullification would not be covered, in part because the facts would not show that the 'defendant *knew* that he was communicating with a juror.'" Br. at 22-23. But this position appears to conflate the *intent* element that is explicitly stated in § 18-8-609(1)—that is, intent to influence a juror's decision—with a hypothetical requirement, not given in the statute, that the defendant *know* a juror is actually listening to or receiving the communication.

By explicitly covering attempts to communicate with jurors "indirectly," § 18-8-609(1) necessarily criminalizes speech in which speakers may not know with certainty who is listening, or whether they have been heard. Indeed, most forms of "public speech"—on which the statute has "little effect," according to the state, Br. at 22—could readily be characterized as "indirect" communication. For example, TV or radio ads, public lectures, published books or op-eds, yard signs, and bumper stickers are all forms of speech through which one may attempt to indirectly communicate with others—including for the purpose of influencing actual or potential jurors—yet in none of these cases would the speaker necessarily *know* whether jurors were recipients of such speech.

Even if the state's interpretation were adopted, the proposed limitation that the statute only applies when a speaker *knows* a juror is listening hardly addresses the overbreadth concerns surrounding this statute. Such a limitation would merely limit criminalization to speakers who are better informed about their audience. On

the state's view, presumably, a member of the Cato Institute could give a public speech about this very case, discuss the history of jury independence, and urge jurors to start issuing acquittals in the face of manifestly unjust prosecutions—but if that speaker began by asking "show of hands, has anyone here currently been selected for jury duty?" and any hands went up, then that same lecture would subject the speaker to criminal liability.

Application of this statute therefore risks making criminals out of a wide range of speakers engaging in presumptively protected speech, whether or not the state's strained interpretation is adopted. Content-based regulations like § 18-8-609(1) are impermissible if they are overbroad and unnecessarily burden more speech than required to accomplish the government's purpose. *Ward*, 491 U.S. 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.

III. COLORADO HAS NO LEGITIMATE INTEREST IN RESTRICTING SPEECH ABOUT THE HISTORICAL ROLE OF JURIES, JURY RIGHTS, AND JURY INDEPENDENCE.

Even aside from its facial overbreadth, C.R.S. §18-8-609(1) fails any level of heightened scrutiny as applied to the defendants' speech in this case. Colorado 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 U.S. 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 U.S. 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 the Magna Carta, and probably even the Norman Conquest. *See* Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* 13 (2d ed. 2014); *see also* Lysander Spooner, *An Essay on the Trial by Jury* 51-85 (1852) (discussing the practice of jury nullification both before and after Magna Carta). In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

One of the most famous illustrations of this principle in pre-colonial England was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Edward Bushell was a member

of a jury who refused to convict William Penn for violating the Conventicle Act, which prohibited religious assemblies of more than five people outside the auspices of the Church of England. *See* Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800*, at 236-49 (1985). In light of Penn's factual guilt, the trial judge essentially ordered the jury to return a guilty verdict, and thereafter imprisoned the jury for contempt when they nevertheless found Penn not guilty. *Id.* But the Court of Common Pleas reversed, firmly establishing the principle that independent juries had the authority to acquit against the wishes of the Crown. *Id.*

This understanding of the jury trial was likewise firmly established in the American colonies. In the run up to the American Revolution, "[e]arly American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the colonies." Conrad, *supra*, at 4. One of the most notable of such cases involved a publisher named John Peter Zenger, who printed newspapers critical of the royal governor of New York and was charged with seditious libel. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871-72 (1994). Zenger's jury refused to convict notwithstanding his factual culpability, thus making Zenger an early symbol for freedom of the press and jury independence. *Id. at* 873-74 ("Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but

nullified the law of seditious libel in the colonies."). 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." Conrad, *supra*, at 4.

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 U.S. 343, 349-350 (1898) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1779). Alexander Hamilton observed that "friends and adversaries of the plan of the [constitutional] 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 U.S. 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 to his 'transporting us beyond Seas to be tried for pretended offenses.'" *Duncan*, 391 U.S. 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," U.S. 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," U.S. Const. amend. VI; and that no person be "twice put in jeopardy of life or limb," U.S. Const. amend. V. Together, these guarantees reflect "a profound judgment about the way in which law should be enforced and justice administered," *Duncan*, 391 U.S. 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 in which the "the discretionary act of jury nullification would not be permitted . . . would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. 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 U.S. 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 U.S. 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* 88 (1998) (quoting Alexis De Tocqueville, *Democracy in America* 293–94 (Phillips Bradley ed. 1945)).

By applying a content-based speech restriction to Mr. Brandt and Mr. Iannicelli, the state's position must necessarily be that it has a compelling interest in precluding them from educating potential jurors about the history and propriety of jury independence. But as the above illustrates, the position for which defendants were advocating is as firmly established in the Anglo-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.

The state's attempt to prosecute Brandt and Iannicelli is all the more troubling because, despite its intended centrality as the bedrock of our criminal justice system, the use of jury trials is quickly evaporating. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 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 v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. 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, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

In short, criminal juries have been dramatically marginalized. 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 plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders.

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 respondent, the decision below should be affirmed.

Dated this 3rd day of December 2018.

Respectfully submitted,

/s/ *Joseph G.S. Greenlee*
Joseph Greenlee, #48023
Millennial Policy Center

Clark M. Neily III
Jay R. Schweikert
Autumn E. Billings
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, a true and correct copy of the foregoing was served on the following:

Colorado Supreme Court
(via ICCES)

Robert M. Russel, Esq.
Beth McCann, Esq.
Counsel for Petitioner
(via ICCES)

David A. Lane, Esq.
Andy McNulty, Esq.
Counsel for Respondent
(via ICCES)

/s/*Joseph G.S. Greenlee*
Joseph Greenlee, #48023