COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80202 Certiorari to the Colorado Court of Appeals Case No. 16CA0211 District Court, City and County of Denver, Case No. 2015CR4212	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ERIC PATRICK BRANDT, Respondent.	
Applicant Attorney: Naomi Gilens, California Bar No. 315813 American Civil Liberties Union Foundation 125 Broad Street, 18th Floor New York, NY 10004 (212) 549-2500 Sponsoring Attorney: Sara R. Neel, Attorney No. 36904 American Civil Liberties Union Foundation of Colorado 303 E. 17th Avenue, Suite 350 Denver, CO 80203 (303) 777-5482	Supreme Court Case No. 2018SC35
BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT/RESPONDENT	

CERTIFICATE OF COMPLIANCE

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/s/ Naomi Gilens
Naomi Gilens

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. For nearly a century, the ACLU has been at the forefront of efforts nationwide to protect the full array of civil rights and civil liberties. The American Civil Liberties Union of Colorado (ACLU-CO) is a state affiliate of the national ACLU. The ACLU and ACLU-CO have appeared before this Court and others in free speech cases, both as direct counsel and as amicus curiae. *See, e.g.*, *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Co. 2002); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Co. 1991).

STATEMENT OF THE FACTS AND CASE

This case is about the right to engage freely in political discussion and debate about the role of the jury in our criminal justice system without fear of criminal punishment. The criminal justice system has long been a subject of considerable public debate in the United States. One aspect of this debate has involved the legitimacy 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. *Jury Nullification*, Black's Law Dictionary (10th ed. 2014). 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 conclusion that the law was violated. *Id.*

Defendants Mark Iannicelli and Eric Patrick Brandt face criminal charges for distributing pamphlets advocating for jury nullification outside the Lindsey-Flanigan Courthouse in Denver. The pamphlets included statements like:

- "Juror nullification is your right to refuse to enforce bad laws and bad prosecutions."
- "Judges say the law is for them to decide. That's not true. When you are a juror, you have the right to decide both law and fact."
- "Once you know your rights and powers, you can veto bad laws and hang the jury."
- "When you're questioned during jury selection, just say you don't keep track of political issues. Show an impartial attitude. Don't let the judge and prosecutor stack the jury by removing the thinking, honest people."
- "Instructions and oaths are designed to bully jurors and protect political power. Although it all sounds very official, instructions and oaths are not legally binding."
- "So, when it's your turn to serve, be aware: 1. You may, and should, vote your conscience; 2. You cannot be forced to obey a 'juror's oath'; 3. You have the right to 'hang' the jury with your vote if you cannot agree with other jurors."
- If asked about jury nullification, "the best answer to give is: 'I have heard about jury nullification, but I'm not a lawyer so I don't think I fully understand it.'"

2017 COA 150 ¶ 4.

The State charged Defendants with seven counts of jury tampering. *Id.* ¶ 5. "Each count alleged that on a particular date the defendant communicated with a named 'JURY POOL MEMBER' intending to influence that person's vote, opinion, decision, or other action in 'a case' in violation of section 18-8-609." *Id.* Colorado's jury tampering statute, C.R.S. § 18-8-609(1), provides that "[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 proceedings in the trial of the case." C.R.S. § 18-8-609(1).

The district court dismissed the charges, holding that the jury tampering statute is unconstitutional as applied to Defendants' advocacy for jury nullification. 2017 COA 150 ¶ 7. The Court of Appeals affirmed, but on different grounds. The court held that "the prohibition of

the jury tampering statute [is] limited to attempts to influence a person's vote, opinion, decision, or other action in a specifically identifiable case." *Id.* ¶ 8. Citing the doctrine of constitutional avoidance, the court observed that that a broad construction of the jury tampering statute to encompass "communications with summoned citizens about matters unrelated to a particular case" would create "a real danger the statute could encroach on a substantial amount of protected speech." *Id.* ¶ 25. Because the State did not "charge defendants with attempting to so influence a juror in a specifically identifiable case," the Court of Appeals affirmed the district court's dismissal of the charges. *Id.* ¶¶ 8, 31.

SUMMARY OF ARGUMENT

Advocacy for jury nullification, like other speech concerning the criminal justice system, is political speech lying at the heart of the First Amendment. The virtues of jury nullification as a key feature of the Anglo-American legal system and a democratic check on courts and law enforcement have been extolled by the likes of John Adams, Alexander Hamilton, and numerous prominent jurists. Today, debates regarding jury nullification are an important part of an ongoing national conversation about criminal justice reform. Although extrajudicial communications intended to alter the outcome of a *specific* case are not protected under the First Amendment, the State concededly has not alleged that Defendants acted with such specific intent here. Defendants' expression is therefore entitled to First Amendment protection.

In order to criminalize protected expression regarding the criminal justice system, the State must show that the expression poses an imminent threat to the administration of justice. The State cannot make that showing here. Even assuming that jury nullification poses a threat to the administration of justice, the State has numerous less restrictive means to address this issue. First, judges routinely instruct jurors to apply the law as described by the court, and courts presume that jurors are capable of following these instructions. Second, the government may

impose reasonable restrictions on expression inside the courtroom and on government property to limit jurors' exposure to unwanted expression. Finally, in cases where a jury is likely to be especially susceptible to outside influence, the court may order the partial or total sequestration of the jury. All of these measures are less restrictive than the State's proposed expansion of the criminal jury tampering statute. The State's application of the jury tampering statute to the advocacy at issue in this case therefore violates the First Amendment.

The State's proposed interpretation of the jury tampering statute would also render the law unconstitutionally overbroad and impermissibly vague. The State contends that the law applies only to communications with jurors that indicate an intent to influence the outcome of any extant case, but one could easily imagine any number of protected messages that fall within this nebulous rubric. Without clearly delineated boundaries between permissible advocacy and criminal jury tampering, the State's interpretation of the law would inevitably chill protected expression relating to the criminal justice system.

Finally, the State's application of the statute to Defendants' protected jury nullification advocacy is content discriminatory. The State argues that it is merely imposing a content-neutral time, place, and manner restriction on communications. But it is readily apparent that Defendants are being prosecuted for the subject matter of their leaflets, not the time, place, or manner of their distribution. If Defendants had distributed leaflets advocating another issue, such as tax reform or socialized medicine, they would not have been prosecuted. Indeed, the State's brief meticulously catalogues the permissible and impermissible statements contained in Defendants' publication. The State's application of the jury tampering statute in this case cannot satisfy the exacting judicial scrutiny applied to content-based restrictions on speech.

In short, Defendants' speech was protected by the First Amendment, and the State's interpretation of the jury tampering statute would be unconstitutional on its face and as applied. This Court should therefore affirm the Court of Appeals.

ARGUMENT

I. Speech About Jury Nullification Is Political Speech at the Core of First Amendment Protection.

The First Amendment exists to "protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and ensure that "debate on public issues" remains "uninhibited, robust, and wideopen [*sic*]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). For this reason, political speech is "the most cherished form of free speech." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12 ¶ 25 (en banc) (quoting *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266, 1276 (Colo. App. 2001)).

Speech about the criminal justice system is quintessential political speech. As the U.S. Supreme Court has explained, "the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070 (1991) (plurality op.); *id.* at 1034 (characterizing a defense attorney's criticism of his client's indictment as "classic political speech"). 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 U.S. 555, 575 (1980).

Advocacy for jury nullification falls squarely within the robust protections for speech concerning judicial proceedings. In *Verlo v. City & County of Denver*, for example, the District

Court for the District of Colorado granted a preliminary injunction allowing the Fully Informed Jury Association and other plaintiffs to hand out jury nullification pamphlets in the plaza outside of the Lindsey-Flanigan Courthouse after finding that the pamphlets were "speech protected by the First Amendment." 124 F. Supp. 3d 1083, 1091 (D. Colo. 2015) ("*Verlo I*"), *aff'd sub nom. Verlo v. Martinez*, 820 F.3d 1113 (10th Cir. 2016) ("*Verlo II*"). *See also United States v. Heicklen*, 858 F. Supp. 2d 256, 273 (S.D.N.Y. 2012).

Far from a novel concept, jury nullification "has a long history in the Anglo-American legal system." *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997). As early as 1670, English courts repudiated the court's power to punish jurors for corrupt or incorrect verdicts in criminal cases. *See Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670) (freeing a juror arrested for voting to acquit William Penn against the weight of the evidence). In "the early days of our Republic," "respected sources" including John Adams, Alexander Hamilton, and "prominent judges" believed "that jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court." *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (citing Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939)). Modern American courts have "long recognized" that "several features of our jury trial system act to protect the jury's power to acquit, regardless of the evidence, when the prosecution's case meets with the jury's moral disapproval." *Thomas*, 116 F.3d at 615 (alterations and internal quotation marks omitted).

The enduring role of jury nullification in our nation's criminal justice system has sparked interest not only among lawyers and scholars, but also the general public. For many people, jury service is among the most intimate interactions with the criminal justice system that they ever experience. Discussions of the jury's power of nullification appear in popular articles, podcasts,

lifestyle blogs, and even advice columns *See, e.g.*, *RadioLab: Null and Void*, New York Public Radio, May 12, 2017;[1] German Lopez, *Jury Nullification: How Jurors Can Stop Unfair & Racist Laws in the Courtroom*, Vox, May 2, 2016;[2] Robert Gebelhoff, *How Powerful Should Our Juries Be?*, Wash. Post, Apr. 4, 2016;[3] Amy Bloom, Jack Shafer & Kenji Yoshino, *Can I Hide My Beliefs During Jury Selection?*, N.Y. Times: The Ethicist, Mar. 4, 2015;[4] Krystin Arneson, *Snowden Deserves Clemency, Says New York Times, The Guardian, And Anne-Marie Slaughter*, Bustle, Jan. 2, 2014 (discussing possibility that a jury might acquit Edward Snowden, if he were brought to trial);[5] *Tell Me More: Jury Nullification—Acquitting Based On Principle*, NPR, Nov. 4, 2013.[6]

To be sure, "the First Amendment does not create a right to influence juries outside of official proceedings, because '[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences.'" *Heicklen*, 858 F. Supp. 2d at 274 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966)) (citations omitted) (alteration provided). "Consistent with this interpretation," courts have held "that the narrow category of speech knowingly made to jurors outside of an official proceeding and *'with the intent to influence the outcome of a specific case'* [is] not protected by the First Amendment." *Id.* (quoting *Turney v. Pugh*, 400 F.3d 1196, 1201 (9th Cir. 2005)) (emphasis added). The State has not alleged that

[1] https://www.wnycstudios.org/story/null-and-void.
[2] https://www.vox.com/2016/5/2/11538752/jury-nullification-paul-butler.
[3] https://www.washingtonpost.com/news/in-theory/wp/2016/04/04/how-powerful-should-our-juries-be/.
[4] https://www.nytimes.com/2015/03/08/magazine/can-i-hide-my-beliefs-during-jury-selection.html.
[5] https://www.bustle.com/articles/11686-snowden-deserves-clemency-says-new-york-times-the-guardian-and-anne-marie-slaughter.
[6] https://www.npr.org/templates/story/story.php?storyId=242990498.

Defendants acted with such specific intent in this case. Their jury nullification advocacy therefore constitutes protected speech concerning judicial proceedings. *Id.*

II. The State Cannot Justify Its Proposed Restriction on Jury Nullification Advocacy.

"The Supreme Court has developed robust protections for speech concerning judicial proceedings." *Turney*, 400 F.3d at 1201 (collecting cases). Extrapolating from these precedents, which applied "various versions of the then-evolving 'clear and present danger' test," courts have held that "speech concerning judicial proceedings may be restricted only if it 'is directed to inciting or producing' a threat to the administration of justice that is both 'imminent' and 'likely' to materialize." *Id.* at 1202 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *accord Heicklen*, 858 F. Supp. 2d at 273.

The State maintains that the prosecution at issue here does not raise First Amendment concerns, because handing out jury nullification pamphlets to summoned jurors—or any other speech that could "influenc[e] jurors outside the courtroom"—"constitutes a serious and imminent threat to the administration of justice." Pet. Br. at 21. This just begs the question. The State fails to explain why the distribution of factual, objective, and lawful material about jury nullification to people summoned for jury duty, without any intent to influence a particular case, threatens either the integrity of trials or jury verdicts. Many prominent jurists have concluded that jury nullification is a feature of Anglo-American criminal law, rather than a bug. But even assuming that jury nullification itself constitutes a threat to the integrity of trials or jury verdicts, the State can address this threat without prosecuting individuals for peacefully disseminating truthful information on a matter of public concern.

It is the judge's role to instruct jurors about their powers and duties during *voir dire* and once they are empaneled. The State argues that Defendants' speech would undermine the

integrity of jury verdicts by influencing jurors outside the courtroom. *See id.* at 21. To the contrary, "our judicial system rests, in part, on the belief that jurors every day follow much more difficult instructions, for instance, instructions to disregard eyewitness testimony that they just heard and ignore evidence that they just saw." *Heicklen*, 858 F. Supp. 2d at 275 n.23 (rejecting government's argument that "speech must . . . give way because of the danger that jurors who receive a pamphlet like [defendant's] will disregard a judge's instructions to render a verdict according to the evidence introduced before them and the law as presented by the court"); *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1088 (Colo. 2011) (en banc) ("Absent evidence to the contrary, we presume that a jury follows a trial court's instructions."). "It is just as reasonable to trust that jurors will follow a judge's instruction to accept the law as explained by the judge and disregard the contents of a pamphlet handed to them by a leafletter outside the courthouse." *Heicklen*, 858 F. Supp. 2d at 275 n.23. At any rate, that is the premise of the First Amendment, which presumes that "falsehood and fallacies are exposed more effectively through discussion than through suppression, and that public debate affords adequate protection against the dissemination of 'noxious doctrine.'" *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

The State may also take steps to restrict jurors' exposure to political speech in and around the courthouse. Though the government is generally prohibited from barring political speech on a public street or sidewalk, "a court's restriction of political views within the courtroom will generally be reasonable." *People v. Aleem*, 149 P.3d 765, 778 (Colo. 2007) (en banc). And in numerous cases, courts have "held that the grounds of a courthouse (apart from surrounding public sidewalks) are not a traditional public forum." *Verlo v. Martinez*, 262 F. Supp. 3d 1113, 1148 (D. Colo. 2017) ("*Verlo III*") (collecting cases). In nonpublic forums, the government may

impose reasonable, viewpoint-neutral restrictions on expression—including content-based restrictions on discussion of judicial proceedings. *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1887 (2018) ("[W]e see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place."). Even in traditional public forums, the government may impose content-neutral time, place, and manner restrictions limiting the ability to directly approach jurors near the perimeter or entrance to the courthouse, so long as those restrictions are appropriately tailored. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Hill v. Colorado*, 530 U.S. 703, 719–23 (2000).

Furthermore, courts may partially or fully sequester juries that are particularly vulnerable to being influenced by extrajudicial advocacy. 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 proposed measures would address the State's asserted concerns about jury tampering in a less restrictive manner than criminalizing constitutionally protected leafletting and advocacy regarding jury nullification. Thus, the State's interpretation of the jury tampering statute is unconstitutional as applied to the expression at issue in this case.

III. The State's Interpretation of the Jury Tampering Statute Is Unconstitutionally Overbroad and Impermissibly Vague.

The State's interpretation of the statute also presents serious overbreadth and vagueness problems. "[A] law may be invalidated as overbroad," in violation of the First Amendment, if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash.*

State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)). A statute is unconstitutionally vague when "it is unclear whether it regulates a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 304 (2008). "In sum, vagueness concerns the lack of clarity in the language of a statute, whereas overbreadth concerns the reach of a statute and its encroachment upon constitutionally protected speech or expressive conduct." *People v. Graves*, 2016 CO 15 ¶ 24 (2016) (en banc).

As the Court of Appeals recognized, the State's interpretation of the jury tampering statute to cover jury nullification advocacy like that at issue here is dangerously overbroad. 2017 COA 150 ¶ 30. In addition, the State's proposed interpretation would impermissibly blur the statute's boundaries, potentially criminalizing any communication with a juror that references the criminal justice system. After all, it is extremely difficult to anticipate what speech might "indicate an intent to influence the outcome of any extant case." Pet. Br. at 25. This vagueness exacerbates the statute's overbreadth. *Graves*, 2016 CO 15 ¶ 22 ("[A] statute that sweeps in a substantial amount of protected expressive activity because it is unclear may be both unconstitutionally overbroad and impermissibly vague."). Although the State asserts that "many communications—even ones that are wrong and misleading—will stand outside the statute's reach," Pet. Br. 23, it is not at all clear how the State will separate the wheat from the chaff. The State offers no guidance, and the examples of permissible and impermissible statements included in its brief only create more confusion. *Compare, e.g.*, Pet. Br. at 24 (Impermissible: "The jury has the power to nullify any law. It also means the jury has the power to ignore previous rulings by the Supreme Court and still find the defendant not guilty if they judge the law and previous court rulings to be wrong.") *with id.* at 25 (Permissible: "When you are a juror, you can protect

your right to keep your property, your right to privacy, and your right to self defense — simply by refusing to enforce bad laws that violate these rights.").

It is easy to imagine other examples of protected advocacy that could be criminalized under the State's interpretation of the statute: Would a demonstration in front of a courthouse expressing opposition to the death penalty constitute jury tampering while a capital case is pending? How about a demonstration against the drug war on a day when several drug cases are scheduled for trial? If someone stands outside a courthouse holding a sign that says "Cops Lie," does that evince an intent to influence a juror's action? The State has offered no limiting principle that would help citizens distinguish between criminal jury tampering and permissible advocacy on criminal justice issues.

Attempting to allay overbreadth concerns, the State points out that the statute applies only to communications with jurors. This is true as far as it goes, but it is also beside the point. Overbreadth is determined based on whether a statute "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep . . . .'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). In this case, the State's interpretation of the statute would criminalize a substantial amounted of protected speech addressed to jurors, relative to unprotected speech addressed to jurors. Moreover, in many cases (including this one), it will be difficult to distinguish between speech addressed to "the public" and speech addressed to jurors. Should courthouse demonstrators assume their signs could influence a juror on the way to jury duty? Is someone knowingly communicating with a juror if they publish an internet post advocating jury nullification on a message board dedicated to discussing issues related to jury

duty?[7] Is it jury tampering if an op-ed writer in a major national newspaper expressly "encourage[s] any juror who thinks the police or prosecutors have crossed the line in a particular case to refuse to convict"?[8] The State's interpretation of the statute conceivably applies to all these scenarios, as well as many others.

IV. The State's Application of the Jury Tampering Statute in This Case Is Content Based.

The State's application of the jury tampering statute to criminalize Defendants' jury nullification advocacy is also impermissibly content based. 2017 CR 150 ¶ 26. *See also, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 403 n.3, 411–12 (1989) (holding that the application of a state statute prohibiting desecration of a venerated object was impermissibly content based as applied to protected expression). "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). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* In *Reed*, for example, the Supreme Court held that a sign code was content based where the code "define[d] 'Political Signs' on the basis of whether a sign's message is 'designed to influence the outcome of an election.'" *Id.* A facially content-neutral law may also be deemed content based, if it "cannot be 'justified without reference to the content of the regulated speech,'" or was "adopted by the government 'because

[7] Reddit, Jury Duty, Search: "Jury Nullification" https://www.reddit.com/r/juryduty/search?q=jury%20nullification&restrict_sr=1 (last visited Jan. 18, 2019).
[8] Paul Butler, *Jurors need to take the law into their own hands*, Wash. Post, Apr. 5, 2016, https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands/?noredirect=on&utm_term=.a4c3135439af.

of disagreement with the message' [the speech] convey[s]." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The State's application of the statute to the protected speech at issue here is content based, because it requires the factfinder to evaluate the content of the speaker's message to determine whether it was meant to "influence a juror's vote, opinion, decision, or other action." C.R.S. 18-8-609(1). The State's prosecution and briefing in this case make the issue plain. Had Defendants' leaflets advocated the election of a candidate for public office or adherence to a religious faith, they would not have been arrested or charged with jury tampering (or any other crime). Indeed, the State's brief carefully parses Defendants' leaflets to sort out permissible messages from impermissible ones. Pet. Br. at 23–25. It is hard to imagine a clearer demonstration of content discrimination.

The State's countervailing arguments fall flat. First, the State contends that its interpretation of the statute "does not regulate the content of speech so much as the time, place, and manner of that speech." Pet. Br. at 22. But Defendants were not arrested or charged with jury tampering because they advocated jury nullification at the wrong time of day, in the wrong place, or in a manner that was too loud, aggressive, or disruptive. Rather, they were merely handing out political leaflets, an activity that is "the essence of First Amendment expression," *McCullen*, 134 S. Ct. at 2536 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)). Defendants are being prosecuted because of the subject matter of their leaflets. Put otherwise, had the Defendants distributed leaflets with a different message at precisely the same time and place, and in precisely the same manner, they would not have been prosecuted.

Alternatively, the State suggests that the statute is not content based because it applies only to "speech directed at jurors." Pet. Br. at 23. The State asserts that, "[c]onsistent with the

statute, an actor can say anything about any legal action, as long as he or she is (1) litigating in court, or (2) addressing a non-juror, or (3) addressing a juror who has completed his or her service." *Id.* at 22. But a statute is still content based even if it is limited to speech at a particular location or directed to a particular audience. In *Boos v. Barry*, for instance, the U.S. Supreme Court held that an ordinance prohibiting the display of any sign that tended to bring a foreign government into "public odium" or "public disrepute" was content based, even though it applied only within 500 feet of that government's embassy. 485 U.S. 312, 315 (1988). The fact that protestors could display such signs elsewhere did not render the law content neutral.

Because content-based restrictions on expression raise the specter that the government is using its coercive power to tilt the direction of public discourse and debate in the direction of its choosing, such regulations must satisfy strict constitutional scrutiny. *McCullen*, 134 S. Ct. at 2530. A content-based restriction satisfies strict scrutiny only if 1) the government had a compelling interest in regulating the restricted speech, and 2) the restriction is the least restrictive means to achieve that interest. *Id.*; *see also United States v. Playboy Entm't Grp.*, 529 U.S. 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 U.S. 507, 534 (1997). Additionally, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entm't Grp.*, 529 U.S. at 816. Thus, it is the State's burden to come forward with a compelling interest and to prove that criminalizing Defendants' conduct is the least restrictive means of advancing that interest. As discussed above, the State cannot meet that burden here, because there are significantly less restrictive means for protecting the administration of justice.

CONCLUSION

For the reasons set forth above, Defendants' speech was protected by the First Amendment, and the State's interpretation and application of the jury tampering statute would unconstitutional. Accordingly, this Court should affirm.

Respectfully submitted,

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I hereby certify that on this 22nd day of January, 2019, a true and complete copy of the foregoing **Brief of *Amici Curiae*** was filed via ICCES, and electronically served on the following:

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