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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 164191

vs.

NICOLAS LYON,

Court of Appeals
No. 360548

Defendant-Appellant.

7th Judicial Circuit
No. 21-47378-FH

BRIEF OF AMICUS CURIAE AMERICAN CONSERVATIVE UNION FOUNDATION IN SUPPORT OF DEFENDANT-APPELLANT

ASHLII M. DYER*
American Conservative Union Foundation
1199 N. Fairfax St., Ste. 500
Alexandria, VA 22314
(202) 347-9388
adyer@conservative.org

Attorney for *Amicus* American Conservative Union Foundation

ERIC E. DOSTER (P41782)
Doster Law Offices, PLLC

2145 Commons Parkway
Okemos, Michigan 48864
(517) 977-0147
eric@ericdoster.com

Attorney for *Amicus* American Conservative Union Foundation

*Temporary admission

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STATEMENT OF QUESTIONS

1. Whether Michigan's use of the one-person grand jury statute is unnecessary since the reasons for its creation are no longer relevant?

   Amicus American Conservative Union Foundation answers: "yes"

2. Whether Michigan's use of the one-person grand jury statute raises concerns about the potential for a negative public perception of the criminal justice system?

   Amicus American Conservative Union Foundation answers: "yes"

3. Whether Michigan's use of the one-person grand jury statute is an unlawful circumvention of Michigander's rights to a fair and unbiased trial?

   Amicus American Conservative Union Foundation answers: "yes"

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INTRODUCTION AND INTEREST OF AMICUS[1]

"[T]o perform its highest function in the best way, 'justice must satisfy the *appearance* of justice.'" *In re Murchison*, 349 US 133, 136-37 (1955) (quoting *Offutt v. United States*, 348 US 11, 14 (1954) (emphasis added)). It is in this light that Amicus seeks to highlight the potential risk of bias and unfairness of a one-person grand jury (whether actual or apparent) as was used in this case.

At a time when most everything is viewed through a political lens, and partisan division among Americans runs as deep as it ever has, one must call into question the Prosecutor's decision to use a one-person grand jury, as it is colloquially known, for a case that is rife with political implications. The Prosecutor's strategy of relying on a one-person grand jury appears to be a decision driven more by convenience than necessity. The mere use of such a mechanism for inquiry invites questions of partisanship, political bias, and fundamental fairness, regardless of the investigation's outcome. With Michigan so politically divided, the decision to use a one-person grand jury will almost certainly undermine confidence in the justice system for a substantial portion of the citizenry.

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[1] Pursuant to MCR 7.312(H)(4), Amicus Curiae American Conservative Union Foundation certifies that no counsel for a party authored this brief in whole or in part, nor made a monetary contribution to fund or prepare the submission of this brief. No party other than Amicus Curiae, its members, or its counsel, made a monetary contribution or contributed to this brief.

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The use of a one-person grand jury in the case at bar was not only unnecessary, but it also created the appearance of bias, if not actual bias. This bears the potential to reduce the public's faith in the political, judicial, and criminal justice systems. This is precisely the type of issue that the Founding Fathers were trying were trying to avoid. By creating safeguards, they worked to insulate us from issues like substantial overreach by the government, this includes when they were laying the groundwork for grand juries in American jurisprudence. The use of the one-person grand jury in Michigan paves the way for overreach between the separate branches of government by permitting a single person or a few people to perform the duties of both the executive and judicial branch.

"[One-person grand juries have] become the law of this State and can be changed *only* by an adverse ruling by a majority of [the Supreme] Court." *People v. Bellanca*, 43 Mich. App. 577, 580 (1972) (quoting *People v. Kamhout*, 227 Mich. 172, 185 (1924)) (emphasis added). In this case, the Michigan Supreme Court can determine whether these types of investigations undermine both the public's perception of "blind justice" and the citizens' expectation of "fair play and substantial justice" in providing a fair and proper trial to Michiganders. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

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This problem is of particular concern to *Amicus,* the American Conservative Union Foundation ("ACUF"), a tax-exempt organization whose mission is to develop conservative solutions to address some of the nation's most pressing problems. ACUF's Nolan Center for Justice ("NCJ") has been at the forefront of criminal justice policy reforms at the national and state levels since its inception nine years ago. ACUF-NCJ actively pursues reforms that improve public safety, strengthen government accountability, advance human dignity, and redress unequal access to justice.

Amicus asserts that use of one-person grand juries is wholly inconsistent with efforts to maintain public confidence in the judicial process. Accordingly, Amicus seeks to end the use of one-person grand juries. In the alternative, Amicus urges the Court to narrow the scope of use and application. In doing so, this Court can reduce the public perception of political prosecutions in Michigan and buttress the belief in blind justice.

STATEMENT OF FACTS

For purposes of this brief, Amicus will use the Statement of Facts as laid out in Appellant's Bypass Application for Leave to Appeal.

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ARGUMENT

I. The standard practice for one-person grand juries in Michigan is inconsistent with the historical use of grand juries

"The grand jury is an integral part of our constitutional heritage which was brought to this country with common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges."

United States v. Mandujano, 425 U.S. 564, 571 (1976).

A. Introduction

The nation's history and development of the criminal justice system speak to grand juries consisting of "persons" or "laymen." "In this country as in England of old, the grand jury has convened as a body of *laymen*, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Costello v. United States*, 350 U.S. 359, 362 (1956) (emphasis added).

In this context, it is notable that the Court's dicta refers to *a* singular "grand jury," which is made up of "laymen" (plural). In contrast, Michigan authorized a single-person grand jury. *Id.*

B. Grand juries have a deep history in old English jurisprudence

Grand juries have been an institution in the criminal justice system for nearly a millennium. Their use can be traced back to 1166, when King Henry II provided that "*a dozen men*" under oath would

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disclose those believed to be guilty of a criminal offenses.[2] R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. Chi. L. Rev. 613, 613 (1983). While methods have evolved, the traditional use and size of the grand jury has been prevalent in this country since long before the signing of the Constitution. The Connecticut Code of 1650 established, "that there shall bee [sic] a Grand Jury of *twelve or fourteene* [sic] able men warned to appeare [sic] every Courte [sic] yearely [sic] in Septembr [sic], or as many and oft as the Governor or Courte [sic] shall thinke [sic] meete [sic], to make presentment of the breaches of any Lawes [sic] or orders or any other misdemeanors they shall know of in this Jurisdiction [sic]." Conn. Code of Laws of 1650, *Grand Jury* (emphasis added).

Aside from the centuries-long tradition of grand juries being multi-person panels, a one-person grand jury runs contrary to the very purpose of the institution as envisioned by the Founders. Indeed, the Supreme Court of the United States in dicta noted that a grand *jury* is made up of *citizens*. *Costello*, 350 U.S. at 362. "Its historic office has been

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[2] "The dozen men sworn (*jurés*) to tell the truth about local facts was planted in English law by the Domesday inquisitions (1086). Henry II's common-law writs, beginning with *Novel Disseisin c.*1166, led to trials by such juries. The Assize of Clarendon that year created the grand jury, charged to name the local felons, bringing them to trial. When the Fourth Lateran Council condemned trials by ordeal, local juries became responsible for verdicts of guilty or not guilty." *Juries*, Oxford Dictionary of the Middle Ages (2010).

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to provide a shield against arbitrary or oppressive action, by ensuring that serious criminal accusations will be brought only upon the considered judgment of *a* representative body of *citizens* acting under oath and under judicial instruction and guidance." *Id*. (emphasis added). Of fifty states, the District of Columbia, and the 94 federal districts, only two other jurisdictions (Washington and Connecticut) have statutes authorizing similar types of judicial inquiries, and then only for special investigatory processes in certain types of cases.

For example, Washington's special inquiry procedure lays out the standard for when to use a one-person grand jury, making clear it follows what Amicus refers to as the "Gotti Rule."[3] That is, to insulate grand jurors from corruption or retribution in cases where sophisticated criminal activity is suspected, including public corruption, organized crime, and fraud. Washington Association of Prosecuting Attorneys, *WAPA Model Policy for Using Special Inquiry Judge Proceedings*, at 1 (2019). This type of procedure is meant to *supplement* the grand jury, rather than *replace* a traditional, multi-member grand jury. *Id.* (emphasis added). In short, the State of Washington understands that

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[3] In both Washington and Connecticut, these special investigatory procedures are narrowed to cases where traditional methods of secrecy are insufficient to protect the identification of grand jury members and or the subject matter of the case, such as in cases of violent organized crime, public corruption, and fraud. *WAPA*, at 2; *see also* Reinhart, at 2. Amicus uses term "Gotti Rule" as it presumes such procedures would be used against infamous mafia boss, John Gotti.

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because the one-person grand jury is inherently offensive to the notion of one's rights, it should be used sparingly, and within a narrow set of circumstances.

There exists, however, no such standard for use in Michigan. Indeed, while the Michigan one-person grand jury statute may have been created to tackle corruption, mounting issues with attendance of witnesses, and immunity issues; it perversely creates the opportunity for even greater corruption in the modern era, as it is easier to corrupt a single juror than a multi-person panel. See App. Bypass Application, at 18 (March 22, 2022) (quoting *In re Colacasides*, 379 Mich. at 90). Amicus, therefore, posits that the one-person grand jury should be stricken by this Court in its entirety. Even if it is upheld, however, this Court should create a narrow framework (like our so-called "Gotti Rule") for which it may be used. This would ensure that all defendants' rights to a fair and proper trial are being upheld, along with public confidence in the criminal justice system.

C. One-person grand juries undermine the public's belief in blind justice

1. There is no standard or limiting principle applicable to the use and application of Michigan's judicial inquiry statute

Acting as both investigator and accusative body, the grand jury represents the pinnacle of prosecutorial power. A judge performing this function as a one-person grand jury, as was the case here, constitutes an

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intermingling of the traditionally executive prosecutorial powers with the role of the judiciary. To satisfy our nation's standards for due process, fair play, and substantial justice, there must at minimum be a strong justification for – and reasonable limits on – judicial concentration of this extraordinary power. However, the Michigan one-person grand jury statute itself contains almost no limiting principles; a judicial inquiry may be initiated by "any complaint," or application by a prosecuting attorney. Mich. Comp. Laws Serv. § 767.3 (LexisNexis 2022). The resulting inquiry must merely "be specific to common intent of the scope of inquiry," but besides that is not restricted to any type of category of criminal case. *Id.*

Additionally, other states that authorize one-person grand jury investigations have in place subject matter and other procedural safeguards to prevent the appearance of impropriety such as limiting the use to investigate cases that require additional secrecy and identification protections, which mitigate but do not eliminate the natural suspicion of the public. However, such provisions are conspicuously absent from Michigan's laws.

2. There are no restrictions on the types of cases that can be determined under this statute compared to jurisdictions that hold inquiries along the same vein

Michigan places no reasonable subject matter restrictions on one-person grand juror inquiries. The statute at issue permits one-person

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grand jury inquiries as an option for investigation of any "crime, offense, or misdemeanor." *Id.* This lack of articulated subject matter limitation empowers prosecutors to avoid marginally more onerous charging and preliminary hearing requirements by empaneling one-person grand jury inquiries for essentially any criminal proceeding. The Genesee County prosecutor has recently done so in 60 unrelated criminal cases. App. Bypass Application, at 2. This opportunity for corruption can be stemmed by categorical restrictions on what types of criminal cases qualify for judicial inquiry. Successful examples of this can be found in the laws governing judicial inquiries in the other states currently permitting such inquiries. Wash. Rev. Code Ann. § 10.27.170 (LexisNexis 2022); *see also* Conn. Gen. Stat. §§ 54-47a – 54-57i (2022).

In Connecticut, a grand jury is restricted to investigating only cases of "governmental corruption, Medicaid vendor fraud, racketeering, election law violations, and felonies punishable by more than five years imprisonment." Christopher Reinhart, Office of Legislative Research Report, *Connecticut's Investigatory Grand Jury*, https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1101.htm, at 2 (September 3, 1998). While there is no parallel requirement in Washington, the Washington Association of Prosecuting Attorneys suggests that such proceedings should only be initiated where there is reason to believe that more traditional investigative techniques will not

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be effective. Although not bound by such guidelines, their mere existence tends to limit applicable investigations to cases of corruption or other crimes that require greater confidentiality. *WAPA,* at 2.

The lack of a limiting factor in Michigan results in an impermissibly broad range of cases in which a one-person grand jury inquiry may be used. From robbery and shooting to contempt to gambling, the slate of cases investigated by one-person grand juries demonstrates that the power may be applied broadly. Granting such a scope of use creates risks for politicization of the justice system, gaming the process, and other opportunistic decision-making.

a) Like most of America, Michigan is a starkly divided state along political lines

Like the rest of the nation, Michigan's political climate has been feverish for the past several years.[4] With an electorate almost evenly split along party lines, any perceived politicization of the criminal justice system is going to raise questions with half of the voters. The use of judicial inquiry in this case will almost certainly undermine the public's trust in the process.

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[4] For example, the 2020 election results were very close in Michigan. Biden won by roughly 3% of the vote; or 50.6% to 47.8%. Politico.com, *Joe Biden won in Michigan flipping a state Donald Trump won in 2016*, https://www.politico.com/2020-election/results/michigan/ (Jan. 6, 2021).

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The case at bar was a high-profile matter that impacted nearly every person living in Genesee County. Beyond the county, Michiganders across the board were broadly aware of the case, and a magnifying glass was on all the government actors involved. When there are such strong political implications, charging decisions must be above reproach. The public expects all the necessary checks and balances need to be present.

Ultimately, using a one-person grand jury creates a high risk or perception of bias, and because there are current and former politicians on both sides of the dispute at bar, granting the investigatory power to a singular person for purposes of finding probable cause highlights the potential for abuse within the investigation. Inevitably it will undermine public perception that justice is blind.

II. If the Court upholds the legitimacy of one-person grand juries, it should apply a balancing test to weigh needs of the prosecution against risk of undermining the public's confidence

In the modern criminal justice system, one would be hard pressed to find even a prosecutor who would complain that it is too difficult to convince a grand jury of probable cause. Indeed, former New York State Chief Judge Sol Wachtler remarked that "[i]f a district attorney wanted,

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a grand jury could indict a ham sandwich."[5] This raises the question of why any prosecutor would need to form a one-person grand jury if a traditional one can be so easily persuaded?

A. The historical reasons which supported the creation of the one-person grand jury statute no longer exist

The one-person grand jury statute was created to ameliorate the issues that arose during the early 20th Century in cases of public corruption and organized crime. See App. Bypass Application, at 18 (citing *In re Colacasides*, 379 Mich. 69, 90 (1967)). At the time, the courts found that citizen grand juries were ineffective, and time consuming in such a modernized society. *In re Colacasides*, 379 Mich. at 90. The one-person grand jury gave the judicial officer a means to exercise subpoena power on witnesses and grant immunity to compel necessary testimony. *Id.*

However, as the Appellant points out in his Petition, the Investigative Subpoena Act ameliorated the need for one-person grand juries by granting prosecutors the power to investigate and compel accordingly. Mich. Comp. Laws Serv. § 767A.5 (LexisNexis 2022); *see also* App. Bypass Application, at 19. In the modern era, it is difficult to see the need for one-person grand juries when traditional, multi-member

[5] Toni Messina, *Criminally Yours: Indicting a Ham Sandwich*, Above the Law, https://abovethelaw.com/2016/02/criminally-yours-indicting-a-ham-sandwich/ (2016).

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juries routinely take up complex matters in Michigan and across the country. To the extent that one-person grand juries provide a modicum of value beyond convenience, that value is outweighed by the risk of undermining the public faith in the process. Because prosecutors and the judiciary now have modern investigatory authorities and resources available, the original purpose behind the creation of the one-person grand jury is now moot.

1. There is no room in the modern criminal justice system for a one-person grand jury when prosecutors have so much power

With the expansion of prosecutorial powers of investigation, grand juries are hardly cumbersome. Given the ease with which a prosecutor can find probable cause utilizing the traditional, multi-person grand jury, why was the Prosecutor in this case so compelled to utilize the one-person grand jury?

When balancing the benefits of the one-person grand jury with the potential harm caused by unfairness or bias, the former simply does not overcome the latter. When one judicial actor is tasked with the secretive duties of a traditionally multi-person panel, the risk of abuse is heightened because of the lack of accountability, as well as the lack of checks and balances inherent in a process requiring consensus among a

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group.[6] While this is not to say that all one-person grand juries are rife with malfeasance, the potential for harm to public confidence is far too great to justify its use.

Here, not only was the judge asked to engage in a judicial-inquiry, but he also chose to employ the assistance of a fellow judge within the Circuit to investigate the issue at hand, and then proceeded to file a charge upon a finding of probable cause – a situation for which there is no precedent.[7] Additionally, the judicial officer extended his own investigatory period beyond the allotted statutory time limitation despite not having the authority to do so. Mich. Comp. Laws Serv. § 767.3 (LexisNexis 2022). These are just a few examples of ways in which the statute was manipulated. Whether or not these procedural anomalies were appropriate is beside the point. The perception arising out of the procedural history of this case and others that the system *can* be gamed is corrosive to the public's confidence in the criminal justice system.

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[6] For example, a panel of 23 jurors that sit on a federal grand jury in the Eastern District of Michigan. U.S. Dist. Ct. E.D.Mich., *Information for Jurors Frequently Asked Questions*, https://www.mied.uscourts.gov/index.cfm?pageFunction=Information%20for%20jurorsFAQList&faqgroup=Information%20for%20jurors (2022).

[7] This was a case of first impression because the state has never addressed whether the judge can charge a criminal offense during a judicial inquiry. See App. Bypass Application, at 2.

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B. The one-person grand jury statute should be struck down as an evasion of one's right to a fair and impartial trial

One-person grand juries should be struck down by the Michigan Supreme Court. Yet despite the many worrisome ways in which the one-person grand jury statute is ripe for abuse, the Court has not yet found it to be unconstitutional. By continuing the use of judicial inquiries like this, Michigan is encouraging the type of circumvention of a fair and unbiased trial, as well as the resulting separation of powers issues that were so prominent in this case.

1. Jurisdictions with similar investigatory procedures have limited the scope and application of judicial inquiry within their courts

If the Court again finds that one-person grand juries are facially valid, their use should be limited in scope and application in a manner similar to Washington and Connecticut, which limit the opportunities for abuse. Washington is clear that the use of their special inquiry judge proceeding is very rare and used only in conjunction with very narrowing safeguards. *WAPA*, at 1, n.2. In Connecticut, the laws of use follow similar narrowing limitations. Reinhart, at 2.

The availability of one-person grand juries should be ended entirely. But if the Court finds the statute authorizing their use facially valid, the Court has the opportunity to put protections in place to limit their use. Aside from limitations on subject matter and duration, the Court should require approval from the Chief Judge of the Circuit or a

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panel of judges after weighing the prosecution's needs against the potential impact on public confidence. By limiting the scope of their application, the risk of abuse is reduced (but not eliminated). Ultimately, the existence of the one-person grand jury runs so counter to how the public expects the grand jury process to run that use of such a process – in and of itself – raises questions of fairness and impartiality.

CONCLUSION

History, justice, and the ideal of transparency dictate that the authority authorizing one-person grand juries should be eliminated altogether, or at a minimum strictly limited.

Since the 1100's, grand juries have been comprised of more than a single individual. Only two other jurisdictions allow one-person grand juries, and even then, their use is limited. Amicus asserts that if there ever was a bonafide need for a one-person grand jury, that time has passed. Traditional multi-member grand juries are capable of maintaining secrecy, addressing complex matters, not afraid of issuing indictments.

In the case at issue, the facts are not so unique, nor so technical as to require the use of a one-person grand jury. A reasonable person could look at the use of a one-person grand jury in the present case and assume political taint or procedural unfairness.

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As such, the use of the one-person grand jury in the State of Michigan should be completely barred. Assuming there are constitutionally appropriate uses, one-person grand juries should be limited to cases where the appearance of bias would be low. In no case should a one-person grand jury be authorized for high-profile prosecutions that have political undertones.

One final point. Failing to rein in the use of this outdated and flawed process for securing an indictment in this case will only spur others to do the same. For example, it is easy to envision a one-person grand jury empaneled in Ottawa or Hillsdale Counties to investigate Governor Whitmer's handling of assisted living facility residents during the COVID-19 pandemic or similar, politically charged matters. This Court has an opportunity to stop such escalation before it even begins.

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RELIEF REQUESTED

Amicus American Conservative Union Foundation respectfully requests that this Court grant the pending Bypass Application for Leave to Appeal filed by the Defendant-Appellant Nicolas Lyon in this matter.

Respectfully Submitted,

American Conservative Union Foundation
Attorney for *Amicus* American Conservative Union Foundation

Dated: April 20, 2022

By: /s/ Ashlii M. Dyer
Ashlii M. Dyer
1199 N. Fairfax Street, Suite 500
Alexandria, VA 22314
(202) 347-9388
adyer@conservative.org

Doster Law Offices, PLLC
Attorney for *Amicus* American Conservative Union Foundation

Dated: April 20, 2022

By: /s/ Eric E. Doster
Eric E. Doster (P41782)
2145 Commons Parkway
Okemos, Michigan 48864
(517) 977-0147
eric@ericdoster.com