STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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DEPARTMENT OF ATTORNEY GENERAL
DANA NESSEL

November 3, 2023

Clerk's Office
Michigan Supreme Court
925 W Ottawa Street
Lansing, Michigan 48913

Re: Notice of Intent to Seek Judicial Notice under MRE 201
People v Burkman, Wohl (Nos. 164638, 164639)

To the Clerk:

Under MRE 201(a), (d), (e), the People intend to ask this Court at oral argument to take judicial notice of the fact that John Burkman and Jacob Wohl pled guilty in Cuyahoga County, Ohio on October 24, 2022, to one count of Telecommunications Fraud, Ohio Rev Code Ann § 2913.05(A), for an August 26, 2020 robocall in Cleveland identical to the robocall that is at issue here. See Attch, Indictment, Count XV ("Defendant(s) unlawfully *having devised a scheme to* ***defraud***, did *knowingly* disseminate . . . [data or sound] . . . *with purpose to execute or otherwise further the scheme to* ***defraud***.") (Emphasis added); § 2913.01(B) (" 'Defraud' means to knowingly obtain, *by deception*, some benefit for oneself or another, or to knowingly cause, *by deception*, some detriment to another.") (Emphasis added). See also Protect Demo Amicus Br, pp 9–10, Ex 11 (Oct 24, 2022 plea, pp 4, 10, 14–15), Ex 12 (Nov 29, 2022 sentencing, pp 19–22 [text of robocall], pp 25–26, *id.* at 25, Wohl: "[I] really express my absolute regret and shame over all of this"; *id.* at 26, Burkman: "I would just echo Mr. Wohl's sentiments. I think the same.").

In light of *Counterman v Colorado*, 143 S Ct 2106, 2111 (2023) and *United States v Hansen*, 143 S Ct 1932 (2023), the People will ask this Court to take judicial notice of these pleas as an adjudicative fact for two reasons:

First, on their knowledge of the falsity of the robocall, defendants argued that the claims are "plausibly true" and that the evidence at the preliminary examination was insufficient to show that they "knew that the information in the robocall was false," see Defs' Br, pp 33, 37, and in response the People argued that the robocall was "deliberately wrongful in nature," and "false," People's Br, p 19, and reiterated based on *Counterman* that the robocall was "not a genuine warning." People's Supp, p 16. The Ohio pleas effectively moot the factual question as an appellate issue, making its resolution now unnecessary. Because this case is in a pretrial posture, the defendants' pleas under oath are admissible at trial here, cf. MRE 410(1), and any possible deficiency at the examination may be remedied by a remand, see MCR 6.110(E), (H). The pleas also render it unnecessary to examine the alternative analysis of the Court of Appeals predicated on the robocalls being "unknowingly false," App'x 201a, as there is direct evidence to rebut this predicate.

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Second, the defendants' pleas to telecommunications fraud support analysis from *Hansen* relevant on the question whether this robocall falls within another exception to the First Amendment, i.e., the fraud exception, a principle identified by the People in their October 3, 2023 corrected supplemental filing, pp 8, 17, quoting *Hansen,* 143 S Ct at 1947 n 4 (" '[F]alse claims [that] are made to effect a fraud or secure moneys or other valuable considerations' are not protected by the First Amendment.") See also Protect Demo Supp Br, filed October 27, 2023, pp 1–5, quoting *Hansen,* 143 S Ct at 1939 (the "First Amendment does not shield fraud"). Compare *Minnesota Voters All v Mansky*, 138 S Ct 1876, 1889, n 4 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.").

In taking judicial notice of the defendants' plea to telecommunications fraud for the identical robocall, the questions presented in this appeal should begin with the Court of Appeals' holding that "[a] fact-finder could conclude from th[e] evidence [at the preliminary examination] that defendants intentionally disseminated a dishonest message with the depraved motive of deterring voting." App'x 200a.

Sincerely,

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
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Cuyahoga County Court of Common Pleas
Criminal Court Division

State of Ohio, Plaintiff vs. John Burkman Jacob Wohl, Defendants	A True Bill Indictment For **Telecommunications Fraud - F5** §2913.05(A) 14 Additional Count(s)

Dates of Offense (on or about)	**The Term Of**	**Case Number**
August 26, 2020	October of 2020	654013-20-CR

The State of Ohio, Cuyahoga County } ss.

Count One **Telecommunications Fraud - F5** §2913.05(A)

Defendants John Burkman, Jacob Wohl

Date of Offense On or about August 26, 2020

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Two **Bribery - F4** §3599.01(A)(2)

Defendants John Burkman, Jacob Wohl

Date of Offense On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Foreperson of the Grand Jury

Michael C. O'Malley

Prosecuting Attorney

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Count Three	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Four	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Five	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

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Count Six	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Seven	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Eight	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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Count Nine	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Ten	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Eleven	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

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Count Twelve	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Thirteen	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Count Fourteen	**Bribery - F4** §3599.01(A)(2)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

did, before, during, or after a primary, convention, or election, attempt by intimidation, coercion, or other unlawful means to induce such delegate or elector to register or refrain from registering or to vote or refrain from voting at a primary, convention, or election for a particular person, question, or issue.

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Count Fifteen	**Telecommunications Fraud - F5** §2913.05(A)
Defendants	John Burkman, Jacob Wohl
Date of Offense	On or about August 26, 2020

The grand jurors, on their oaths, further find that the Defendant(s) unlawfully

having devised a scheme to defraud, did knowingly disseminate, transmit, or caused to disseminated or transmitted by means of wire, radio, satellite, telecommunication, telecommunications device, or telecommunication services any writing, data, sign, signal, picture, sound, image with purpose to execute or otherwise further the scheme to defraud.

The offense is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

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