CASE NO. 23-10579-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JOHN R. MOORE, JR. &
TANNER J. MANSELL
Defendants-Appellants.

Appeal from a Judgment of the U.S. District Court for the Southern District of Florida, Case No. 9:22-cr-80073-DMM-2

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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December 23, 2024

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amicus* certifies that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Clark M. Neily III, counsel for *amicus curiae*

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Respectfully submitted,

Dated: December 23, 2024

/s/ Clark M. Neily III

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper 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.

This case interests Cato because a system that was painstakingly designed to discourage ill-conceived prosecutions and prevent unjust convictions failed to do so here. Understanding why that occurred may help prevent it from happening again in future cases and spare these Defendants felony convictions that they plainly do not deserve.

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[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION

The ability to impose criminal sanctions is among the most fearsome and readily abused powers of government, as the colonists well knew from their own bitter experience with British Admiralty courts. Thus, it is no accident that roughly half the Bill of Rights is devoted to describing and prescribing, in notable detail, a markedly defendant-favoring process for resolving criminal charges. And if one were to distill the essence of that framework to a single prime directive, it would be this: the prevention of unjust convictions and punishments.

As explained below, the failure of that directive in this case is most plausibly attributed to the combination of a jury that was insufficiently aware of its historic injustice-preventing role, together with an insufficiently parsimonious judicial interpretation of the relevant statute. When one constitutional safeguard—jury independence—is functionally eliminated from the adjudicative process, it becomes even more vital to ensure that other safeguards—such as lenity—operate robustly. And because the efficacy of a criminal justice system depends significantly upon its perceived legitimacy, courts should take care to avoid ratifying palpably unjust results when, as here, the law does not compel them.

ARGUMENT

The Supreme Court has frequently emphasized the importance of fair procedures in preserving the perceived legitimacy of criminal law. Thus, "insofar as

the public fears arbitrary prosecution, it risks undermining public confidence in the criminal justice system." *Marinello v. United States*, 548 U.S. 1, 11 (2018). The Court has repeated that admonition in a variety of criminal-law contexts, including public access to judicial proceedings,[2] production of evidence,[3] racially disparate punishments,[4] discrimination on the basis of race[5] and gender[6] in jury selection, and Article III's Venue Clause,[7] among others. In short, "[c]ompliance with and respect

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[2] *Press-Enter. Co. v. Superior Ct. of California, Riverside Cnty.*, 464 U.S. 501, 508 (1984) (explaining that "[o]penness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system").

[3] *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

[4] *Buck v. Davis*, 580 U.S. 100, 124 (2017) (warning that "relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process") (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)).

[5] *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice").

[6] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (noting that "community participation in the administration of the criminal law" is "critical to public confidence in the fairness of the criminal justice system").

[7] *United States v. Johnson*, 323 U.S. 273, 276 (1944) (explaining role of Venue Clause in promoting "the fair administration of criminal justice and public confidence in it, on which it ultimately rests").

for the law are dependent upon whether the 'community' perceives the criminal law to have moral credibility and legitimacy."[8]

Preserving the perceived legitimacy of the criminal justice system through rigorous commitment to fair procedures and fair results takes on special significance in the current environment, which has seen public confidence in institutions[9]—including particularly the criminal justice system[10] and the judiciary[11]—plummet over the past few years. Even more concerning, that loss of confidence has occurred

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[8] Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 894 (2019).

[9] Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023) (noting that less the 43 percent of Americans "[h]ave a great deal or fair amount of confidence in the police" and "[c]onfidence in police, public schools, large technology companies and big business are at or tied with their record lows"), https://tinyurl.com/2v27v9b2.

[10] Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023) (showing that 49 percent of Americans think the criminal justice system is fair, down from 66 percent in 2003), https://tinyurl.com/4k6buu3a; Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, But Police Up*, GALLUP (July 15, 2024) (noting that "[f]ive institutions have the confidence of less than one-quarter of U.S. adults—the criminal justice system, newspapers, big business, television news and Congress"), https://tinyurl.com/r7c3f74h.

[11] Lindsay Whitehurst, *American's Confidence in Judicial System Drops to Record Low*, PBS NEWS (Dec. 17, 2024) https://tinyurl.com/3kcr8pdb (citing Benedict Vigers & Lydia Saad, *Americans pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024) (noting that "[A]mericans' confidence in their judicial system dropped to a record-low 35 percent in 2024—setting the U.S. far apart from other wealthy nations"), https://tinyurl.com/mryd857m).

against the backdrop of extreme ideological polarization and the unprecedented spectacle of multiple criminal prosecutions of a former president that some Americans consider perfectly appropriate and others dismiss as partisan "lawfare."[12] And of course that same former president has been reelected to office after pledging to use the criminal justice system to mete out "retribution" to various perceived antagonists, including members of the outgoing administration.[13]

All of this may seem far removed from the workaday decision of a U.S. Attorney's office in Florida to pursue a maritime-theft case with no political valence beyond the coincidence of being in the same courthouse at the same time as the Government's classified-documents case against Donald Trump. But the man-bites-dog (or shark) nature of this case and the decision to address what appears to have been an honest mistake with the hammer of a federal felony prosecution has garnered

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[12] Chris Jackson & Analeise Acevedo Lohr, *Majority Believe Prosecution of Donald Trump Upheld Rule of Law, Not Motivated by Politics,* IPSOS (May 31, 2024) (explaining that 52 percent of Americans believe Donald Trump's New York hush money charges were mainly about enforcing and upholding the rule of law while 45 percent of Americans believe the case was primarily motivated by preventing Donald Trump's return to the White House), https://tinyurl.com/3p7yzr3y.

[13] James Zirin, *Trump Will Turn America's Justice System into a Tool of Political Revenge*, THE HILL (Dec. 18, 2025) (discussing Donald Trump's desire to exact political revenge), https://tinyurl.com/2s3trw7a.

extensive media coverage[14] and prompted an outpouring of public concern.[15] Of course, that is precisely the sort of transparency and accountability the Founders sought to ensure by enshrining public jury trials and freedom of the press in the Bill of Rights,[16] and the system should operate in such a way as to inspire public confidence rather than condemnation.

Among the defining characteristics of American criminal justice is its commitment to the so-called "Blackstone ratio," which famously states it is "'better that ten guilty persons escape, than one innocent suffer.'" *Hill v. Humphrey*, 662 F.3d 1335, 1377 (11th Cir. 2011) (Barkett, J., dissenting) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *358). Accordingly, the Constitution bristles with

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[14] *E.g.*, Raj Tawney, *They Freed 19 Sharks from a Commercial Fisherman's Net. Now They Could Go to* Prison, NEW REPUBLIC. (Jan. 10, 2023), https://tinyurl.com/3zu9ndtv; Hannah Phillips, *Florida Divers Who Freed Sharks, Destroyed Fisherman's Gear Avoid Harshest Penalties*, USA TODAY (Feb. 20, 2023), https://tinyurl.com/yc38n23z.

[15] David Goodhue, *Why Two South Florida Tour Guides Who Freed 12 Sharks Are Now Paying for Their Actions*, MIAMI HERALD (Feb. 24, 2023); Hannah Phillips, *Jupiter Divers who Freed Sharks from Fishing Line May Have Their Theft Convictions Overturned*, PALM BEACH POST (June 21, 2024) (noting the public outcry) https://tinyurl.com/3fv68a5n; Jess Thomsom, *Florida Divers Stole Fishing Gear and Freed Sharks in Front of Police Chief*, NEWSWEEK (Dec. 7, 2022) (documenting the extensive media attention the case has received and public support for the defendants, including a fundraiser to cover their legal fees), https://tinyurl.com/mtzdanf2.

[16] U.S. CONST. amends. VI & I.

multiple, redundant safeguards designed to ensure that doubtful cases result in acquittals rather than convictions. These protections include the rights of counsel, confrontation, and due process, along with jury unanimity and prohibitions against unreasonable searches, self-incrimination, double jeopardy, and appeals from acquittals.

But from a purely originalist standpoint, perhaps the single greatest protection against unjust convictions and punishments was the institution of jury independence, which included—but was by no means limited to—the power to acquit against the evidence. At the Founding, criminal jurors were not relegated to the role of mere fact-finders, as they are today.[17] Indeed, the conception of criminal juries as having no proper role in assessing the wisdom, fairness, or legitimacy of a given prosecution is a more recent invention that early American lawyers and jurists would rightly have condemned as antithetical to centuries of common-law understanding and practice.[18]

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[17] *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 51–61, 54 (2003) (discussing historical power of so-called jury nullification and explaining that at the time of the Founding, "[t]he jury was seen as much more than a factfinder; it was a valuable check on government action").

[18] *See id.*; *see also* Cover, *supra*, at 885–86 (noting that Founding-era juries "had a vast power to find both fact and law" and observing that "[i]t is well established in the scholarly literature that juries had a right to acquit against the evidence").

Even in modern times, it is widely understood that jurors still *possess* the power of conscientious acquittal,[19] with the only real question being how far system actors may go to ensure they remain ignorant of that power[20] and discourage them from exercising it.[21]

As suggested in the panel opinion and described in Defendants' Petition for Rehearing En Banc, the jury in this case appeared reluctant to convict, and only did so after sending out seven notes and receiving an *Allen* charge from the trial judge. Petition at 7. Had the jury instructions in this case better embodied the Supreme

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[19] *See, e.g.*, *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) (acknowledging that "a jury does have the power to bring in a verdict 'in the teeth of both law and facts,'" even though "its duty is to apply the law as interpreted and instructed by the court") (quoting *Horning v. Dist. of Columbia*, 254 U.S. 135, 138 (1929).

[20] *See, e.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1139 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (noting that majority "clearly acknowledges there can be no doubt that the jury has 'an unreviewable and unreversible power . . . to acquit in disregard of the instructions on the law given by the trial judge'" and arguing that jury should be advised of that power in appropriate cases) (quoting majority op., *id.* at 1132). *But see State v. Sayles*, 244 A.3d 1139 (Md. 2021) (divided court holding that Maryland juries have no power to acquit against the evidence and instructing trial court judges to so advise juries if asked about "jury nullification" in future cases).

[21] *E.g.*, *United States v. Lynch*, 903 F.3d 1061, 1088 (9th Cir. 2018) (Watford, J., dissenting) ("I have my doubts about whether we were right to endorse [an anti-nullification instruction], for it affirmatively misstates the power that jurors possess.").

Court's directive that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (internal quotation marks omitted), the verdict would likely have obviated this appeal by more accurately reflecting how ordinary people understand the word "steal" in the context of potentially ruinous felony charges. *Cf. Dougherty*, 473 F.2d at 1142 (Bazelon, C.J., dissenting) (noting that "[t]he very essence of the jury's function is its role as a spokesman for the community conscience in determining whether or not *blame* can be imposed") (emphasis added). Criminal defendants are entitled to the full measure of protection that the Constitution provides, including a properly instructed jury and a doctrinally sound interpretation of imprecise statutory terms.

CONCLUSION

The spectacle of an imperious national government prosecuting virtuous citizens for activities within its "special maritime jurisdiction" would have been entirely familiar to the Founders. But they would likely have been dismayed by the identity of that government and by the miscarriage of justice that occurred here. It is highly doubtful that a Founding-era jury, fully cognizant of its historic powers and duties, would have branded John Moore and Tanner Mansell lifelong felons for their misguided attempt to fulfill what they perceived to be a civic duty. The Court can

still avoid that result by granting the Petition and applying a suitably restrained interpretation of the relevant statute. And it should.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2,246 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman typeface.

/s/ Clark M. Neily III

Dated: December 23, 2024 *Counsel for Amicus Curiae Cato Institute*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on December 23, 2024, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Clark M. Neilly III

Dated: December 23, 2024 *Counsel for Amicus Curiae Cato Institute*