No. 22-186

In the Supreme Court of the United States

Troy Mansfield,

Petitioner,

v.

Williamson County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

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 was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending the jury trial as the presumptive means of adjudicating criminal charges and ensuring that the serious problem of coercive plea bargaining is not exacerbated by prosecutors empowered to withhold exculpatory evidence prior to the entry of a guilty plea. Permitting such a practice would further erode the participation of citizen juries in the criminal justice system and deprive defendants of the right to subject prosecutions to meaningful adversarial testing.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Troy Mansfield was charged with a crime he did not commit, and an especially heinous crime at that—sexual misconduct with a child. The prosecutors in his case were well aware of evidence highly corroborative of Mansfield's innocence: specifically, that the alleged victim's statements to prosecutors differed greatly from what she initially told police. Pet. at 5. Eventually, she disclaimed any memory of what happened, alternatively suggesting to prosecutors that another child "might have done it." *Id.* In light of this information, the prosecutor concluded the alleged victim could not testify at all, leaving the District Attorney's office with no witnesses against Mansfield. *Id.* at 5-6.

Nevertheless, in defiance of this Court's holding in *Brady v. Marland*, 373 U.S. 83, 87 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process"—as well as a direct order from the state criminal court—the District Attorney's office failed to turn over this exculpatory evidence. Pet. at 5-6. Instead, the prosecutors offered a plea bargain of "only" 120 days, notwithstanding that Mansfield's charges subjected him to a risk of life imprisonment. *Id.* at 6. They even went so far as to lie about the strength of their evidence, claiming that the alleged victim (that they knew could not testify) was a "strong witness." *Id.* at 7. In light of such overwhelming pressure, Mansfield understandably took the deal. *Id.*

Despite such blatant misconduct, the Fifth Circuit held below that Mansfield's *Brady* claim was foreclosed by the principle announced in *Alvarez v. City of Brownsville*, 904 F.3d 382, 392 (5th Cir. 2018) (en

banc), that there is no constitutional right to exculpatory evidence at the plea-bargaining stage. The Petition explains in detail why certiorari is warranted to address this question, both because of the deep split between fourteen circuit and state high courts, Pet. at 14-22, and because of its exceptional importance, *id.* at 25-29. It likewise explains why the core principles of due process underlying *Brady* apply equally to plea bargaining as they do to trial or sentencing, as "a plea hearing is all about a defendant's guilt or innocence." *Alvarez*, 904 F.3d at 407 (Costa, J., dissenting). *See* Pet. at 23-24, 27-28. *Amicus* will not retread those arguments here.

Instead, *amicus* writes separately to explain how failure to enforce the due process right to exculpatory evidence before entering a plea relates to and undermines a separate constitutional provision—the Sixth Amendment right to a jury trial itself. Under our Constitution, and within the Anglo-American legal tradition generally, the jury trial is the cornerstone of criminal adjudication. As long as there has been criminal justice in America, the independence of citizen jurors has been understood to be an indispensable structural check on executive, legislative power, and even judicial power.

Yet as this Court has repeatedly recognized, "criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Indeed, in the last year, 98.3% of federal criminal convictions were obtained from guilty pleas,

not jury trials.[2] The Petition repeatedly discusses this startlingly high plea-bargaining rate, correctly explaining that—as nearly all criminal adjudications are done through pleas—*Brady* must apply during these proceedings for its due process protections to have any practical relevance to most defendants. Pet. at 25-28.

Amicus writes separately to illustrate a separate but complementary point—that the practical eliminate of modern jury trials is driven in large part by exactly the sort of coercive plea-bargaining tactics at issue in this case. In other words, ensuring that defendants receive exculpatory evidence before entering a guilty plea is essential not just to make plea bargaining *fair*; it is essential for ensuring that pleas are genuinely *voluntary*, and that defendants are not unlawfully coerced into abandoning their right to a jury trial in the first place. Granting the Petition and holding that *Brady* applies during pre-trial plea negotiations would therefore be a small but vital safeguard against the wholesale erosion of the jury trial itself.

ARGUMENT

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT BECAUSE OF ITS RELATIONSHIP TO THE JURY TRIAL.

Brady v. Maryland, 373 U.S. 83, 87 (1963), articulated the landmark rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of

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[2] UNITED STATES SENTENCING COMMISSION, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56, *available at* https://bit.ly/3pIPZJQ.

the good faith or bad faith of the prosecution." As a formal, doctrinal matter, this rule is grounded in the Fourteenth Amendment's Due Process Clause, as its fundamental purpose is "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985).

With respect to plea bargaining, however, the *Brady* rule has special importance because it is essential for ensuring that pleas are voluntary in the first place. To wit, nearly every court that has embraced the majority position—that *Brady* does apply pre-plea—has emphasized that withholding material, exculpatory information at this stage renders a plea uninformed, unintelligent, or otherwise involuntary.[3]

Of course, a guilty plea is "an event of signal significance" that necessarily results in a defendant abandoning their right to a jury trial entirely. *Florida v. Nixon*, 543 U.S. 175, 187 (2004). Thus, anything that threatens the voluntariness of guilty pleas equally threatens the jury trial itself—not because *Brady* is merely a "trial right," but because its due process principles are intended, in part, to ensure that defendants

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[3] *See, e.g.*, *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) ("[A] defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim."); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994) ("[T]he prosecution's violation of *Brady* can render a defendant's plea involuntary."); *Campbell v. Marshall*, 769 F.2d 314, 315 (6th Cir. 1985) (withholding *Brady* information "so taint[ed] the plea-taking as to render the guilty plea involuntary or unintelligent"); *Medel v. State*, 184 P.3d 1226, 1235 (Utah 2008) (failure to disclose "material exculpatory evidence" renders a guilty plea involuntary); *Gibson v. State*, 514 S.E.2d 320, 523-24 (S.C. 1999) (a defendant "may challenge the voluntary nature of his guilty plea . . . by asserting an alleged *Brady* violation").

can make a meaningful *choice* about whether to exercise their right to a trial. To that end, the importance of the question presented is underscored by the centrality of the criminal jury trial to the American vision of criminal justice.

The right to a jury trial developed as a "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." *Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968) (trial by jury is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *see also Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone's characterization of "trial by jury as 'the grand bulwark' of English liberties").

The tradition of independent juries standing as a barrier against unsupported or unjust prosecutions pre-dates the signing of Magna Carta, and likely even the Norman Conquest. *See* CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13 (2d ed. 2014); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 51-85 (1852) (discussing this tradition both before and after Magna Carta). In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

A landmark pre-colonial decision on the sanctity of the jury trial was *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). Bushell was a member of an English jury that refused to convict William Penn for violating the Conventicle Act, which prohibited religious assemblies of more than five people outside the auspices of the Church of England. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 236-49

(1985). The trial judge essentially ordered the jury to return a guilty verdict and even imprisoned the jurors for contempt when they refused. However, the Court of Common Pleas granted a writ of habeas corpus to Bushell, cementing the authority of a jury to acquit against the wishes of the Crown. *Id.*

This understanding of the jury trial was firmly established in the American colonies as well. One notable case involved John Peter Zenger, who was charged with seditious libel for printing newspapers critical of the royal governor of New York. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-72 (1994). The jury refused to convict notwithstanding Zenger's factual culpability, thus establishing an early landmark for freedom of the press and jury independence. *Id.* at 873-74. Indeed, "Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies." *Id.* America's Founders thus "inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation." CONRAD, *supra*, at 4.

Ultimately, the jury trial was understood not just to be a fair means of deciding guilt or innocence, but as an independent institution designed to give the community a central role in the administration of justice. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Thompson v. Utah*, 170 U.S. 343, 349-50

(1898) (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779). Alexander Hamilton observed that "friends and adversaries of the plan of the [constitutional] convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government." THE FEDERALIST NO. 83.

Indeed, the community itself has an interest, complementary to but separate from the defendant's, in seeing that its verdicts—rendered through a process that "the Constitution regards as the most likely to produce a fair result," *Yeager v. United States*, 557 U.S. 110, 122 (2009)—are respected. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches," the "jury trial is meant to ensure [the people's] control in the judiciary," and constitutes a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). By providing an "opportunity for ordinary citizens to participate in the administration of justice," the jury trial "preserves the democratic element of the law," *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991), and "places the real direction of society in the hands of the governed," AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88 (1998) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed. 1945)).

Thus, failure to enforce *Brady* disclosure rules preplea does not merely threaten the due process rights of defendants engaged in plea bargaining; it threatens the voluntariness of pleas themselves, which in turn

undermines the Constitution's axiomatic assumption that citizen juries should comprise the foundation of criminal adjudication in this country.

II. ENFORCING *BRADY* PRE-PLEA IS ESPECIALLY URGENT IN LIGHT OF THE VANISHINGLY SMALL ROLE THAT JURY TRIALS PLAY IN OUR CRIMINAL JUSTICE SYSTEM.

The jury trial is foundational to the notion of American criminal justice, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2 (emphases added). And the Sixth Amendment not only guarantees the right to a jury trial generally, but lays out in specific detail the form such a trial shall take. *See Faretta v. California*, 422 U.S. 806, 818 (1975) ("The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . .").

Yet despite their intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the

penal landscape and driven our vanquished jury into small pockets of resistance").

The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones*, 526 U.S. at 248. That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court."). And that fraction grows steadily smaller each year: in 2021, 98.3% of federal criminal convictions were obtained through guilty pleas. UNITED STATES SENTENCING COMMISSION, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56.[4]

These statistics are especially concerning because there is ample reason to believe many criminal defendants—regardless of factual guilt—are effectively coerced into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS., Nov. 20, 2014.[5] Indeed, according to the National Registry of Exonerations, 18 percent of known exonerees pleaded guilty to crimes that it is virtually certain they did not commit. *Why Do Innocent People Plead Guilty To Crimes They Didn't Commit?*, The Innocence Project (2018).[6] Yet, "[i]nstead of vacating their convictions on

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[4] *Available at* https://bit.ly/3pIPZJQ.

[5] *Available at* https://bit.ly/3KC6EHa.

[6] *Available at* https://bit.ly/3OHEptX.

the basis of innocence, the prosecution offers the wrongly convicted a deal—plead guilty." *Id.*

The government is at a distinct advantage during the plea-bargaining process. "Plea bargaining merges the[] accusatory, determinative, and sanctional phases of [criminal] procedure in the hands of the prosecutor." John H. Langbein, *Torture and Plea Bargaining*, 46 UNIV. CHI. L. REV. 3, 18 (1978). Therefore, it comes as no surprise to learn that many of those who plead guilty "have been induced by the government to do so." Clark Neily, *A Distant Mirror: American-Style Plea Bargaining through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 726 (2020).

Prosecutors have a wide array of tools at their disposal to pressure defendants into pleading guilty, including, but not limited to: threatening increased penalties for defendants hoping to go to trial (commonly known as the "trial penalty"),[7] threatening to add charges in an effort to increase a potential sentence,[8] the financial, logistical, and psychological burdens of pre-trial detention,[9] threatening to use uncharged or acquitted conduct to enhance a potential sentence,[10] and threatening to prosecute family members.[11]

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[7] *See generally* NAT'L ASSOC. OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://bit.ly/38IF8KG.

[8] *Id.* at 50.

[9] *See* Russel M. Gold, *Paying for Pretrial Detention*, 98 N.C.L. REV. 1255, 1269 (2020).

[10] *See* WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE 75 (2018).

[11] *Id.;* Neily, *supra*, at 730.

Most importantly for present purposes, of course, is the authority of prosecutors (in some jurisdictions) to withhold exculpatory evidence during plea negotiations. Indeed, one could hardly ask for a starker illustration of the coercive nature of this tactic than the facts of this very case. When the prosecutors in Mansfield's case entered plea negotiations, they literally had no complaining witnesses against the defendant that they were willing to put on the stand. Pet. at 5; Pet.App.42a. One of the prosecutors went so far as to suggest the case could "be disposed of w/out trial, since [the] victim cannot testify." Pet. at 7; Pet.App.42a.

But the prosecutors knew that Mansfield himself did not know just how weak their case against him was, and they endeavored to maintain this advantage by failing to comply with both *Brady* and a direct court order to disclose exculpatory information. Pet. at 5-6. They then leveraged this information asymmetry into aggressive use of the "trial penalty," offering 120 days if Mansfield took a plea, but threatening life imprisonment if he insisted on his trial rights. *Id.* at 6; Pet.App. 46a-47a, 62a. Had Mansfield been made aware that the prosecutors literally had no witnesses against him, he might well have been willing to risk those odds (or more likely, the prosecutors would have simply abandoned their hollow shell of a case). But in the absence of the information to which he was constitutionally entitled, Mansfield felt he had no choice but to bend to their demands.

There is no panacea for the jury's diminishing role in our criminal justice system; it is a deep, structural problem that far exceeds the bounds of any one case or doctrine. But the least we can do to avoid further discouraging defendants from exercising their right to a

jury trial is to ensure they have access to material, exculpatory evidence prior to the entry of a guilty plea.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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