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July 20, 2018

VIA FEDERAL EXPRESS

Clerk of the Court
Genesee County District Court
630 S. Saginaw Street
Flint, MI 48502

Re: *People of the State of Michigan v. Nicolas Leonard Lyon*
Case No. 17T-01355-FY

Dear Clerk:

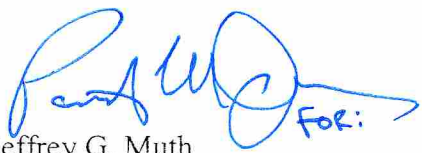
Enclosed for filing is one (1) original and one (1) Judge's copy of *Council of State and Territorial Epidemiologists' Motion for Leave to File Amicus Curiae Brief in Support of Defendant* and *Proof of Service* of same regarding the above-referenced matter. A check in the amount of \$20.00 is enclosed for the filing fee.

Also enclosed are *Notice of Appearance's* for attorney Jeffrey G. Muth and attorney Patrick M. Jaicomo. If you should have any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

MILLER JOHNSON

By

 For:
Jeffrey G. Muth

JM:jmb
Enclosures

cc: Todd Flood
Charles E. Chamberlain

STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

NICOLAS LEONARD LYON,

Defendant.

Case No. 17T-01355-FY

Hon. David J. Goggins

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COUNCIL OF STATE AND TERRITORIAL EPIDEMIOLOGISTS’
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Council of State and Territorial Epidemiologists (CSTE) moves this Court for leave to file a brief as amicus curiae in this Court. CSTE states in support of its motion:

1. CSTE is an organization of member state and territories representing public health officials who investigate patterns and causes of injury and disease.

2. Epidemiologists seek to reduce the risk and occurrence of negative health outcomes through research, community education, and health policy.
3. CSTE works to strengthen the role of applied epidemiology to drive public health and policy actions.
4. As such, CSTE also provides technical advice and assistance to partner organizations and to federal public health agencies such as the Centers for Disease Control and Prevention (CDC). The organization supports effective public health surveillance and sound epidemiologic practice through training, capacity development, and peer consultation.
5. CSTE has a profound interest in the outcome of this matter, because it is deeply concerned about the implications of high-ranking public health officials being prosecuted for the alleged errors or omissions of their agencies in carrying out infectious disease investigations.
6. CSTE hopes to impress upon the Court that the negative public policy and public health consequences of the criminal prosecution of officials for their agencies or departments' investigations will be far-reaching and severe, and that the law does not support the charges being pursued in this case.
7. As friend of the Court, CSTE will be able to present to the Court a different perspective regarding the issues in this case than those presented by the parties.
8. Michigan's judicial policy favors amicus filings. *Grand Rapids v Consumers Power Co*, 216 Mich 409, 414-415; 185 NW 852 (1921).

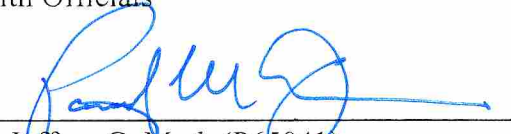
WHEREFORE, CSTE requests that this Court enter an order granting this Motion for Leave to File Amicus Curiae Brief and accept for filing CSTE's proposed amicus curiae brief, which is attached as **Exhibit A**.

Respectfully submitted,

MILLER JOHNSON
Attorneys for Amici Curiae, Council of
State and Territorial Epidemiologists
and Association of State and Territorial
Health Officials

Dated: July 20, 2018

By



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EXHIBIT A

STATE OF MICHIGAN
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Defendant.

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COUNCIL OF STATE AND TERRITORIAL EPIDEMIOLOGISTS'
AMICUS BRIEF IN SUPPORT OF DEFENDANT NICOLAS LEONARD LYON

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INTRODUCTION AND STATEMENT OF INTEREST

The Council of State and Territorial Epidemiologists (CSTE) is an organization of state, local, territorial, and tribal epidemiologists and related public health officials who monitor and investigate patterns and causes of injury and disease. Epidemiologists seek to reduce the risk and occurrence of negative health outcomes through surveillance, assessments, community education, and health policy. CSTE works to strengthen the role of applied epidemiology to drive public health and policy actions. As such, CSTE also provides technical advice and assistance to partner organizations and to federal public health agencies such as the Centers for Disease Control and Prevention (CDC). The organization supports effective public health surveillance and sound epidemiologic practice through training, capacity development, and peer consultation.

CSTE has a profound interest in the outcome of this matter because it is deeply concerned about the implications of public health officials being prosecuted for the alleged errors or omissions of their agencies in carrying out infectious and other disease investigations. The charges in this case related to alleged shortcomings in the investigative process are truly unprecedented in American jurisprudence. In addition to overturning fundamental legal principles, including sovereign immunity and the legal duty owed by public health officers, the criminalization of the decision-making process during the course of an active public health investigation would set new and dangerous precedent that should be of concern to all public officials.

CSTE hopes to impress upon the Court that the negative public policy and public health consequences of the criminal prosecution of officials for their agencies' or departments' investigations will be far-reaching and severe, and that the law does not support the charges being pursued in this case. For these reasons, CSTE respectfully requests that the Court abstain from

criminalizing the administration of public health and the scientific process that is involved with investigating disease outbreaks.

Argument

I. There is no common-law or statutory duty that supports criminal charges related to the public health investigative process, including the decision of whether to issue public notice.

In its charging documents, the prosecution contends that state officials have a “duty to notify the public of any and all serious health concerns.” In general, public health officials have a duty to protect public health; however, notification of the public is not a stated duty. As CSTE understands it, the prosecution is asking this Court to make new criminal law that will unduly pressure public health officials and improperly criminalize the investigative process. CSTE hopes to impress upon the Court that imposing such a duty for the first time in this case will have broad, negative ramifications to public health.

II. There is no basis to impose criminal penalties for the discretionary decision of whether to provide general public notice of an outbreak before the epidemiological investigation is complete.

The decision by public health officials of whether and when to provide public notice is a matter of judgment based on the particulars of the disease and of the investigation; each outbreak investigation is unique and can differ in approach even among outbreaks of the same disease, especially depending upon the setting or persons affected. Such decisions are always difficult, without any clear guidelines, industry standards, or algorithms to aid public officials. CSTE is not aware of any state public health law that has explicit or implicit language on when public notice should be given during an outbreak. Thus, in the absence of any legal definitions or requirements, the question of notice is one of professional judgment. The exercise of this judgment involves risk assessment, weighing the benefits to the public against the potential adverse consequences of the

notice, including implicating the wrong source based on preliminary data. Such adverse consequences can include unduly exacerbating existing fear in a community and causing panic. In certain circumstances, the correct decision may be to wait on issuing notice until, for example, the source of the outbreak is more definitively identified or the investigative findings are verified or complete.

Given the lack of any legal requirements regarding the issuance of public notice and the unique circumstances associated with any particular outbreak or public health crisis, any criminal charges related to the decision of when to issue notice are wholly inappropriate and detrimental to public health. Public health officials must already balance and weigh numerous factors in deciding whether, when, and how to issue public notice in the midst of a health crisis. Public health officials and infectious and other disease investigators must be allowed, in the course of an investigation, to follow the facts wherever they may lead and then make the often difficult decisions of whether, when, and how to provide public notice, without the fear of criminal prosecution for making the “wrong” decision in hindsight.

III. CSTE is not aware of any court criminalizing the scientific process associated with an outbreak investigation.

There is no case law with circumstances similar to those here that would put public health officials on notice that they could be prosecuted based on the manner in which their agencies investigate public health crises. Indeed, in the civil context, CSTE is unaware of a court ever ruling that a public health official is not entitled to qualified immunity based on the failure to properly publicize a public health concern.

Under federal law, “[a] government official performing a discretionary function is entitled to qualified immunity in his personal capacity where the official’s action (or failure to act) does not violate constitutional standards in light of clearly established law at the time the official acted.”

Barber v Salem, 953 F2d 232, 236 (CA 6, 1992). Qualified immunity applies even when a governmental employee may be mistaken about the law or facts. *Pearson v Callahan*, 555 US 223, 232; 129 S Ct 808; 172 L Ed 2d 565 (2009). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions . . . it protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Ashcroft v al-Kidd*, 563 US 731, 743; 131 S Ct 2074; 179 L Ed 2d 1149 (2011) (citations omitted).

There are no cases holding public health officials responsible for not raising public alarm quickly enough. To the contrary, the handful of cases that do address even remotely similar circumstances hold just the opposite. For example, in *Lombardi v Whitman*, 485 F3d 73 (CA 2, 2007), allegations that governmental officials made false statements that caused exposure to dangerous air pollutants were held to be insufficient to overcome a qualified immunity defense. Likewise, in *Branch v Christie et al*, 2018 WL 337751 (D NJ Jan 8, 2018), allegations that governmental officials knowingly exposed school children to water that was contaminated with unsafe levels of lead and concocted a scheme to cover up the health hazard, were also held to be insufficient to state a claim to overcome qualified immunity.

Qualified immunity supports an important public policy of ensuring that capable individuals are not deterred from accepting public health positions out of fear of personal liability for the decisions that are made in the course of public health investigations. If the charges in this case were to stand and a public health official’s delay in publicizing a potential health concern could give rise to criminal charges, public health officials (and other public officials) would be exposed to potential criminal liability from any outbreak of illness if it could be plausibly alleged that the agency should have responded differently or more quickly. The prosecution’s theory in

this case risks transforming every outbreak in any jurisdiction into the potential for criminal liability for public health officials.

Conclusion

Based on the foregoing, the Council of State and Territorial Epidemiologists respectfully requests that the Court dismiss the criminal charges in this case. If it does not, all public health will suffer.

Respectfully submitted,

MILLER JOHNSON

Attorneys for Amici Curiae, Council of State and
Territorial Epidemiologists
and Association of State and Territorial Health
Officials

Dated: July 20, 2018

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NOTICE OF APPEARANCE

Patrick M. Jaicomo, of Miller Johnson, hereby enters his appearance as counsel for Amicus Curiae, Council of State and Territorial Health Officials, in the above-captioned matter.

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Attorneys for Amicus Curiae Council of State and
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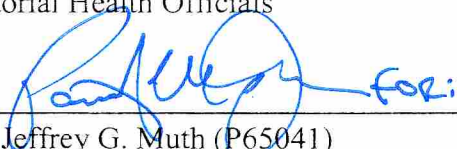
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PROOF OF SERVICE

Jessica Brickner states that she is an employee of Miller Johnson and that on the 20th day of July, 2018, she served a copy of Council of State and Territorial Epidemiologists' Motion for Leave to File Amicus Curiae Brief in Support of Defendant and Notice of Appearance's for attorney Jeffrey G. Muth and Patrick M. Jaicomo via first class mail on:

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Jessica Brickner