LOUISIANA FIRST CIRCUIT
COURT OF APPEAL

No. 2019-CA-0125 and No. 2019-CW-0436

JOSEPH ALLEN, STEVEN AYRES, ASHLEY HURLBURT, RORY KEVIN GATES, JAMES HOWARD, DEMARCUS MORROW, RODNEY WALLER, KEITH ARCEMENT, FREDERICK BELL, GENARO CRUZ GOMEZ, SAM YBARRA, MICHAEL CARTER, AND JAMES PARK, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED

VERSUS

JOHN BEL EDWARDS IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA, ZITA JACKSON ANDRUS, CHRIS L. BOWMAN, FLOZELL DANIELS, JR., THOMAS D. DAVENPORT, JR., PATRICK J. FANNING, W. ROSS FOOTE, KATHERINE E. GILMER, MICHAEL C. GINART, JR., FRANK HOLTHAUS, DONALD W. NORTH, AND MOSES JUNIOR WILLIAMS, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF LOUISIANA PUBLIC DEFENDER BOARD; AND JAMES T. DIXON, JR., IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE PUBLIC DEFENDER

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE, DOCKET NO. C655079,
DIVISION: A, SECTION 27

MOTION FOR LEAVE TO FILE BRIEF OF DUE PROCESS INSTITUTE, AMERICAN CONSERVATIVE UNION FOUNDATION NOLAN CENTER FOR JUSTICE, CATO INSTITUTE, FREEDOMWORKS FOUNDATION, THE JAMES MADISON INSTITUTE, R STREET INSTITUTE, INNOCENCE PROJECT NEW ORLEANS, THE INNOCENCE PROJECT, NATIONAL LEGAL AID & DEFENDER ASSOCIATION & PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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1.

The Due Process Institute, American Conservative Union Foundation Nolan Center for Justice, Cato Institute, FreedomWorks Foundation, James Madison Institute, R Street Institute, Innocence Project New Orleans, Innocence Project, National Legal Aid & Defender Association, and the Public Defender Service For The District of Columbia respectfully seek this Court's permission to file the attached *amicus* brief.

2.

These cases present unique issues for the Court's consideration. Lurking beneath the parties' arguments are complex constitutional questions that must also be considered.

3.

Amici offer the attached brief to address the Sixth Amendment's development and historical interpretation—an important matter of constitutional law that might otherwise escape the Court's attention on the parties' briefing.

4.

This motion for leave is timely because the Court has not yet resolved either case and prepares to rehear oral argument in case no. 2019-CA-0125 on January 14, 2020.

5.

Given the complex history of this case and the important issues at stake, *Amici* urge this Court to consider the attached brief in its resolution of these cases.

Respectfully submitted,

/s/ Chloé M. Chetta

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel of record listed below by facsimile, electronic mail, and/or placing same in the United States mail, postage prepaid and properly addressed, this 8th day of January, 2020.

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ORDER

Considering the foregoing Motion for Leave to file an Amici Curiae Brief;

IT IS ORDERED that the Motion is granted and the amici curiae brief may be filed.

Baton Rouge, Louisiana, this ____ day of _____, 2020.

_____

LOUISIANA FIRST CIRCUIT
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INTRODUCTION

Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, it creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Since its founding, Due Process Institute has participated as an *amicus curiae* in a host of state and federal cases presenting critically important criminal legal issues.

The American Conservative Union Foundation is the one of the nation's oldest grass-roots organizations dedicated to advancing conservative beliefs and public policies at all levels of government. Its Nolan Center for Justice works to reform America's criminal justice system to improve public safety, foster greater government accountability, and advance human dignity.

The Cato Institute is a non-partisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on accountability, overcriminalization, and restoring jury trials to their proper role as the default mechanism for adjudicating criminal charges in America.

The mission of FreedomWorks Foundation is to educate and empower Americans with the principles of individual liberty, small government, and free markets.

The James Madison Institute (JMI) is a non-partisan, non-profit, public policy think tank that works to advance the principles of limited government and free markets. Formed in 1987, JMI promotes policy solutions that provide Floridians greater access to economic opportunity. JMI's policy recommendations are rooted in the principles found in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism and individual liberty.

The R Street Institute is a non-profit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

Innocence Project New Orleans is a non-profit law office that represents innocent prisoners in Louisiana and Mississippi. It has freed or exonerated 36 innocent people. It also advocates for sensible criminal justice policies that reduce wrongful convictions. Its experience is that well-resourced counsel is the best safeguard against wrongful conviction.

The Innocence Project ("Project") provides *pro bono* representation to indigent prisoners whose innocence can be established through post-conviction evidence. The Project seeks to prevent future miscarriages of justice by researching their causes, participating as *amicus curiae* in cases of broader significance, and pursuing reforms to enhance the truth-seeking function of the criminal justice system. As an organization that has exonerated ten individuals in Louisiana who collectively served 200 years of wrongful imprisonment—several of whom received woefully ineffective Assistance of Counsel—the Project has a compelling interest in ensuring Louisiana has an adequately funded public defender system.

National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services for those who cannot afford counsel. For over 100 years, NLADA has pioneered initiatives that promote access to justice and right to counsel at the national, state, and local level. NLADA advocates on behalf of our country's public defense providers, civil legal aid attorneys, and their clients. In furtherance of this work, NLADA develops standards and provides training and technical assistance to advance its goal of securing equal justice.

The Public Defender Service For The District Of Columbia is a federally funded, independent organization committed to providing and promoting high quality legal representation for indigent persons facing a loss of liberty in D.C. It heartily supports the people of the state of Louisiana in their endeavor to achieve the same.

Due Process Institute and its co-*amici* seek to participate here because the ultimate disposition of this case presents a key criminal legal question: whether the Sixth Amendment right to counsel prohibits states from systemically underfunding public defender offices. In our view, the answer is plainly "yes." This affirmative answer is compelled by the text of the Sixth Amendment, which provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In the modern era of institutional prosecutorial and police agencies, funded by budgets in the millions and sometimes hundreds of millions of dollars, this Sixth Amendment text cannot meaningfully be understood without some baseline level of commensurate funding for the defense function—otherwise the "right" to the "Assistance of Counsel for his defence" would be meaningless. The same answer is compelled by history, as the Framers of the Sixth Amendment intended to enshrine a vibrant adversarial system within the Constitution, not "a sacrifice of unarmed prisoners to gladiators." *United States v. Cronic*, 466 U.S. 648, 657 (1984). And the same answer is compelled by almost a century of precedent (explained below), as the United States Supreme Court has made clear that the Sixth Amendment right to "Assistance of Counsel for his defence" encompasses the right to professional, appointed, compensated counsel for the public's defense. So, as a matter of text, history, and precedent, the Sixth Amendment compels the States, when they establish professional prosecutorial and police functions, to allocate sufficient funds for a meaningful defense within the adversarial system.

ARGUMENT

I. THE TEXT OF THE SIXTH AMENDMENT SEEKS TO PRESERVE AND STRENGTHEN THE ADVERSARY SYSTEM BY PROVIDING A CONSTITUTIONAL RIGHT TO THE "ASSISTANCE OF COUNSEL FOR [THE] DEFENCE"

In interpreting the Sixth Amendment right to the "Assistance of Counsel" we begin with the text of the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The most critical term here is "assistance"—a term synonymous with "directing the judgment or conduct of another," and "engaged in the direction of a cause in court."[1] Thus, the text of the Sixth Amendment does not simply guarantee the accused a right to a "counsel," but to a counsel who is actively "assisting" an accused in a court proceeding "for his defence." *United States v. Cronic*, 466 U.S. 648, 654 (1984). This latter phrase "for his defence" is also important as it identifies this right as one within the adversarial system. The inclusion of this right within the Sixth Amendment is critical as well, as the amendment guarantees the accused a host of other procedural legal rights—the right to trial by an impartial jury, in a suitable venue, with proper notice of the charge, with confrontation of witnesses against him, and compulsory process—that would all become empty promises if they were left to the accused alone to enforce. *Id.* at 653-54; *Kaley v. United States*, 571 U.S. 320, 344 (2014) (Roberts, C.J., *dissenting*) ("In many ways, th[e right to counsel] is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys." (citing *United States v. Cronic*, 466 U.S. at 653-54 (1984))). In other words, the panoply of rights guaranteed in the Sixth Amendment—and to some extent the amendment itself—would be rendered virtually meaningless without the

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1 *See* definitions at www.dictionary.com.

"guiding hand of counsel" contemplated by the text of the Sixth Amendment. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Indeed, in *Powell*, after citing to the text of the Sixth Amendment and reviewing historic practice related to the Assistance of Counsel, the United States Supreme Court articulated exactly the role that counsel was contemplated in "assisting" for the defense:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 68-69.

In short, the text of the Sixth Amendment does not just afford a "right" to "counsel"—it does much more. The Framers provided Americans with a constitutional right to the "Assistance of Counsel for [the] defence" a right that applies in "all criminal prosecutions," and in the context of a host of guarantees that can only be afforded with counsel prepared to offer a defense designed to counter the prosecution's case. "The right to the effective [A]ssistance of [C]ounsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656.

II. THE FRAMERS WERE REFORMERS WHO SOUGHT TO EMBED THE CRUCIBLE OF MEANINGFUL ADVERSARIAL TESTING INTO THE AMERICAN CRIMINAL JUSTICE SYSTEM.

History confirms that the Framers sought to embed "the crucible of meaningful adversarial testing" into the American criminal legal system through the Sixth Amendment's "Assistance of Counsel for [the] defence" text. Our system, in stark contrast to the English system, would match two comparable adversaries—the

State and the accused—in a fair battle. This imperative prompted the Framers to seek to deviate, to the greatest extent possible, from what they viewed as one-sided "sham" proceedings, in which the Crown had all the resources and often interfered with the accused's ability to present a defense. Seeking to even the scales, the Framers adopted a vibrant and uniquely American right that went well beyond contemporary English law by including not just the right to counsel, which England did not yet have, but the right to counsel's affirmative "Assistance . . . for [the] defence"—i.e., the right to meaningful and effective assistance in presenting the accused's defense. We discuss this history in more detail below.

A. The Framers Adopted the Sixth Amendment in Part to Reform and Rectify Restrictions The English System Had Placed on The Right to Counsel.

It is easy to see why, at the time of Founding, the Framers were dissatisfied with the scope of the English laws related to counsel. In 1789, English law forbade defendants from hiring counsel for most felonies. *Powell*, 287 U.S. at 65. To be sure, dating back to the 1200s, English courts sometimes appointed counsel to unrepresented defendants where it was not expressly forbidden, and even required counsel for misdemeanors. Felix Rackow, *The Right to Counsel: English and American Precedents*, The William and Mary Quarterly, Vol. 11, No. 1, (Jan. 1954) at 4. But even then, defendants could not retain counsel to develop the facts at a felony trial; rather, the retention was limited to counsel's assistance on questions of law. *Id.* at 5 n.9 ("It is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, *unless some point of law shall arise proper to be debated*." (emphasis added) (citing Edward Coke's *Institutes of the Laws of England* 137)). The Crown justified denying defendants retained counsel because the professional judge (being paid upwards of £1,000 a year by the Crown) "would act as counsel for the defendant, seeing to it 'that the indictment, [trial], and other proceedings be good and sufficient in law'" at

the expense of the Crown. *Id.* at 6 (citing Coke's *Institutes* 137); *see* United Kingdom Courts and Tribunals Judiciary, History of the Judiciary, https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary/ (last visited December 10, 2019) (noting that by 1645, King Charles I paid professional English judges £1,000 a year).

Long before America's founding, the imbalanced English system was moving slowly toward reform. In 1696, Parliament passed the Treason Trials Act, which expressly permitted retaining counsel for charges of treason. The Act was the "one and only statute that guaranteed a right to counsel in England prior to the adoption of the Bill of Rights." Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 Iowa L. Rev. 1999, 2001 (2014) [hereinafter Hashimoto, *Originalist Argument*]. Parliament's reasoning for this reform is critically important: Treason was one of the few felonies for which the Crown retained professional counsel to prosecute, so Parliament sought to balance the proceedings through the Act. *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263, 309–10 (1978); *see also* Hashimoto, *Originalist Argument* at 2002.

The Framers clearly approved of this evolution and were influenced by it, but they wanted to move faster and more broadly. As a result, they drafted a far-reaching provision that ensured that not just discretion to allow counsel where it was not forbidden and not simply the ability to appoint a neutral legal adviser who could also act as the judge. Rather, the Framers adopted a "right" to the "Assistance of Counsel for [the] defence"—a right that would attach automatically "in all criminal prosecutions." With this text, the Framers explicitly abolished the English rules denying counsel in most cases and also ensured that counsel would not be a neutral magistrate advising purely on questions of law or constrained by a dual judicial-defense function. Instead, American "defence" counsel would serve as a unique and

much-needed bulwark between the State and the accused—loyal only to the accused and able to provide full "assistance" during the criminal trial process.

There is no other plausible way to interpret this language. As the Supreme Court explained in *Powell v. Alabama*: "how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." 287 U.S. at 61. In the Sixth Amendment, the Framers constitutionalized a more complete and more advanced adversary system, building on the foundation of the English Parliament's limited reforms in Treason cases. *See* Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 Widener L. Rev. 323, 327-328 (2009) ("[T]he fact that the states and the federal government constitutionalized the right to counsel implies that America had already accepted an adversary system by the 1780s, when England was just taking its first significant steps in that direction."). The Sixth Amendment's guarantees were fully in line with the American consensus views on the subject at the time: Prior to the enactment, twelve of the thirteen original colonies had already rejected counsel restrictions stemming from English common law. *Powell*, 287 U.S. at 64.

The climate of reform that existed in 1789 is also manifested in the first federal criminal code, one of Congress's first statutes after ratifying the Constitution. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790) (the "Crimes Act of 1790"). Section 29 of the Crimes Act of 1790 explicitly includes a right to appointed counsel for treason and capital cases: "And that every person so accused and indicted for any of the crimes aforesaid [treason and capital] . . . the court before whom such person shall be tried, or some judge thereof, *shall, and they are hereby authorized and required immediately upon his*

request to assign to such person such counsel, not exceeding two, as such person shall desire . . . ." (emphasis added). This passage fundamentally incorporated the right to appointed counsel within the American legal system. William M. Beaney, *The Right to Counsel in American Courts*, 29-30 (1955). By contemporaneously mandating appointed counsel in cases where a professional prosecutorial function was beginning to exist, the Framers evidenced their understanding that the "right" to "Assistance of Counsel" included the appointment of counsel by the court when necessary to even the scales between prosecution and the defense. This was important in 1789, but it became much more important as the prosecutorial and police functions expanded dramatically in the nineteenth and twentieth centuries.

B. The Development of Professional Prosecutorial and Police Functions, Without the Evolution of Corresponding Defense Functions, Threatened to Undo The Adversarial Balance The Framers Had Enshrined In The Sixth Amendment.

At the time of the Founding, the American criminal justice system may have lacked a significant number of professional attorneys, but criminal prosecution especially saw rapid growth in professionalization and complexity following the Civil War. Initially, the prosecution followed a private model where the accusers and victims played an out-sized role in trying a case before a magistrate. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 Am. Crim. L. Rev. 1309, 1325-26 (2002) ("In most colonies, private citizens initiated the process by bringing a complaint before the Justice of the Peace . . . . Indeed, private citizens continued to initiate and litigate criminal prosecutions in New York . . . even as late as 1891."). The idea of a professional and fully dedicated public prosecutor soon evolved from the private model "in response to fears of social disorder." *Id.* at 1311. In the second half of the nineteenth century, the public wanted their prosecutors to be fully dedicated to pursuing cases with zeal. *Id.* The election of District Attorneys, accountable to constituents, marked the most

significant shift to a public model, where a defendant would find themselves across the bar from not just a mere complainant, but the full might of the state embodied in a paid professional attorney. *Id.* at 1328. By the late nineteenth century, "the District Attorney and the police had usurped the citizen's power to pursue or drop charges after the initial complaint." *Id.* at 1329.

Prosecutors were not the only branch of the criminal justice system that professionalized. American police began as informal volunteers and official constables paid by the fee system for their warrants, but by the 1880s, all major U.S. cities relied on municipal police forces with full-time employee officers accountable to a central governmental authority. Gary Potter, *The History of Policing in the United States, Part 1*, Eastern Kentucky University, Policy Studies Online, https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1 (last visited Dec. 10, 2019).

One factor motivating this increase in professional prosecutors and police forces was the increasingly complicated criminal code. The common law originally only had a handful of *malum in se* criminal offenses like murder, rape, robbery, and arson, but the code exponentially expanded towards upwards of 51 titles, 4,500 statutes, and 300,000 regulations over the nation's relatively brief history. *See* John Malcolm, *Defining the Problem and Scope of Over-criminalization and Over-federalization, Testimony before the Committee on the Judiciary Over-criminalization Task Force*, U.S. House of Representatives on June 14, 2013, Heritage Foundation, https://www.heritage.org/testimony/defining-the-problem-and-scope-over-criminalization-and-over-federalization (last visited Dec. 10, 2019).

In sharp contrast to the onslaught of police and prosecutorial resources, the resources available to the defense function grew less rapidly. *See* Sara Mayeux, *What Gideon Did*, 116 Colum. L. Rev. 15, 33 (2016) (explaining how public criminal defense was merely low-cost training for novice lawyers due to the funding

challenges before the mid-twentieth century). By the start of the twentieth century, this increasingly lop-sided resource allocation endangered the fairness the Framers had sought in enshrining an adversarial system. The police officers who arrested the defendant and investigated the allegations did so in a full-time capacity with centralized state funding and direction, and with an ever-increasing array of complex laws to choose from to press their cases. The state also employed teams of prosecutors who could dedicate their time, efforts, and zeal to obtaining a conviction. As illustrated by the United States Supreme Court's last century of jurisprudence,[2] without a corresponding defense function, the adversarial balance that the Framers sought to enshrine in the Sixth Amendment would be negated.

III. WELL-ESTABLISHED SUPREME COURT CASE LAW HAS VINDICATED THE FRAMERS' VISION OF THE SIXTH AMENDMENT

With this background, there can be little doubt that the Framers, who adopted the "Assistance of Counsel for [the] defence" reform in the Sixth Amendment to rectify the English system's imbalance between the "defence" and the State, would have insisted that, as the police and prosecution function professionalized and gained considerable resources, the State had a corresponding obligation to ensure the continuing vitality of the defense function as well.

The United States Supreme Court has brought this vision to life over the past century. Beginning in the 1920s and 1930s,[3] when the Supreme Court began to interpret the post-Civil War amendments to "incorporate" certain federal

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2 Throughout this brief, *amici* have framed their arguments in terms of emanating from the "Assistance of Counsel for [the] defense" clause given that the United States Supreme Court has relied upon that clause in its relevant right to counsel jurisprudence. *Amici*, however, wish to note for this Court that it need not rely solely on that clause to come to the conclusion that the State must provide adequate funding for the public's defense. Importantly, both the Constitution's jury trial right and guarantee of procedural due process (as old as the Magna Carta) embody the Framers' focus on maintaining adversarial balance.

3 *See* John Raeburn Green, *The Bill of Rights, The Fourth Amendment and the Supreme Court*, 46 U. Mich. L. Rev. 869 (1948) (noting that Supreme Court did not begin to interpret the Fourteenth Amendment as incorporating Bill of Rights to the States until the 1920s).

constitutional rights directly to the States, the Court began to make clear that the "Assistance of Counsel" called for by the Sixth Amendment included a substantive component. Thus, in 1932, the Supreme Court held by a margin of 7-2 in *Powell v. Alabama*, that the right to "Assistance of Counsel for the defence" as incorporated by the Fourteenth Amendment, did not simply require "appointment" of counsel for indigent defendants in capital cases, it required that defendants have the "aid of counsel" in a "real sense." 287 U.S. at 57. The Court in *Powell* noted that in the proceedings below, "no attempt was made to investigate" any defense, and "no opportunity to do so was given;" instead, the defendants were "immediately hurried to trial." *Id.* at 58. Under these circumstances, the Court determined that "the failure of the trial court to make an *effective* appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." *Id.* at 71 (emphasis added). The Court noted that its interpretation of the Sixth Amendment had previously been adopted by "an overwhelming array of state decisions," and was fully consistent with the history of the "Assistance of Counsel for [the] defence" clause of the Sixth Amendment. *Id.* at 58, 66-70 (*citing in part*, 2 Thomas M. Cooley Story on the Constitution, 4th ed. § 1949, p. 668).

Six years after *Powell*, in *Johnson v. Zerbst*, the United States Supreme Court construed the Sixth Amendment's right to "Assistance of Counsel for [the] defence" to require federal courts to appoint counsel for every indigent felony defendant. 304 U.S. 458 (1938). The Court explained its *per se* rule as follows:

> [T]his and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise

> policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to ". . . the humane policy of the modern criminal law . . ." which now provides that a defendant ". . . if he be poor, . . . may have counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.

Id. at 462-63. In short, the Supreme Court interpreted the Sixth Amendment as including a right to the appointment of counsel for indigent defendants in felony cases, and it did so by expressly acknowledging the Framers' creation of a right to *meaningful* adversary proceedings. *Id.*

Four years later, in *Betts v. Brady*, the United States Supreme Court partly applied this principle to the States, making clear that the Sixth Amendment compelled the appointment of criminal counsel for indigent defendants in some cases, but also holding that it did not *per se* require the appointment of counsel in every state court felony case. 316 U.S. 455 (1942). In declining to adopt a *per se* appointment of counsel rule, the Court examined English common law and state court practice at the time of the founding but fundamentally misconstrued the Framers' intention to reform that practice by adopting a much more vigorous right to the "Assistance of Counsel" in every criminal prosecution. *See id.* at 465-72. Indeed, the *Betts* Court eschewed any sort of textual analysis, ignored the reform-minded spirit in which the Framers drafted the Sixth Amendment's right to counsel, and ignored the disparity between the prosecutorial and defense functions that had arisen after the Sixth Amendment was adopted. Instead, the *Betts* Court suggested that the contemporaneous state constitutional and statutory provisions regarding the appointment of counsel were the "most authoritative sources" in determining the scope of the Sixth Amendment right to "Assistance of Counsel" as applied to the States.

Betts thus expanded the Sixth Amendment right to the "Assistance of Counsel" to the States in some instances but left it to a later court to fully implement the vibrant Sixth Amendment provision of the Framers. This ultimately occurred in

Gideon v. Wainwright, where the Court granted *certiorari* precisely to address the question of "whether *Betts v. Brady* should be reconsidered." 372 U.S. 335 (1963). Answering this question in the affirmative, the *Gideon* Court began its analysis with a recitation of the Sixth Amendment's text and concluded that although *Betts* had correctly determined that this Sixth Amendment right was significantly fundamental so that it must be applied to the States by virtue of the Fourteenth Amendment, it had ignored the text and history of the Sixth Amendment by failing to adopt the *per se* analysis of earlier cases such as *Powell* and *Johnson*. *Id.* at 343-44. As the *Gideon* Court explained:

> In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344. Since *Gideon* restored the historic meaning of the Sixth Amendment, the United States Supreme Court has repeatedly reaffirmed it, upholding the Framers' "adversary system benchmark" for implementing the objective of a fair trial. Jerold H. Israel, *Gideon v. Wainwright—From a 1963 Perspective*, 99 Iowa L. Rev. 2035, 2055 (2014). Thus, less than a decade after *Gideon*, the Court found that "the right . . . to have the Assistance of Counsel for . .

. defence" guarantees some baseline level of effectiveness. *See McMann v. Richardson*, 397 U.S. 759, 771 n.11 (1970) (holding that "the right to counsel is the right to the effective [A]ssistance of [C]ounsel.") As the Supreme Court has explained, the right to "effective" Assistance of Counsel is a natural reading of the text, and also embodies the Framers' historic vision that the "right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

Likewise, in *United States v. Cronic*, the United States Supreme Court held that the denial of counsel—either directly or indirectly through counsel's failure "to function in any meaningful sense as the Government's adversary"—violates the Sixth Amendment. 466 U.S. at 649. As the Supreme Court explained, while there is no guarantee of a perfect trial, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-57. In the years since, the Court has decided a host of cases defining the full contours of this Sixth Amendment right, adhering to this vision of the Sixth Amendment as the guarantor of a meaningful adversary process. *See, e.g., Wiggins v. Smith,* 539 U.S. 510 (2003) (right to effective counsel includes reasonable investigation of mitigating evidence in a capital case sentencing)*; United States v. Gonzalez-Lopez,* 548 U.S. 140, 147-48 (2006) (right to select counsel of choice within scope of Sixth Amendment); *Missouri v. Frye*, 566 U. S. 134 (2012) and *Lafler v. Cooper*, 566 U. S. 156, 165 (2012) (right to effective "Assistance of Counsel" during guilty plea proceedings); *United States v. Davila,* 569 U.S. 597, 610 (2013) (deprivation of counsel of choice right is structural error that undermines integrity of proceedings and necessitates new trial automatically).

IV. UNDERFUNDING PUBLIC DEFENSE IS INAPPOSITE WITH BOTH THE ORIGINAL UNDERSTANDING OF THE SIXTH AMENDMENT AND THE SUPREME COURT CASES INTERPRETING IT.

It is against this textual and historic backdrop that this Court must decide the important questions before it. *Amici* believe the parties are in the best position to argue the substantive issues currently before the Court, as well as the ultimate issue of whether Louisiana's public defender system meets the requirements of the Sixth Amendment, although *amici* do note with concern the stark statistical resource disparities between Louisiana's prosecution and defense functions set forth in the expert affidavits submitted in this case. *Amici* do believe, however, that the questions before this Court must be significantly informed by the text, history and scope of the Sixth Amendment right to "Assistance of Counsel" discussed above, as those sources shed clear light on what the Sixth Amendment commands. Clearly, the Framers drafted the "Assistance of Counsel" provision to ensure a true adversarial proceeding, in which an accused could be effectively represented by counsel—a counsel who could reasonably compete with the prosecutors and police on the other side of the case. While the Constitution may not demand mathematical equality between the prosecution and defense functions, the Framers wanted to eradicate the sort of "rigged" criminal justice system that the English had provided before the Revolution. As the Framers were keenly aware—some of them had been personally targeted by the English criminal justice system—true justice is impossible when the Government receives overwhelming resources and the defense function systematically receives meager ones.

Thus, to the extent that a meaningful systemic disparity exists between prosecutor and defense caseloads, investigative resources and/or other adversarial resources, those disparities reflect exactly what the Framers of the Sixth Amendment were attempting to defeat. The law is clear that the Sixth Amendment will not permit gross inadequacies in the funding of the public defense function. *See Tucker v. State*

of Idaho, 394 P.3d 54, 63 (Id. 2017) ("Alleging systemic inadequacies in a public defense system results in actual or constructive denials of counsel at critical stages of the prosecution suffices to show an injury in fact to establish standing in a suit for deprivation of constitutional rights."); *see also Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013); *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 222 (N.Y. 2010); *Duncan v. Michigan*, 774 N.W.2d 89 (Mich. Ct. App. 2009), *aff'd on other grounds*, 780 N.W.2d 843 (Mich. 2010). Like these other courts have done, this court should enforce the Constitution by ensuring that Louisiana guarantees the "Assistance of Counsel. . . for [the] defence" in "all criminal prosecutions."

CONCLUSION

Amici urge this court to enforce and uphold the Framers' vision of the adversarial system embodied in the Sixth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served upon counsel of record listed below by facsimile, electronic mail, and/or placing same in the United States mail, postage prepaid and properly addressed, this 8th day of January, 2020.

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