No. 17-1047

In the

Supreme Court of the United States

SCOTT DAVID PERREAULT,

Petitioner,

v.

ANTHONY STEWART, WARDEN,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Davis* v. *United States*, 512 U.S. 452, 459 (1994), this Court held that people who want the assistance of counsel during custodial interrogation must invoke the right "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." This Court has explained that the "requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and * * * provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Berghuis* v. *Thompkins*, 560 U.S. 370, 381 (2010) (alterations and omission in original) (quoting *Davis*, 512 U.S. at 458-459). Despite this Court's clear directive, division has emerged as to whether courts may divine ambiguity from clarity by reframing straightforward requests for counsel into negotiation tactics.

When an individual under custodial interrogation says, "Well, then let's call the lawyer then 'cause I gave what I could," is a state court ruling contrary to and an unreasonable application of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny in concluding that those words were "akin to negotiations," and thus not an unequivocal invocation of his right to counsel?

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INTEREST OF AMICUS CURIAE[1]

The National Association for Public Defense ("NAPD") is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models.

In addition, NAPD hosts annual conferences and webinars where early access to counsel, pretrial release, discovery, investigation, cross-examination, and law enforcement and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous advocacy and strives to obtain optimal results for clients both at the trial level and on appeal. Accordingly, NAPD has a strong

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Counsel of record for all parties received 10 days' notice of the filing of this brief and provided consent to its filing.

interest in the issues raised in this case and fully supports the grounds for certiorari identified by Petitioner. As Petitioner has detailed, this case presents a concrete federal and state court split on an important constitutional issue, and the Sixth Circuit's decision is on the wrong side of that split. Furthermore, the rationale underlying the Sixth Circuit's opinion would have far-reaching implications on the right to counsel, severely undermining the vital protections required by this Court's jurisprudence.

NAPD writes separately as *amicus curiae* to provide additional discussion, from the perspective of the indigent criminal defense bar, about the importance of the issue and the practical implications of the Sixth Circuit's decision if left in place.

SUMMARY OF ARGUMENT

From its founding, our nation has deemed fundamental the right of an accused to a fair trial. This Court has long held that this right cannot be realized unless people who face the concentrated power of government to interrogate, charge, convict, and sentence are guaranteed the assistance of counsel. This case is about the vital importance of legal representation at the earliest stages of a criminal case and the ability of people who want lawyers to assist them during custodial interrogation to invoke their rights and obtain that assistance. The decisions of the Sixth Circuit and Michigan

Court of Appeals in this case conflict with law that was clearly established long ago by this Court, create a split among the nation's circuits and states, sow confusion when clarity is needed regarding the invocation of the right to counsel, and contribute to the continuing erosion of that right. Moreover, the decisions weaken the right to counsel in the face of increasingly broad recognition that early access to an attorney is pivotal to reducing mass incarceration and, more specifically, to reducing the harsh impact of carceral systems in low-income communities and communities of color. If left intact, these decisions would unconstitutionally curtail the right to counsel and disproportionately harm the most vulnerable people who are targeted for investigation and potential prosecution in criminal legal systems across the country.

In this case, Petitioner unambiguously invoked his right to counsel under clearly established law. Nevertheless, the Michigan Court of Appeals divined ambiguity from clarity, dismissing Petitioner's request for a lawyer as "akin to negotiations." The Sixth Circuit held that this approach was a reasonable interpretation of this Court's precedent. Neither of these propositions is true. The Fifth Amendment right to counsel protects people who are subjected to custodial interrogation precisely because the power disparities and coercion inherent in that setting vitiate the capacity to negotiate with interrogating officers. Thus, the rulings and rationale below hinge on fundamental misunderstandings regarding both the reality of

police interrogations and the critical role of early access to assistance of defense counsel, particularly for the low-income people and people of color who are disproportionately subjected to policing, prosecution, and prison.

Petitioner has ably discussed the relevant precedents in his petition. *Amicus* writes separately to emphasize the importance of legal representation at precisely the phase Petitioner was denied his right to counsel. The rulings of the state and federal courts in this case widen an already yawning gulf between the minority of people who can afford to retain criminal defense counsel to protect their rights beginning at the earliest phases of criminal processes and the overwhelming majority of people who cannot do so. People of means can pay lawyers to meet them at the jailhouse or otherwise stave off uncounseled custodial interrogation. Poor people cannot. The Sixth Circuit's opinion, if left intact, would only increase the struggles of the majority of criminal defendants who cannot afford to hire counsel as they try to utter the increasingly elusive magic words required to get a lawyer's help. By further undermining the right of early access to counsel, the state and federal court rulings in this case will harm not only the people who are targeted by law enforcement for custodial interrogation and potential prosecution, but the fairness, reliability, and legitimacy of case outcomes and of the criminal legal systems across the country.

Defendants who obtain representation early have a leg up in avoiding pre-trial detention and

enjoy significantly better outcomes overall. Early access to counsel also benefits criminal justice systems by reducing well-documented risks of unwarranted detention and pretrial incarceration, inaccurate statements and false confessions, and civil rights abuses by police. Based on these benefits, jurisdictions in the United States and abroad have recognized the value of early access to counsel and are embracing stationhouse representation programs in order to ensure that people who are subjected to detention and interrogation have the opportunity to speak with an attorney as quickly as possible. These efforts illustrate that the Sixth Circuit wrongly minimized the crucial role that defense lawyers play from the moment government attention focuses on a particular individual—going so far as to dismiss an individual's invocation of the Fifth Amendment right to counsel during custodial interrogation as akin to the whim of a child fighting over a toy.

The Sixth Circuit's opinion is contrary to and an unreasonable application of this Court's clearly established precedent. If left uncorrected, it will do significant harm to the constitutional protections established by *Miranda* and its progeny. This Court should grant the petition and reverse the decision below.

ARGUMENT

I. THE LOWER COURTS' DECISIONS ARE CONTRARY TO, AND UNREASONABLE APPLICATIONS OF, THIS COURT'S CLEARLY ESTABLISHED PRECEDENT.

Petitioner has ably identified the ways in which the Sixth Circuit's decision (and the state court opinion it embraced) runs counter to clearly established law. As is required under this Court's precedent, Petitioner properly and unambiguously invoked his right to counsel by telling officers "Well, then let's call the lawyer then 'cause I gave what I could."

Amicus addresses this issue briefly to highlight the dangerous notion that police interrogations are akin to negotiations. They are not. The Sixth Circuit's reasoning is inconsistent, not only with reality, but with the decisions of this Court, as well. In *Miranda* itself, the Court acknowledged the obvious: that police officers are in a superior bargaining position during interrogations because they control the environment and purposefully place the suspect in a heightened state of vulnerability. *Miranda*, 384 U.S. at 449–59. The police also possess a powerful tool of persuasion: they can threaten the suspect with detention and punishment. Unlike the car dealership analogy wielded by the Sixth Circuit, the criminal suspect cannot walk off the lot if he doesn't get the deal he wants. The notion that a person under interrogation

is in a position to negotiate with the police is nonsensical.

It is also dangerous. The Sixth Circuit's ruling and rationale would significantly curtail suspects' ability to invoke their right to counsel. Its reasoning (i.e., that a suspect asking for a lawyer is negotiating and not actually invoking his or her right to an attorney) could apply to any request for counsel. It therefore conflicts with this Court's clear precedent. By requiring an unambiguous invocation of one's right to counsel, *Miranda* and its progeny have established an "objective inquiry that 'avoid[s] difficulties of proof and * * * provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Berghuis v. Thompkins*, 560 U.S. at 381 (alterations and omission in original) (quoting *Davis*, 512 U.S. at 458-459). Instead of acknowledging the obvious clarity of the rights invocation in this case, the courts salted the "linguistic minefield of disqualifying language" that separates people who are under custodial interrogation from the aid of counsel with another in a long line of improvised explosive devices. *See* Janet Ainsworth, *Curtailing coercion in police interrogation: the failed promise of Miranda v. Arizona*, THE ROUTLEDGE HANDBOOK OF FORENSIC LINGUISTICS 119 (2010).

The Sixth Circuit grossly undervalues the role of counsel. As this Court's opinions have made clear, criminal defense lawyers are not bargaining chips, but vital players in the justice system. This is why a suspect's invocation of their right to counsel is supposed to halt an interrogation. *See Edwards v.*

Arizona, 451 U.S. 477, 484-85 (1981). Analogies to car buyers, squabbling children, and civil parties reveal a deep misunderstanding of the role of criminal defense counsel in general, and more specifically, the role of public defense lawyers upon whom the vast majority of defendants rely. The Sixth Circuit's dismissive posture toward criminal defense counsel is also at odds with this Court's jurisprudence, which time and again has underscored the importance of representation. And, as discussed at length below, defense counsel's participation as early as possible in the process is particularly fundamental to the process's fairness.

The lower courts' opinions would also widen the gulf between the experience of affluent defendants and their indigent peers. This result is counter to the Court's repeated admonishment that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). Despite this Court's guidance, the lower courts' decisions here will only serve to exacerbate disparities between rich and poor defendants in our criminal legal systems. As discussed more fully below, the people most likely to be in a position to "negotiate" with law enforcement are actually the least likely to be impacted by the heightened standard for invoking the right to counsel established by the Sixth Circuit's opinion, as they have the means to retain counsel who will meet them at the jailhouse door, if not sooner.

II. THE SIXTH CIRCUIT'S REASONING WOULD DIMINISH EARLY ACCESS TO LEGAL COUNSEL AND DISPROPORTIONATELY IMPACT VULNERABLE DEFENDANTS.

Early access to counsel is fundamental to a fair justice system. If left unchecked, the Sixth Circuit's reasoning would raise the bar for defendants seeking to invoke their right to counsel. This shift would have far-reaching consequences, but it would be especially pernicious as applied to vulnerable groups such as juveniles and individuals with mental disabilities and illnesses. It would also have a lopsided impact on those who are most frequently in contact with the criminal legal systems: low-income individuals who are disproportionately people of color.

A. Early access to legal representation benefits defendants and justice itself.

Early access to legal counsel is integral to a fair and efficient justice system. *Miranda*, 384 U.S. at 469 ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."). Representation at the interrogation phase can protect defendants against self-incrimination and prevent unnecessary detention of individuals who cannot afford to post bail. The involvement of counsel is not just good for defendants, however, as the presence of an attorney can also prevent false admissions and confessions as well as civil rights abuses that diminish public faith

in law enforcement and criminal legal systems in general.

Although people have the right to an attorney during custodial interrogation, unless they know an attorney whom they can call (and afford to pay), they are on their own until formally charged. This is because the Sixth Amendment right to counsel does not attach until formal charges are filed. *See Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 210 (2008) (emphasizing need to "get a lawyer working" early in criminal proceedings); *see also* Eve Primus, *Disentangling* Miranda *and* Massiah*: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U.L. REV. 1085 (2017). Thus, early access to counsel is especially critical for indigent clients who cannot afford an attorney and may not be appointed one until after interrogation, when significant damage may already have been done. In other words, custodial interrogation is a critical entry point into criminal legal systems and processes that can cause serious harm independent of a conviction and sentence. Being unnecessarily detained for days, weeks, or even months at a time does more than infringe on a person's liberty, it also jeopardizes that individual's job, housing, or custody of children. *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017). Further, unnecessary pretrial detention may impact the outcome of a defendant's case: as this Court has recognized, a detainee "is hindered in his ability to gather evidence, contact

witnesses, or otherwise prepare his defense" while detained. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

Moreover, detainees are under heightened pressure to accept guilty pleas in exchange for time served or probation out of fear of losing jobs or their homes. *See* Heaton et al., *Downstream Consequences* at 715. Pre-trial detention also leads to worse outcomes for those defendants who choose not to plead guilty: people detained before trial are convicted more frequently, receive larger sentences, and are more likely to commit future crimes. *See id.* at 736.

B. Vulnerable groups are less likely to explicitly invoke their rights and more likely to offer false confessions.

Miranda and its progeny were decided based on a recognition of the importance of counsel throughout a criminal defendant's case. Unfortunately, the warnings that sprang from *Miranda* have proven insufficient to the task. For one thing, "a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey." Christopher Dearborn, '*You Have the Right to an Attorney', but Not Right Now,* 44 SUFFOLK U.L. REV. 359, 374 (2011). One review of *Miranda* warnings found that many contained words that required at least a tenth-grade reading level to comprehend, while the vast majority of those incarcerated read at the sixth-grade level or below. *See* Richard Rogers et al., *The Language of Miranda Warnings in American*

Jurisdictions: A Replication and Vocabulary Analysis, 32 LAW & HUM. BEHAV. 124, 132 (2008).

Even people who understand the literal meaning of the *Miranda* warning given to them do not necessarily comprehend the complex constitutional protections embedded therein or, more complex still, the implications of those protections in their cases. For instance, the *Miranda* warnings do not explain the fact that one's invocation of the right to counsel is effective only if unambiguous and unequivocal. *See Davis*, 512 U.S. at 459-462. In sum, this means that many people waive their rights without fully understanding the consequences.

The situation is even worse for vulnerable groups. For instance, juveniles and individuals suffering from mental disabilities or mental illness have significant difficulty invoking constitutional protections and are particularly vulnerable to giving false confessions under police interrogation. This combination increases the likelihood of a false confession, inaccurate, inculpatory admissions, and other outcomes that are harmful both to these individuals and to justice itself. This Court has acknowledged that "the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed," and "[t]hat risk is * * * all the more acute * * * when the subject of custodial interrogation is a juvenile." *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (quotation marks omitted); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (discussing the susceptibility of

juveniles to peer pressure). The same is true of adults with developmental vulnerabilities. *Atkins v. Virginia*, 536 U.S. 304, 318 n. 24 & 320–21 (2002).

As noted, in order to invoke one's right to counsel, one must do so explicitly and unequivocally. *See Davis*, 512 U.S. at 459. This is especially difficult for juveniles and individuals suffering from mental disabilities and illness, as they are more likely to struggle to comprehend the *Miranda* warnings, let alone invoke the rights referenced therein. Numerous studies have found that most adults with an intellectual disability lack the necessary vocabulary and cognitive ability to understand *Miranda* warnings or the function of constitutional rights in an interrogation. *See, e.g.*, Saul Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions* in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT at 163-79 (2004). As one scholar recently put it, these individuals' miscomprehension is "both literal (not understanding the meaning of the words) and abstract (not understanding the reasons why one might invoke these rights)." Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act As A Safeguard*, 47 N.M. L. REV. 64, 72 (2017) (citations omitted). Similar issues apply to juveniles, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1153, 1166 (1980), and adults with serious psychological disorders, Virginia Cooper

& Patricia Zapf, *Psychiatric Patients' Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390 (2008).

Not only do these vulnerable individuals struggle more than others to invoke their constitutional rights, but they are also less capable of articulating exculpatory information, more susceptible to interrogation techniques, and more likely to comply with police instruction.

Research suggests that individuals with even mild learning disabilities—defined as an IQ between 57-75—are significantly more suggestible than their counterparts with average mental abilities. I.C.H. Clare & G.H. Gudjonsson, *Interrogative Suggestibility, Confabulation, and Acquiescence in People with Mild Learning Disabilities: Implications for Reliability during police interrogations*, 32 BRITISH JOURNAL OF CLINICAL PSYCH. 295, 298 (1993). Further, they are "more susceptible to 'leading questions,'" more likely to engage in conversation with interrogating officers, and more likely to acquiesce to officer demands. *Id*. All told, this makes individuals with learning disabilities more likely to giving erroneous testimony.

Unfortunately, police officers are trained to take advantage of this dynamic. *See* Richard Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 266 (1996); *see also*, *Miranda*, 384 U.S. at 449-55. This is because the purpose of interrogation is not to discern the truth. Instead, police are trained to interrogate

only those suspects whose culpability they "establish" on the basis of their initial investigation Nathan Gordon & William Fleisher, *Effective Interviewing and Interrogation Techniques* (2006). Thus, the police utilize interrogation techniques designed to elicit incriminating statements, admissions, and confessions. *See* Richard Leo, *Police Interrogation and American Justice* (2008). Because these techniques presume that suspects will resist, interrogation is "stress-inducing by design—structured to promote a sense of isolation and increase the anxiety and despair associated with denial relative to confession." Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6 (2010).

Taken together, this means that individuals who are less likely to invoke their constitutional rights are also more susceptible to police interrogation techniques and therefore more likely to provide self-incriminating admissions, even if they are not true. This conclusion is corroborated by empirical reviews of known false confessions and convictions. For instance, a 2010 study of DNA exonerations involving false confessions found that 43% of false confessors suffered from some form of mental disability. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1064 (2010). Similarly, a 2004 study of false confessions found that at least 28 of the 125 false confessions assessed were provided by individuals with an intellectual development disorder. Steven Drizin &

Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 971 (2004).

The Sixth Circuit's reasoning would allow police officers to interpret nearly any request for counsel as a mere negotiation tactic, raising the bar even higher for suspects seeking to invoke their constitutional rights. This is because the lower courts' here considered what they believed to be a suspect's subjective motivations. Such considerations are clearly inconsistent with the opinions of this Court. *See, e.g.*, *Berghuis*, 560 U.S. at 381. For the reasons discussed here, that shift will be particularly harmful for vulnerable individuals like juveniles and those suffering from mental disabilities and illnesses; doing so will increase the likelihood of wrongful convictions and other outcomes that harm defendants and justice itself.

C. The Sixth Circuit's reasoning would disproportionately impact people of color and low-income individuals.

The meteoric rise of incarceration rates in America over the last four decades, particularly for people of color, has been well documented. The most recent wave of scholarship related to this phenomenon describes how criminal legal policies impose disproportionate and disenfranchising impacts on people of color, who are, in turn, disproportionately low income. *See, e.g.*, Vesla Weaver et al.*, Detaining Democracy? Criminal Justice & American Civic Life,* 651 ANNALS AM.

ACAD. POL. & SOC. SCI. 6, 19 (2014)); Amy Lerman & Vesla Weaver, *Arresting Citizenship*: *The Democratic Consequences of American Crime Control* 6-13 (2014); National Research Council of the National Academies, *The Growth of Incarceration in the United States, Exploring Causes and Consequences,* 56-64, 91-103, 233-58, 303-13 (2014).

This disparity is ongoing. The FBI's most recent crime data shows that African Americans constitute 26.9% of all arrests, more than twice their representation in the general population. FBI, *Crime in the U.S.*, Table 21 https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21 (2016); U.S. Census Bureau, *Population Estimates*, https://www.census.gov/quickfacts/fact/table/US/PST045216 (July 2016).

Low-income defendants, who are disproportionately people of color, face significant hurdles in mounting a defense. Individuals who can afford a lawyer often retains one immediately, at which point the lawyer will work to prevent uncounseled interrogation, secure the client's release, develop a defense, and engage in plea negotiation. But those who cannot afford to hire representation often must wait for a lawyer to be appointed, which may take days, weeks, or months. *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel,* Report of the Nat'l Right to Counsel Comm., 85-87 (2009). As they wait, these defendants do not receive the "consultation, thorough-going investigation and preparation" that

this Court has described as "vitally important" from the outset of a case. *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932).

One who does not have a lawyer immediately after arrest is at a disadvantage. As noted, represented individuals are less likely to be jailed while awaiting trial. This compounds the fact that the bail system penalizes the poor. For instance, a 2013 study found that more than half of people held in jail in New York City awaiting trial were unable to pay bail amounts of $2,500 or less. Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 32, http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf (2015).

If the lower courts' reasoning is left intact, the right to counsel will be diminished, particularly for the people who need it most. The nation's most vulnerable defendants and the individuals most likely to have contact with criminal legal systems will unnecessarily be jailed while awaiting trial. And justice itself will suffer from higher incidence of false admissions and confessions.

III. MANY JURISDICTIONS ARE WORKING TO PROVIDE EARLIER ACCESS TO COUNSEL.

As discussed, introducing defense counsel at the interrogation stage of a prosecution has significant benefits for every criminal justice stakeholder. Recognizing these benefits, jurisdictions across the

U.S. and abroad have adopted programs aimed at providing people with representations as early as possible. A non-exhaustive list of examples follows below. The Sixth Circuit's decision flies in the face of the movement toward earlier access to counsel.

A. Statutory requirements

California requires minors aged 15 and under to consult with an attorney before waiving their right to remain silent or their right to counsel. Cal. Welf. & Inst. Code § 625.6. Neither the minor nor the minor's parent can waive the consultation requirement, and statements made by the minor prior to consultation are generally inadmissible. Citing opinions of this Court, the California legislature noted that juveniles are particularly susceptible to the pressures inherent to custodial interrogations. *Id.* (Statutory Notes, § 1(a)).

B. Jailhouse access programs

Based on the benefits to both defendants and criminal justice systems, several jurisdictions across the country are working to provide early access to counsel either in-person and via phone.

a. Cook County, Philadelphia, New York

Last year, Cook County Illinois Chief Judge Timothy Evans established a Stationhouse Representation Program designed to "help individuals held in Chicago Police Department

custody gain access to a free attorney in the police station." Circuit Court of Cook County, *Chief Judge signs order to provide free lawyers for arrestees in CPD custody* (March 14, 2017). The order states that "when an arrestee * * * requests court-appointed legal representation * * * the Public Defender shall be deemed appointed by the court as defense counsel." Circuit Court of Cook County, Order No. 2017-01 (March 14, 2017). In a press release, Chief Judge Evans noted that his intention was to "ensure that constitutional rights are protected from the earliest point of contact with the criminal justice system * * * . Everybody deserves access to justice. They should always have the opportunity to speak with an attorney before talking to anybody else." *Id.*

The program provides coverage 24 hours per day. Assistant Public Defenders are on-call during business hours, and an independent non-profit organization—First Defense Legal Aid ("FDLA")—covers non-business hours. *See* Chicago Appleseed Fund, *Station-house Representation in Chicago at Six Months*, at 2 (Sept. 29, 2017). The number of requests for station-house representation has increased by 15% since the program's inception. *Id.* at 3. Going forward, the county is considering expanding the program to provide 24/7 coverage by Assistant Public Defenders.

The program has also been embraced by Cook County State's Attorney Kimberly Foxx, who issued the following statement: "The legitimacy of the justice system depends on protecting the

constitutional rights of people who come in contact with it. Today's announcement affirms the commitment of all the stakeholders in the justice system to ensuring that no one is denied their constitutional right to counsel." Circuit Court of Cook County, *Chief Judge signs order* at 3.

The Philadelphia Public Defender also has a pilot program, called "Pre-Trial Advocates," providing jailhouse advocates for detainees. The program connects detainees with defenders prior to bail hearings. Previously, detainees had access to very brief interviews with pretrial services and then appeared via closed television at their bail hearing. The program is netting results: more arrestees are spending less (or even no) time in jail than before. Interview with Mark Houldin, Office of the Philadelphia Public Defender (Jan. 10, 2018).

The Legal Aid Society of New York ("LAS") launched its own stationhouse representation program—"the Community Justice Unit"—in 2012. This program is part of the city's Gun Violence Crisis Management System ("CMS"). Through CMS, partners called "violence interrupters" enter at-risk communities and attempt to diffuse gang violence before it begins. LAS provides a 24-hour hotline to be used whenever violence interrupters witness an arrest. Upon receiving a request via the hotline, LAS contacts the relevant police precinct and informs NYPD that the arrestee is represented. Arrestees involved in this program have been less likely to be detained. Interview with Anthony Posada, LAS (Jan. 26, 2018).

b. Call-in services

As noted, FDLA supports the Cook County Public Defender in its Stationhouse Representation Program. But FDLA has been providing similar services for more than 20 years. *See First Defense Legal Aid*, https://www.first-defense.org/. FDLA staff attorneys manage and advise the volunteers who man the organization's hotline. Kate Morrissey, *First Defense Legal Aid: Chicago lawyers give free counsel in free time*, http://www.medillnews847.com/madeinchicago/fdla/index.html. Once a person reaches the bond stage, FDLA provides its case file to the public defender's office, which handles the case going forward. *Id.* According to FDLA director Eliza Solowiej, providing early access to lawyers reduces costs by exposing holes in cases that are likely to fall apart later on. Steve Schmadeke, *Arrestees to get access to lawyers free of charge at Chicago police stations*, CHICAGO TRIBUNE (March 14, 2017).

The Bronx's "Good Call" is another early-access call-in program. Launched in 2016, Good Call provides 24-hour legal support to individuals arrested in the Bronx, connecting them with major legal service providers. On average, individuals are connected to lawyers in just 40 seconds. Good Call, *About Us*, https://goodcall.nyc/about-us.

In January 2017, Washington's King County Department of Public Defense created an "On Call Attorney" program that provides free unrecorded access to attorneys from jail phones. Local court

rules require that arrestees are able to speak with an attorney as soon as possible, and individuals who utilize the hotline are routed to an on-call attorney. The program dispatched nearly 1,500 calls to attorneys in 2017. Interview with Jonathan Rudd, King County Department of Public Defense (Jan. 10, 2018).

Vermont provides yet another call-in hotline. Defenders there have established this program in response to a state statute guaranteeing drivers the right to speak with an attorney before taking a breathalyzer. *See* 23 V.S.A. § 1202. Drivers who cannot afford an attorney are routed to the local public defender.

C. Smart defense programs

The Contra Costa County "Smart Defense" program is one of six Smart Defense initiatives administered by the U.S. Department of Justice's Bureau of Justice Assistance. This program is aimed at improving the misdemeanor pretrial justice system in Richmond, California by, among other things, providing early access to legal counsel. *See* NLADA, *Smart Defense Initiative Expands Evidence Based Approaches to Public Defense* (2017), http://smartdefenseinitiative.org/wp-content/uploads/smart-defense-expansion-fact-sheet.pdf.

The Contra Costa Office of the Public Defender is partnering with the City of Richmond Police and the West County Re-entry Success Center to provide clients with pretrial representation. After

individuals are cited and requested for prosecution, police provide them with printed information cards, referring them to counsel. The police, prosecutor, and the court provide defenders with information about citations to allow them to start investigating cases early on and notifying clients about upcoming appointments and court appearances. *See* Smart Defense Contra Costa, *Early Representation*, http://smartdefenseinitiative.org/initiative-site/contra-costa/. The district attorney's office employs embedded prosecutors who are assigned to specific police stations. These prosecutors work on pre-filing negotiations and early case resolutions with the defenders and arrestees.

The Smart Defense site in neighboring Alameda County is working to provide representation at arraignment. A review of the county's misdemeanor arraignment statistics from January 2014 to April 2015, revealed that over 1,000 people were arraigned without defense counsel present. As a result, these defendants spent a few days in jail before a lawyer was assigned to represent them, disrupting their lives and keeping them from their jobs and families. In response, the Alameda County Public Defender's Office is working to represent clients at arraignment hearings on a pilot basis.

D. Participatory defense movement

The participatory defense movement uses community organizing strategies to empower key stakeholders in the criminal justice process—people who face criminal charges, their families, and their

community—to reform public defense and bring people home from government custody as soon as possible. *See generally*, Janet Moore et. al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281 (2015). For many of the reasons discussed above, early access to counsel is a central focus of the organization. *See*, *e.g.*, Albert Cobarrubias Justice Project, *What it was like when my child was interrogated by police*, https://acjusticeproject.org/2016/08/18/what-it-was-like-when-my-child-was-interrogated-by-police/ (Aug. 18, 2016); Albert Cobarrubias Justice Project, *"The First 24" – A Participatory Defense Action Tool*, https://acjusticeproject.org/2016/03/08/the-first-24-a-participatory-defense-action-tool/ (March 8, 2016).

Given their shared interests, the Alameda County Smart Defense project is collaborating with the participatory defense movement. Shared goals include engaging clients' families in their representation, including by helping families navigate and understand the court system in the first 24 hours after a family member has been arrested. Smart Defense Alameda County, *Early Representation*, available at http://smartdefenseinitiative.org/initiative-site/alameda-county/ (last visited Feb. 22, 2018). Moreover, the participatory defense movement also was active in promoting the bill, now California Welfare and Institutions Code § 625.6 (discussed above), which requires attorney

consultation for minors prior to custodial interrogation.

E. International programs

Recognition of the value of early representation in criminal proceedings is not exclusively domestic. Internationally, the United Kingdom and the United Nations have both established systems for providing early access to legal counsel.

According to the U.K. code of practice for the detention, treatment, and questioning of persons by police officers, once an individual is brought to the police station under arrest, the custody officer must make sure the person is told clearly about their right to consult privately with an attorney and that free independent legal advice is available. PACE Code C § 3.1. Further, the individual under arrest must be given a written notice, which contains information regarding their right to consult privately with an attorney or free independent counsel, the process for obtaining legal advice, and their right to remain silent. *Id*.

If an arrestee asks for free legal advice, the Defence Solicitor Call Centre must be informed of the request, and free legal advice will be provided via telephone. The custody officer at the police station must also remind the individual in pre-trial detention about the right to legal advice and record any reasons for waiving it. *Id*.

The U.N. established a set of "Principles and Guidelines" in 2013 to ensure that suspects and accused persons have effective early access to legal aid. Among these is Principle 3, which states that the right to legal aid applies throughout all stages of the criminal justice process including from the time a person suspected of an offense is placed under investigation U.N. Office on Drugs and Crime, *U.N. Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* at 9 (June 2013).

The UN utilizes three primary methods of delivering early access to legal aid: "call-in" programs, "embedded" programs, and "visiting" programs. In a call-in program, a legal aid provider is contacted to provide legal advice and assistance when a person exercises his or her right to early access to legal aid. In an embedded program, a legal aid provider is permanently located at police stations or other detention facilities so that legal advice and assistance are available at any time. In a visiting program, a legal aid provider regularly calls on a police station or detention facility to provide legal advice and assistance to detainees. *Id.* at 70-73.

* * *

These diverse efforts underscore the widely shared understanding of how critically important it is that people who are subjected to investigation and detention have access to defense counsel at the earliest stages of the criminal process. The Sixth Circuit's opinion cuts in the opposite direction by raising new barriers between defense lawyers and

the people who need them. The ruling conflicts with and is an unreasonable application of this Court's clearly established precedents, exacerbates the risk of harm to the people who can least afford to bear that risk, and undermines the fairness, reliability, and legitimacy of case outcomes and the criminal legal systems that produce them. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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