No. 18-106

In The Supreme Court of the United States

JOHN R. TURNER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE DUE PROCESS INSTITUTE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHEN A. MILLER
Counsel of Record
BARRY BOSS
KARA L. KAPP
COZEN O'CONNOR
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103
samiller@cozen.com
(215) 665-4736

SHANA TARA O'TOOLE
DUE PROCESS INSTITUTE
700 Pennsylvania Ave., SE
Suite 2019
Washington, D.C. 20003
shana@idueprocess.org
(202) 558-6683

CLARK M. NEILY III
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, D.C. 20001
jschweikert@cato.org
(202) 216-1461

Counsel for Amici Curiae the Due Process Institute and the Cato Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether the Sixth Amendment right to counsel attaches before indictment when the prosecutor threatens to indict a defendant unless he accepts the prosecutor's offer of a plea agreement.

Whether the Sixth Amendment right to counsel attaches when a federal prosecutor conducts plea negotiations before the filing of a formal charge in federal court, where the defendant has already been charged with the same offense in state court.

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INTEREST OF *AMICI*

In accordance with Supreme Court Rule 37, *Amici* respectfully submit this brief in support of the Petitioner.[1] The Due Process Institute is a non-profit, bipartisan, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. The Cato Institute is a nonpartisan 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 the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. The court below wrongly denied Turner his fundamental right to the assistance of counsel at a critical stage in the federal criminal prosecution against him. As such, *Amici* have a strong interest in the questions presented by the petition.

[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amici* note that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *Amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This Court's Sixth Amendment attachment jurisprudence has become detached from the Amendment's original meaning. The Court wrongly applies different attachment rules to different Sixth Amendment rights, even though these rights share the same textual foundation. These differing rules, moreover, are untethered from the Amendment's text and original meaning. This case presents an ideal vehicle to clarify the rule and provide much needed guidance to lower courts on this question of considerable importance.

Founding-era sources make clear that Sixth Amendment rights attached before indictment where a prosecutor communicated an intent to prosecute a person and requested that person to either admit guilt or face an indictment. Founding-era dictionaries reveal that contemporaries understood a person to be an "accused" subject to a "prosecution" where a government official expressed an intent to prosecute and requested that the individual formally admit guilt. At the time of the Founding, the term "accuse" was defined broadly and was not limited to the specific act of indicting. Accordingly, the Framers would have understood that an "accused" would have included anyone who had been blamed by or informed of a government official's intent to file formal criminal charges against them. The Founding-era understanding of "prosecution" referred to the general pursuit of a task or goal, including the initial steps involved in pursuing a criminal case against a person. As a prosecutor's pursuit of formal charges naturally begins prior to filing an indictment,

Framing-era citizens would have understood the term "prosecution" to include a prosecutor's pre-indictment acts in pursuit of charging and convicting an accused.

Framing-era jurists likewise understood a person to be an "accused" subject to a "prosecution"—for Sixth Amendment purposes—where a government official expressed an intent to prosecute and requested that the individual admit guilt. Principally, in *United States v. Burr*, Chief Justice Marshall addressed this very question. 25 F. Cas. 30, 32 (C.C. Va. 1807). The Court held that the defendant's Sixth Amendment rights attached immediately, *prior to indictment*, where a government official, General James Wilkinson, had drafted a letter to President Thomas Jefferson accusing Burr of treason. *Id.* at 30. Throughout the opinion, Chief Justice Marshall refers to Burr as "the accused," despite the fact that he had yet to be indicted. *Id.*

Applying the Sixth Amendment's original meaning here, Turner's right to counsel plainly attached at the moment the federal prosecutor stated his intent to prosecute Turner as part of a demand that Turner plead guilty. By expressing an intent to indict Turner and requesting that he enter a guilty plea, the prosecutor unequivocally accused Turner of a federal crime, a critical step in the pursuit of federal charges against him. The Court should thus grant the writ of certiorari and restore the original understanding of when the Sixth Amendment right to counsel is triggered.

REASONS FOR GRANTING THE WRIT

I. This Court's Sixth Amendment attachment jurisprudence is untethered from the Amendment's original meaning.

The Sixth Amendment enumerates several rights to criminal defendants—among them the right to assistance of counsel, the right to compulsory process of witnesses, and the right to be informed of the allegations against them. Despite sharing the same textual foundation, this Court has wrongly applied different attachment rules to each of these enumerated rights, and has done so in a manner untethered from the Amendment's text and original meaning. The Court should grant the writ in this case because this case presents an ideal vehicle to clarify its attachment jurisprudence and restore the Amendment to its original meaning.

A. The Supreme Court's Sixth Amendment jurisprudence applies different attachment rules to different rights despite a shared textual foundation.

Under the Court's current Sixth Amendment attachment framework, certain rights attach earlier than others even though all Sixth Amendment rights apply to the "accused" in all "criminal prosecutions." For example, the right to a speedy trial may attach pre-indictment in the case of a defendant's arrest. *See United States v. Marion*, 404 U.S. 307, 321 (1971) (holding that "it is either a formal indictment or information

or else the actual restraints imposed by arrest . . . that engage the particular protections of the speedy trial provision of the Sixth Amendment"). Similarly, the right to compulsory process may also attach pre-indictment and pre-arrest, once a defendant has an interest in preparing his defense. *See*, *e.g.*, *Burr*, 25 F. Cas. at 33 (compulsory process); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 55 (1987) (citing *Burr* favorably); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 104–08 (1974) (discussing importance of *Burr* opinion in Sixth Amendment interpretation); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213, 222-26 (2017) (discussing this Court's precedent allowing for pre-charge attachment of right to counsel). There is no principled basis why the same attachment rule should not apply to the right to counsel.

The current Sixth Amendment attachment rule, moreover, creates unprincipled inconsistencies with respect to what qualifies as a critical stage at which a defendant has a right to advice of counsel. The Court has explained that whether an event constitutes a "critical stage" of the criminal prosecution depends on whether the stage is a "trial-like confrontation." *See United States v. Ash*, 413 U.S. 300, 309-12 (1973). Applying this principle, the Court has recognized that plea negotiations, interrogations, and lineups qualify as critical stages. *See*, *e.g.*, *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (applying Sixth Amendment right to counsel to plea negotiations); *Lafler v. Cooper*, 566 U.S.

156, 162 (2012) (same); *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (applying right to counsel to pre-trial lineups); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (applying right to counsel to pre-trial interrogations); *White v. Maryland*, 373 U.S. 59 (1963) (applying right to counsel to entry of plea); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (same). In *White* and *Hamilton*, the Court concluded that the right must attach before the plea stage so that the lawyer could advise the accused on available defenses in order to allow him to intelligently decide whether to plead guilty. *White*, 373 U.S. at 60; *Hamilton*, 368 U.S. at 54-55; *accord Ash*, 413 U.S. at 312.

However, under the current attachment rule, defendants subjected to these same government actions *before* indictment may be denied the right to counsel that would apply to them after indictment. *See*, *e.g., Moran v. Burbine*, 475 U.S. 412, 431-32 (1986) (holding that the right to counsel does not apply to *pre-indictment* interrogations); *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding that the right to counsel does not apply to *pre-indictment* lineup). There is no principled reason why making the decision whether to plead, post-indictment, is more of a "trial-like confrontation" than the same stage, pre-indictment. That is especially true where, as here, the prosecutor has already expressed an intent to indict if the plea offer was rejected.

The Sixth Circuit's application of the Court's right-to-counsel attachment rule demonstrates its logical absurdity. The Sixth Circuit claimed that the question whether a stage is "critical" "must be kept

'distinct'" from whether the right has yet attached—even though these questions are inextricably related. *See*, *e.g.*, *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (explaining that the timing of attachment is closely tied to whether the accused has reached a critical stage of the proceedings). If a stage qualifies as a *critical* part of a "criminal prosecution," that must inform whether the right should attach, as the rationales in *White* and *Hamilton* make clear. The Sixth Circuit's opinion, however, makes no effort to grapple with, let alone resolve, the unprincipled inconsistencies resulting from this jurisprudence.

B. The Court's current attachment rules are untethered from the Sixth Amendment's text and original meaning.

The Sixth Amendment rights apply to all who are "accused" in a "criminal prosecution[.]" Specifically, it provides that "[i]n all *criminal prosecutions*, the *accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence*" (emphasis added). The attachment rules accordingly must find their anchor in these two key terms: "accused" and "criminal prosecution."

As a matter of basic sentence construction, the Court should assume that a word or phrase such as the "accused" or "criminal prosecution" means the same thing *in the same sentence* to all subordinate clauses of that sentence. *Cf. Texas v. Cobb*, 532 U.S. 162, 173 (2001) (holding that there is "no constitutional difference" between the meaning of the same term ("offense") in the Fifth and Sixth Amendments). The Court's Sixth Amendment attachment jurisprudence, however, treats the terms "accused" and "criminal prosecution" as if they mean *one thing* with respect to the right to be informed but *something else* with respect to the right to counsel. Such a result has no basis in the Amendment's text, particularly because each of these terms only appears *once* in the Amendment, and thus can only have *one* meaning.

C. This case presents an opportunity to clarify the rule and provide much needed guidance to lower courts on a question of considerable importance.

The Court's right-to-counsel attachment rule is also unmoored from the Sixth Amendment's original meaning. *See Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality) (no consideration of original meaning in announcing attachment rule); *see also Gouveia*, 467 U.S. at 188-89 (affirming the rule announced in *Kirby* with no originalist analysis). The Court's journey away from the Sixth Amendment's original meaning has resulted in logically flawed tests like the one applied by the

lower courts. This case presents an opportunity to restore the Court's attachment jurisprudence and restore logical consistency in the protection of individual liberties.

The Court has never addressed the question squarely presented here. It has never answered whether a prosecutor's presentment of a pre-indictment plea offer constitutes the initiation of a "criminal prosecution" where the prosecutor *has expressed an intent to indict* and a *parallel prosecution* for the same conduct is *already underway*.

The existing jurisprudence, moreover, makes no answer to this question inevitable. As Judge Bush stated in his concurrence *dubitante*, "the Court's precedents do not expressly state that *only* a 'formal charge, preliminary hearing, indictment, information, or arraignment' may trigger the attachment of the right to counsel. . . . This leaves open the possibility that the prosecutor's presentment of the plea offer was itself an 'initiation of criminal proceedings.'" *United States v. Turner*, 885 F.3d 949, 956 n. 1 (6th Cir. 2018) (Bush, J., concurring *dubitante*). The Court should take this opportunity to provide much needed guidance on this important issue.

II. The Framers intended Sixth Amendment rights to attach pre-indictment if the prosecutor communicated an intent to prosecute a person and requested that person to admit guilt or face indictment.

Founding-era sources provide critical insight into the original meaning of the Sixth Amendment and its key terms. Founding-era dictionaries reveal that contemporaries understood a person to be an "accused" subject to a "prosecution" where a government official had expressed an intent to prosecute and requested that the individual formally admit guilt. Framing-era jurists likewise understood a person to be an "accused" subject to a "prosecution" where a government official expressed an intent to prosecute and requested that the individual admit guilt. Applying this original understanding to Turner's case, Founding-era citizens would have understood the Sixth Amendment right to counsel to apply to Turner because the prosecutor had expressed an intent to institute criminal proceedings and requested that Turner enter a guilty plea.

The following review of Founding-era sources elucidates the meaning of "accused" and "criminal prosecution" in the Sixth Amendment, terms which are critical in understanding when the enumerated Sixth Amendment rights were intended to attach. The Court regularly consults Founding-era dictionaries, early decisions of the federal judiciary, and other historical documents in determining the Constitution's original meaning. *See*, *e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2671-72 (2015)

(using Founding-era dictionary definitions to interpret "legislature" as used in the Elections Clause); *D.C. v. Heller*, 554 U.S. 570, 604-14 (2008) (looking to post-ratification commentary on the Second Amendment); *Marsh v. Chambers*, 463 U.S. 783, 787-91 (1983) (noting "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also how they thought that Clause applied . . . "); *see also Sveen v. Melin*, 138 S. Ct. 1815, 1826-28 (2018) (Gorsuch, J., dissenting) (discussing original public meaning of the Contracts Clause). Indeed, "[f]aithful adherence to the Constitution . . . *requires* us to examine [its] terms as they were commonly understood when the text was adopted and ratified[.]" *Turner*, 885 F.3d at 955 (Bush, J., concurring *dubitante*) (emphasis added).

Where the Court is asked to apply an amendment to a modern context not present or foreseeable at the time of the Framing, as here, the Court asks how Founding-era contemporaries understood the right to operate in the contexts that then existed. It then applies that understanding by analogy to the present-day context. *See*, *e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (holding that the government must obtain a warrant to access historical cellphone records to avoid "encroachment of the sort the Framers, 'after consulting the lessons of history,' drafted the Fourth Amendment to prevent"); *United States v. Jones*, 565 U.S. 400, 411 (2012) (applying "an 18th-century guarantee against unreasonable searches" to the government's use of GPS monitoring to track a criminal

suspect); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (applying same to thermal imaging searches); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (analyzing "the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers *within* an automobile"); *accord Turner*, 885 F.3d at 958 (Bush, J., concurring *dubitante*).

A. Founding-era sources reveal that the Framers understood a person to be an "accused" subject to a "prosecution" when a government official had expressed an intent to prosecute and requested that the individual admit guilt.

Beginning with Founding-era dictionaries, the definitions of "accuse" were broad in scope and would easily include a government official's act of announcing an intent to prosecute and requesting that the individual admit guilt. Specifically, the definitions of "accuse" in these dictionaries generally encompassed acts of placing blame on, censuring, imputing wrongful conduct to, *or* expressing an intent to institute a criminal action against an individual. Of the nine prevailing non-legal English dictionaries of the Framing era, eight define "accuse" as to "blame," "censure," "declare to have committed a crime," or "to charge with a crime."[2] Notably,

[2] *See* John Ash, *New & Complete Dictionary of the English Language* (London, Edward & Charles Dilly 1775) ("To charge, to impeach, to censure."); Rev. James Barclay, *Complete & Universal English Dictionary* (London, J.F. & C. Rivington et al., 1792)

the term "to charge" is further defined by these same dictionaries as "to impute" an action to a person or to "censure" someone.[3] The ninth does not define "accuse" but rather "accusation," and describes it as "*intending a criminal action* against any one, either in one's own

("To charge with a crime; to inform against, indict, or impeach; *to censure*."); Thomas Dyche & William Pardon, *A New General English Dictionary* (London, Toplis & Bunney, 18th ed. 1781) ("To indict, impeach, charge with a fault."); Samuel Johnson, *A Dictionary of the English Language* (London, J. F. & C. Rivington et al., 7th ed. 1785) ("To charge with a crime; To blame or censure."); William Perry, *The Royal Standard English Dictionary* (Worcester, 1st Am. ed. 1788) ("to impeach, blame or censure"); Thomas Sheridan, *A Complete Dictionary of the English Language* (London, Charles Dilly, 3d ed. 1790) ("To charge with a crime; to blame or censure."); John Walker, *A Critical Pronouncing Dictionary* (London, G.G.J. & J. Robinson, & T. Cadell, 1791) ("To charge with a crime; to blame or censure."); Noah Webster, *American Dictionary of the English Language* (N.Y. S. Converse 1828) ("*To charge with*, or *declare to have committed a crime*, either by plaint, or complaint, information, indictment, or impeachment; to charge with an offense against the laws, judicially or by a public process"); *accord Turner*, 885 F.3d at 958 n. 5 (Bush, J., concurring *dubitante*).

[3] *See* Ash, *supra* n. 1 ("to impute, to put to any one's account"); Barclay, *supra* n. 1 ("to impute or ascribe"); Dyche & Pardon, *supra* n. 1 ("to accuse a person with something"); Johnson, *supra* n. 1, *available at* https://books.google.com/books?id=j-UIAAAAQAAJ&q=charge#v=snippet&q=charge ("[t]o impute as a crime" "[t]o accuse; to censure"); Perry, *supra* n. 1 ("to accuse; . . . [to] impute"); Sheridan, *supra* n. 1 ("to accuse, to censure"); Walker, *supra* n. 1 ("to impute . . . to accuse, to censure"); Webster, *supra* n. 1 ("[t]o load or lay on in words, something wrong, reproachful or criminal; to impute to"); *accord Turner*, 885 F.3d at 958 n. 5 (Bush, J., concurring *dubitante*).

name, or that of the publick."[4] The four prevailing legal English dictionaries of the Founding era do not define the verb "accuse." Three instead define the term "accusation," only by way of example, citing Clause 39 of the Magna Carta.[5] The fourth does not define "accuse" or "accusation" at all.[6]

In sum, at the time of the Sixth Amendment's ratification, the term "accuse" was defined broadly, included the general act of blaming an individual for wrongful conduct, and was in no way limited to the act of indicting or otherwise filing formal criminal charges. Accordingly, as the term "accused" was originally understood, it would include anyone who had been blamed, censured, or informed of a government official's intent to file criminal charges against them.

The use of the term "accused" in the Crimes Act of 1790—drafted by the First Congress—confirms that the term was commonly understood at that time to include individuals not yet indicted. *See Myers v. United States*, 272 U.S. 52, 174-75 (1926) (noting that the First Congress's decisions "have always been regarded . . . as of the greatest weight" in interpreting the

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[4] Nathan Bailey, *New Universal Etymological English Dictionary* (London, T. Waller, 4th ed. 1756).

[5] *See* Timothy Cunningham, *A New and Complete Law Dictionary* (London, S. Crowder et al. 1764); Giles Jacob, *A New Law Dictionary* (The Savoy, Henry Lintot, 6th ed. 1750); Thomas Potts, *A Compendious Law Dictionary* (London, T. Ostell 1803).

[6] Richard Burn & John Burn, *A New Law Dictionary* (London, A. Strahan & W. Woodfall 1792) (next entry after "account" is "ac etiam").

Constitution); *see also*, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting that "17 draftsmen of the Constitution . . . were Members of the First Congress" and consulting legislation enacted by the First Congress in interpreting original "contemporaneous understanding" of Establishment Clause). Notably, the Act in some places used the phrase "accused or indicted" in enumerating rights that applied to defendants. *See*, *e.g.*, Crimes Act of 1790, 1st Cong. § 29 (2d Sess. 1790) (extending right to subpoena witnesses to both "accused" and "indicted" individuals). The inclusion of "accused" individuals and "indicted" individuals as separate groups to whom these rights applied signals that the First Congress understood the term "accused" to apply to some individuals who had not yet been "indicted." Any other reading would make the inclusion of both terms ("accused" and "indicted") redundant. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (cautioning "against reading a text in a way that makes part of it redundant").

Likewise, the term "prosecution"—as defined in Founding-era dictionaries—includes all stages of a prosecutor's pursuit of a criminal case against a person, which almost invariably begins prior to indictment. Eight of the nine prevailing English non-legal dictionaries define the term "prosecution."[7] Seven of these sources define it primarily as a "pursuit; an

[7] The ninth, *New Universal Etymological English Dictionary*, does not define the terms "prosecute" or "prosecution" at all. Bailey, *supra* n. 3 (entry following "prosa" is "proselytes").

endeavor to carry on any design."[8] This broad definition includes all stages of a "pursuit." These dictionaries include more specific secondary definitions, such as "process at law" and "suit against a man in a criminal cause."[9] One dictionary, *The Royal Standard English Dictionary*, defines prosecution only as "a criminal or civil suit."[10] This source, however, defines the act itself, "to prosecute," more broadly, consistent with the other leading dictionaries, as "to pursue, continue."[11] Of the

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[8] Ash, *supra* n. 1 ("A pursuit, an endeavor to carry on any design."); Barclay, *supra* n. 1 ("an endeavor to carry on. A continued attempt, or a continuation of an attempt."); Dyche & Pardon, *supra* n. 1 ("a lawsuit for some offence; the earnest pursuit of anything"); Johnson, *supra* n. 1 ("Pursuit; endeavor to carry on."); Sheridan, *supra* n. 1 ("Pursuit, endeavor to carry on."); Walker, *supra* n. 1 ("Pursuit, endeavor to carry on"); Webster, *supra* n. 1 ("The act or process of endeavouring to gain or accomplish something; pursuit by efforts of body or mind . . . "); *accord Turner*, 885 F.3d at 959 n. 8 (Bush, J., concurring *dubitante*).

[9] Ash, *supra* n. 1 ("A pursuit, an endeavor to carry on any design; a process at law."); Barclay, *supra* n. 1 ("an endeavor to carry on. A continued attempt, or a continuation of an attempt. A suit against a person in law."); Dyche & Pardon, *supra* n. 1 ("a lawsuit for some offence; the earnest pursuit of anything"); Johnson, *supra* n. 1 ("Pursuit; endeavor to carry on. Suit against a man in a criminal cause."); Sheridan, *supra* n. 1 ("Pursuit, endeavor to carry on; suit against a man in a criminal cause."); Walker, *supra* n. 1 ("Pursuit, endeavor to carry on; suit against a man in a criminal cause"); Webster, *supra* n. 1 ("The act or process of endeavouring to gain or accomplish something; pursuit by efforts of body or mind . . . The institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment").

[10] Perry, *supra* n. 1 ("a criminal or civil suit").

[11] *Id.*

prevailing legal English dictionaries, three do not define the term at all.[12] The fourth defines a related term, "prosecutor," as "he that follows a cause in another's name."[13]

The Founding-era definitions of "prosecution" broadly define this term to capture all stages of the pursuit of a goal, including the initial steps involved in pursuing a criminal case against a person. At the time the Sixth Amendment was ratified, the earliest official steps in at least some jurisdictions often occurred *before* indictment.[14] As a prosecutor's pursuit of formal charges naturally begins prior to the act of filing an indictment, the term "prosecution" was originally understood to include a prosecutor's pre-indictment acts in pursuit of those charges. Demanding that the accused agree to plead guilty without requiring the prosecutor to file a formal indictment falls well within the scope of such a pursuit.

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[12] Burn & Burn, *supra* n. 5 (entry following "prorogue" is "protection"); Jacob, *supra* n. 4 (same); Potts, *supra* n. 4 (same).

[13] Cunningham, *supra* n. 4.

[14] In Virginia, for example, state criminal proceedings in the Founding-era began—prior to indictment—with an examination by a magistrate. *See*, *e.g.*, J.A.G. Davis, *A Treatise on Criminal Law, with an Exposition of the Office and Authority of Justices of the Peace in Virginia* 110, 416 (C. Sherman & Co. 1838).

B. Jurists of the Founding era similarly understood a person to be an "accused" subject to a "prosecution" where a government official expressed an intent to prosecute and requested that the individual admit guilt.

This Court has emphasized that "historical practice" should be accorded "significant weight" in adjudicating constitutional questions. *NLRB v. Canning*, 134 S. Ct. 2550, 2559-60 (2014). As the primary evidence of historical judicial practice, this Court routinely consults early jurisprudence and gives particular weight to the decisions of this Court's Founding-era jurists, including Chief Justice Marshall. *See*, *e.g.*, *Boumedine v. Bush*, 553 U.S. 723, 781-82 (2008) (quoting Chief Justice Marshall's opinion in *Ex parte Watkins*); *United States Term Limits v. Thornton*, 514 U.S. 779, 788, 821-22 (1995) (quoting Chief Justice Marshall in *McCulloch v. Maryland*). A review of this jurisprudence confirms that—consistent with the Founding-era dictionaries and legislation—Founding-era jurists understood a person to be an "accused" subject to a "prosecution" where a government official expressed an intent to prosecute and requested that the individual admit guilt.

Principally, in *United States v. Burr*, Chief Justice Marshall, sitting as a circuit judge, addressed the very question of whether a defendant qualified as an "accused" subject to a "prosecution" prior to indictment, whose Sixth Amendment rights attached. 25 F. Cas. 30, 33 (C.C. Va. 1807). In *Burr*, Chief Justice Marshall held

that defendant Aaron Burr's Sixth Amendment rights attached *pre-indictment* where a government official, General James Wilkinson, had drafted a letter to President Thomas Jefferson accusing Burr of treason, and President Jefferson had penned a response.[15] *Id.* at 31. Burr stood accused—but not yet indicted—of treason for allegedly conspiring to provoke insurrection out West in Spanish territory. *Id.* at 30. Burr had moved for a subpoena *duces tecum* to obtain a copy of General Wilkinson's letter to President Jefferson accusing him of treason and a copy of the President's response. *Id.* The question arose whether Burr was entitled to the Sixth Amendment right to compulsory service of process. *Id.* at 31. Chief Justice Marshall ruled that the right had indeed attached, reasoning that "accused" meant something different from "indicted," and that the enumerated rights attach as soon as a defendant has an interest in preparing his case. *Id.* at 33.

To be sure, this case involved the Sixth Amendment right to compulsory process rather than the right to counsel. Because both rights are constrained by the same key terms informing when these rights attach ("accused" and "criminal prosecution"), that distinction is immaterial. The Court should therefore "accord significant weight to Chief Justice Marshall's analysis," as it provides critical primary evidence of

[15] Notably, *United States v. Burr* has been cited repeatedly by this Court in recent years in considering important constitutional and evidentiary issues. *See*, *e.g.*, *United States v. Hubbell*, 530 U.S. 27, 54 (2000) (Thomas, J., concurring); *Clinton v. Jones*, 520 U.S. 681, 703-04 (1997); *Franklin v. Massachusetts*, 505 U.S. 788, 826 (1992).

the Founding-era understanding of these key terms. *Turner*, 885 F.3d at 962-63 (Bush, J., concurring *dubitante*).

Other early federal decisions corroborate the conclusion that Framing-era jurists understood that a person could be an "accused" subject to a "prosecution" *prior to* indictment, who were thus entitled to the Sixth Amendment's enumerated protections.[16] For instance, in *United States v. Bollman*, where two defendants were accused of conspiring with Burr to commit treason against the United States, defense counsel invoked the Sixth Amendment right to counsel.[17] 24 F. Cas.

[16] *See*, *e.g.*, *United States v. Bollman*, 24 F. Cas. 1189 (C.C.D.C. 1807) (No. 14,622) (applying Sixth Amendment right to counsel to defendants pre-indictment because "at least no authority had been cited where an accused person had been denied this privilege"); *Ex parte Burford*, 3 Cranch (7 U.S.) 448, 450-52 (1806) (Marshall, C.J.) (granting the writ of habeas corpus to a prisoner, holding that the Sixth Amendment right to be informed of accusations attached pre-indictment); *Hollingsworth v. Duane*, 12 F. Cas. 359, 363 (C.C.D. Pa. 1801) (No. 6,616) (applying Sixth Amendment protection to defendant absent indictment despite summary nature of contempt proceedings); *United States v. Moore*, 26 F. Cas. 1308, 1 Wall Cir. Ct. 23 (1801) (recognizing the right of a defendant to compulsory process before indictment); *Allen v. State*, 10 Ga. 85, 91 (1851) (applying Sixth Amendment protection of compulsory process to defendants pre-indictment based on need to put defendants on "equal ground[s]" with prosecution); *see also*, *e.g.*, *United States v. Williams*, 28 F. Cas. 647, 654 (C.C.D.C. 1833) (No. 16,712) (applying state statute mirroring Sixth Amendment protection of compulsory process to defendant pre-indictment as an accused based on interpretation that right applied to persons "accused *or* indicted") (emphasis added).

[17] At the time of the case, many referred to the Sixth Amendment as the "eighth article of the amendments of the constitution of the United States" because the initial Bill of Rights approved

1191. They argued that defense counsel had the right to present argument to the court on whether probable cause existed to try the defendants. *Id.* The court applied the Sixth Amendment right to counsel prior to indictment, allowing counsel to present argument. *Id.* In so holding, it referred to the defendants as the "accused" and noted that "no authority had been cited where an *accused* person had been denied this privilege[.]" *Id.* (emphasis supplied). While two of the three judges expressed some doubt as to whether the right yet attached, using lenity as their guidepost, the panel concluded that the right should attach and counsel should be heard. *Id.* Defense counsel then presented argument on the merits. *Id.* In determining the original understanding of when the Sixth Amendment right to counsel was intended to attach, there can be no better evidence than how jurists decided this very question at the time of the Founding. *Burr* and *Bollman* thus provide powerful confirmation that as originally understood, attachment of Sixth Amendment rights, including the right to counsel, did not hinge on the act of indictment.

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by the First Congress had twelve, not ten, articles. The first of these articles was never ratified and the second was not ratified at the time of the Founding (the Twenty-Seventh Amendment). The remaining articles (Three through Twelve) were renumbered from One to Ten. *Turner*, 885 F.3d at 961 n. 13 (Bush, J., concurring *dubitante*); *see also*, *e.g.*, *Bollman*, 24 F. Cas. at 1190.

C. The Sixth Amendment affords a right to counsel to Turner because the prosecutor required Turner to enter a guilty plea or otherwise face indictment.

As discussed above, Founding-era citizens would have understood an "accused" to include anyone who had been blamed, censured, or informed of a government official's intent to file formal criminal charges against him. Turner fits squarely within these bounds. Turner had already been indicted in state court on multiple counts for the underlying conduct. *Turner*, 885 F.3d at 951. During these state proceedings, Turner's counsel came into contact with a federal prosecutor, who confirmed that he planned to bring charges for the same underlying conduct. *Id.* at 952. The federal prosecutor then conveyed a plea offer to Turner's counsel, requesting that Turner plead guilty now or face a federal indictment imminently. *Id.* To be sure, the Framers neither faced nor contemplated this *exact* scenario, as plea bargaining did not exist at that time.[18] Where, as in *Jones*, 565 U.S. at 411, the Court faces a context that neither existed nor was foreseeable at the time of the Founding, the Court's first task is to discern the guiding principles employed by the Founding generation in applying the right. *Id.* Once discerned, the Court must apply those principles to the facts presented. *See id.* Applying the Founding-era understanding to this case, there is no question that once the federal prosecutor conveyed to Turner's attorney his

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[18] *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 8-9 (1979).

intent to indict Turner, Turner became an "accused" under the Sixth Amendment.

Moreover, the term "prosecution" was originally understood to include a federal prosecutor's pre-indictment acts designed to initiate criminal proceedings and achieve a successful conviction of the accused. Therefore, the federal prosecutor's request that Turner agree to plead guilty without requiring the prosecutor to file a formal indictment was plainly designed to initiate (and successfully complete) the guilt phase of criminal proceedings. Because Founding-era contemporaries would have understood Turner as an "accused" faced with an early stage federal "criminal prosecution," the right to counsel plainly attached at this stage and the lower court's opinion must be reversed.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should grant Petitioner's petition for a writ of certiorari.

STEPHEN A. MILLER
Counsel of Record
BARRY BOSS
KARA L. KAPP
COZEN O'CONNOR
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103
samiller@cozen.com
(215) 665-4736

SHANA TARA O'TOOLE
DUE PROCESS INSTITUTE
700 Pennsylvania Ave., SE
Suite 2019
Washington, D.C. 20003
shana@idueprocess.org
(202) 558-6683

CLARK M. NEILY III
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, D.C. 20001
jschweikert@cato.org
(202) 216-1461

Counsel for Amici Curiae
the Due Process Institute and the Cato Institute