No. 10-10

IN THE
Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS [AND LARRY E. PRICE, SR.],
Respondent[s].

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT[S]' BRIEF IN OPPOSITION

STEPHANOS BIBAS
Counsel of Record
NANCY BREGSTEIN GORDON
University of Pennsylvania Law School Supreme Court Clinic
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

STEPHEN B. KINNAIRD
PANTEHA ABDOLLAHI
Paul, Hastings, Janofsky & Walker LLP
875 15th Street N.W.
Washington, DC 20005
(202) 551-1842

QUESTION PRESENTED

In this case, a child's indigent mother appeared *pro se* in a civil-contempt action to enforce a child-support decree against the child's father. Though he held multiple jobs during the years following the child-support order, the father repeatedly failed to pay child support. Often, payments were made only after he was faced with the prospect of being jailed for civil contempt. At his sixth civil-contempt hearing, he blamed his failure to pay primarily on his prolonged use of illegal drugs. The question presented is:

In a civil action by a *pro se* mother to enforce a child-support order, does the father have an absolute right under the Sixth or Fourteenth Amendment to have a court *sua sponte* appoint counsel to represent him before he can be jailed for civil contempt, for a limited time or until he complies with the court's order?

PARTIES TO THE PROCEEDING

Petitioner Michael D. Turner is the father of B.L.P. and was the defendant and appellant in the courts below. Rebecca L. Price, the mother of B.L.P. and the only plaintiff and respondent in the courts below, is the proper respondent here. She now uses her married name, Rebecca L. Rogers, which she lists in the caption and uses throughout this brief. Petitioner still owes child-support payments to Mrs. Rogers.

Because of her indigence, Rebecca L. Rogers had to relinquish physical custody of B.L.P. to her parents, Judy and Larry E. Price, Sr. Accordingly, in May 2009, the Oconee County Family Court redirected future child-support payments from Rebecca Rogers to Judy Price. Judy Price passed away in June 2010, so her widower Larry E. Price, Sr., now has sole physical custody of his granddaughter B.L.P., and the family court has redirected future child-support payments to him. Larry E. Price, Sr., therefore is filing, contemporaneously with this brief, a motion to intervene as an additional named respondent. He will neither file any separate briefs nor move for divided argument, but simply wishes to join in the arguments made by his daughter because of his monetary interest in the outcome of this case.

Petitioner seeks to add another respondent, the South Carolina Department of Social Services (DSS). Pet. ii. Though petitioner's counsel served his state appellate brief on the South Carolina Attorney

General's Office, neither that office nor DSS entered an appearance or filed a brief below in this contempt proceeding. Neither was listed as a defendant or respondent in any of the judgments, orders, or opinions in the record on appeal. Moreover, this case does not draw into question the constitutionality of any South Carolina statute or rules, which are silent on the question presented. Pet. 6. Thus, 28 U.S.C. § 2403(b) and S. Ct. R. 29.4(c) do not apply. Even if they did, the State would have at most the option of intervening. Because it has chosen not to intervene, the State is not a party to this suit. S.C. DSS Br. in Opp. 1-3; *see also United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2234 (2009). Thus, the Clerk of this Court has correctly declined to list DSS as a respondent on the docket-sheet caption.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

Other Authorities

REASONS FOR DENYING THE PETITION

There is no need for this Court to reach out to decide this case. Courts are not clearly divided on the question presented. Most of the decisions petitioner cites are readily distinguishable: they involve criminal cases, cases prosecuted by the State or by a plaintiff's lawyer, or more complex cases not involving child support. Petitioner does not cite a single case that unambiguously conflicts with the decision below.

Moreover, this case would be a poor vehicle for review. Among other things, petitioner has fully served his civil-contempt sentence, mooting this case. He would have been held in contempt with or without a lawyer; by his own admission, though he had nearly two years to comply, he failed to pay child support because he had indulged in illegal drugs. He never timely requested counsel, raising the issue for the first time on appeal. And, in the state courts below, petitioner raised only the categorical claim that a defendant always has a right to counsel if the court imposes even conditional incarceration for civil contempt. He never raised, and the state courts never passed on, petitioner's new claim in the alternative that South Carolina's contempt procedures are fundamentally unfair under the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) and *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27 (1981).

Finally, the decision below is correct. The Sixth Amendment right to counsel applies only when State prosecutors pursue criminal convictions that impose criminal stigma as well as loss of liberty, unlike civil-contempt proceedings. There is no basis for a categorical right to counsel when the court imposes incarceration only until the contemnor complies with a court order. Even assuming that petitioner did not forfeit his *Mathews* claim, the due process balancing test for appointing counsel weighs in favor of keeping *pro se* defendants evenly matched with *pro se* indigent plaintiffs. Determining indigence, which is a *prerequisite* to appointing counsel, is a straightforward factual issue that does not itself require counsel. States may choose to reserve scarce indigent-defense funding for criminal cases, where the need for counsel is greatest. Further review is unwarranted.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND OF CHILD-SUPPORT ENFORCEMENT

Noncustodial parents often fail to pay the child support they owe. In 2007 alone, noncustodial parents owed $34.1 billion in child support to 6.4 million custodial parents in the United States. U.S. Census Bureau, *Custodial Mothers and Fathers and Their Child Support: 2007*, at 9 (2009). The noncustodial parents paid less than

two-thirds of the amount they owed; more than 1.5 million custodial parents—and their children—received nothing at all. *Id.* at 7 tbl.2.

The nonpayment problem grows worse as the custodial parent's income declines. For single-parent families, child-support payments compose 31% of total household income; they are a dearly needed "lifeline" for struggling families. 155 Cong. Rec. S10,705-06 (2009) (statements of Senators Kohl and Rockefeller). More than 30% of custodial parents in poverty who were due child support received none whatsoever in 2007. U.S. Census Bureau, *supra,* at 8 fig.4.

Many nonsupporting parents have the means to pay but choose not to. At a congressional hearing, Senator Rockefeller observed that the average nonsupporting father who owed child support earned "close[] to $25,000" per year. *Downey-Hyde Child Support Enforcement and Assurance Proposal: Hearings Before the Subcomm. on Hum. Resources of the H. Comm. on Ways and Means*, 102nd Cong. 28 (1992). At that hearing, the Commissioner of the Massachusetts Department of Revenue reported the results of an empirical study of 72,000 absent, nonsupporting parents. Their average income "was $24,000 [in 1992 dollars], easily enough to pay the average child support order of $3,400 a year." *Id.* at 106 (statement of Mitchell Adams). Thousands of them were "successfully concealing income from the child support

enforcement agency" through self-employment or off-the-books income. *Id.* at 106-07.[1]

To combat this "abdication of moral and legal duty by deadbeat parents," 144 Cong. Rec. 8827 (1998) (statement of Rep. McCollum), Congress and the States have taken steps to enforce parents' obligations to their children. In 1984, Congress enacted the Child Support Enforcement Amendments of 1984. Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at scattered sections of 26 U.S.C. and 42 U.S.C. (2006)). That Act required States to deduct unpaid child support from delinquent parents' tax refunds, to allow liens to be imposed on their property, and to compel employers to withhold child support from their pay. *Id.* § 3(b) (codified as amended at 42 U.S.C. § 666 (2006)).

A key component of mid-1990s welfare reform was the federal government's requirement that States implement rigorous tools to

---

[1] Many "deadbeat dads" avoid having sources of income that can be detected or garnished. *See, e.g.*, Christina Norland, *Unwed Fathers, the Underground Economy, and Child Support Policy*, *Fragile Families Res. Br.* No. 3, at 2 (2001) (noting that nearly 30% of nonsupporting fathers "participated in underground activity," meaning that they earned money from self-employment, off-the-books work, or criminal activity such as selling stolen goods); Abdon M. Pallasch, *State's Deadbeat Dads Owe $3 Bil*, Chi. Sun-Times, Apr. 8, 2007, at A14 (noting that divorce lawyers joke that some fathers come down with "Acquired Income Deficiency Syndrome," meaning that they seek to avoid sources of income that can be garnished); Regina Brett, Editorial, *True Deadbeat Dads Guilty of Neglect*, Cleveland Plain Dealer, Dec. 7, 2005, at B1 ("The first thing those men do is quit working so they won't have to pay. Or they work under the table so no one can track it . . . . Some men become job-hoppers. As soon as the support bureau catches up to them, they quit and move on. It's a game of tag and the child always loses."). Though occasionally fathers are plaintiffs and mothers are defendants in child-support cases, usually the mother is the plaintiff. Thus, this brief sometimes refers to plaintiffs as "mothers" and defendants as "fathers."

enforce child-support obligations. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, tit. III, 110 Stat. 2105, 2198-2260 (1996) (codified as amended at 42 U.S.C. §§ 652-666 (2006)). Though federal law requires families on welfare to assign their child-support payments to the State to reimburse welfare costs, in recent years the focus of federal law has shifted to increasing the portion of child-support payments that custodial parents are able to collect. *See* Laura Wheaton et al., The Urban Inst., *Final Report: Benefits and Costs of Increased Child Support Distribution to Current and Former Welfare Recipients* 1 (2005). Under the federal "family first" policy, child-support payments must be distributed first to families who leave welfare before they are used to reimburse the government's welfare costs. *Id.* at 5; PRWORA § 302(a) (codified as amended at 42 U.S.C. § 657(a)(2)(A), (B)(i) (2006)). Amendments enacted in 2005 encourage States to pass some of their reimbursements back to custodial parents. For example, the 2005 amendments waive a State's obligation to share the proceeds with the federal government if they give a certain amount to the family on welfare. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301(b), 120 Stat. 142-43 (2006) (codified at 42 U.S.C. § 657(a)(7) (2006)). Thus, increasing shares of child-support payments go directly to support children.

II. FACTS

Petitioner Michael Turner fathered B.L.P., the daughter of respondent Rebecca L. Rogers (née Price), in 1995, when petitioner was 18 and Rogers was 16. The pair drifted apart soon after B.L.P.'s birth in 1996. Rogers worked as a waitress, sought help from her parents, and received State financial assistance to support her daughter.

In January 2003, DSS notified petitioner that he had a duty to support his daughter. On June 18, 2003, the clerk of the Oconee County Family Court entered an Order of Financial Responsibility, requiring him to pay $51.73 in child support per week. Pet. App. 19a, 22a. Petitioner voluntarily consented to and signed the order. *Id.* at 24a.

Petitioner did not begin making his agreed-upon payments for months, paying nothing all summer. By September 2003 he was more than $800 in arrears, and the family court warned him that it would jail him for ninety days unless he satisfied his obligation to his daughter. Petitioner, or someone on his behalf, paid $1055.57 over the next month. The episode started a pattern in which he resisted making payments until spurred to do so by the threat of jail. In February 2004, October 2004, and once more in February 2005 the family court again ordered petitioner to serve ninety days in jail for civil contempt unless he made good on his child-support obligations. Each time, petitioner, or someone on his behalf, was able to pay the money (totaling $800.67,

$884.79, and $750.92, respectively) in the few weeks before and few days after the hearing. Though petitioner refers without citation to "at least three" periods of incarceration before the proceeding below "for terms of varying duration," Pet. 8 n.4, county jail records show that he was not jailed at all in September 2003 or February 2005. He was jailed for only two days in February 2004 and three days in October 2004, in addition to a third period discussed below.

Petitioner found construction and automotive jobs during these years, but he did not hold onto them. Oconee County Family Court records identify seven different employers for whom he worked after agreeing to make child-support payments in 2003: McGuffin's Auto Service, Weaver's Brake Service, Brook's Tire Service, Wolf Construction, Quality Construction, Tamassee Knob Car Care, and John's Painting. The court collected some money through wage withholding in 2004 and 2005, but those payments ceased by July 2005. In August 2004, after the family court began to garnish petitioner's wages, Brook's Tire replied that petitioner no longer worked there. The pattern repeated itself with Wolf Construction in June 2005 and Quality Construction the next month.

Meanwhile, the family court grew impatient with petitioner's pattern of dilatory payments. In September 2005, it issued another bench warrant and directed that he be jailed for six months unless he

made good on his child-support obligations. According to county jail records, he was jailed and released after four-and-a-half months (after deducting good-time credits). In the four-and-a-half years since April 2006, petitioner has made only five payments, totaling $425, for his daughter's care and support. By the time he appeared at his contempt hearing on January 3, 2008, he was more than $5700 in arrears.

III. PROCEDURAL HISTORY

In March 2006, the clerk of the Oconee County Family Court ordered petitioner to show cause why he should not be held in civil contempt. That same month, petitioner or someone acting on his behalf made a payment of $1404, far more than most of his other payments. When petitioner made no further payments for the next four months, the court issued a bench warrant for his arrest on July 7, 2006. Between April 2006 and January 2008 he made only three payments, all in August 2006, totaling $200. He was not arrested on the bench warrant until December 26, 2007.

On January 3, 2008, petitioner appeared in family court for a contempt hearing. Neither he nor Rogers was represented by an attorney, and petitioner never requested an attorney. He blamed his failure to pay during the preceding twenty-one-plus months primarily on his illegal drug habit, that is, "do[ing] meth, smok[ing] pot, and

everything else," and secondarily on two months' disability, for which he had filed for SSI and government disability benefits. Pet. App. 17a. He admitted that "I know I done wrong." *Id.* The court ordered petitioner jailed for twelve months or until he paid the balance he owed Rogers, whichever came first. The court also made petitioner eligible for work release and placed a lien on his SSI and other government benefits. *Id.* at 7a-8a. There is no evidence in the record that petitioner tried to take advantage of this work-release opportunity to satisfy his child-support obligation, and no record evidence of wages being withheld between 2006 and 2010.

With the help of pro bono counsel, petitioner appealed the civil contempt order. Rogers had no counsel and filed no brief.[2] Before the State's intermediate appellate court could act, the South Carolina Supreme Court certified the case to itself for direct review. Pet. App. 1a. Petitioner completed serving the full twelve-month civil-contempt sanction while his appeal was pending.

The South Carolina Supreme Court affirmed the family court's civil-contempt order. It held that defendants facing incarceration for

[2] The South Carolina Attorney General's Office declined petitioner's attorneys' request that it file a brief on appeal, noting that the office was forbidden by law to take positions in private domestic disputes. As for DSS, it would have been a party only while it was entitled to collect any child support that Rogers received. In March 2004, DSS acknowledged that Rogers had closed her public assistance account as of July 1, 2003, and moved to have the family court send petitioner's child support payments directly to her. The court granted the motion.

civil contempt have no right to court-appointed counsel. *Id.* at 4a. It noted a crucial difference between civil and criminal contempt proceedings: the former are conditional and remedial, while the latter are unconditional and punitive. A defendant like petitioner has no right to a court-appointed attorney "because he may end the imprisonment and purge himself of the sentence at any time by doing the act he had previously refused to do." *Id.* at 3a. Petitioner's "conditional sentence is a classic civil contempt sanction" because he was able to free himself by paying the child support he owed, *id.*, which he could have done, for example, through work release. Thus, the criminal-procedure protections of the Sixth and Fourteenth Amendments do not apply, *id.*, including the Sixth Amendment's right to counsel "[i]n all criminal prosecutions." U.S. Const. amend. VI.

While petitioner's appeal was pending, Rogers became unable to support her daughter any longer and had to relinquish custody to her parents. In May 2009, the family court directed that petitioner's child-support payments be paid to Rogers' mother, Judy Price. Judy died in June 2010, and the court redirected those payments to proposed respondent Larry E. Price, Sr., Rogers' father and Judy's widower. He now cares for B.L.P. and three of Rogers' other children on his own, with occasional help from other family members. To support the four children, he works intermittently as a roofer and receives foster-care

payments (although respondents' financial means are not listed in the record on appeal). *See* U.S. S. Ct. IFP Aff. of Larry E. Price, Sr. Rogers works part-time as a restaurant hostess, paying $34.26 per week to support her children, and walks five miles to and from work because she cannot afford a car. U.S. S. Ct. IFP Aff. of Rebecca L. Rogers. As of July 2010, petitioner owed the family more than $12,728 in overdue child support.

SUMMARY OF ARGUMENT

There is no square division of authority calling for this Court's review. Most of the cases cited in the petition involve criminal prosecutions, cases prosecuted by a lawyer for a government or plaintiff, or cases not involving child support. Not a single case unambiguously conflicts with the decision below.

Moreover, this case suffers from grave vehicle problems. Petitioner has served his sentence, mooting this case; there is no reason to think future cases will evade review. He also failed to raise his right-to-counsel claims in the trial court and raises his *Mathews*/*Lassiter* balancing-test claim for the first time in this Court. Petitioner conceded that he failed to pay because he had indulged in illegal drugs; appointing counsel thus would not have affected the outcome. And by

questioning whether the contempt was truly civil, he casts doubt on whether this case even implicates the question he has presented.

Finally, the decision below is correct. The Sixth Amendment limits the right to counsel to "criminal prosecution[s]" because they involve not only loss of liberty, but also State prosecutorial power and criminal stigma. Because proceedings like probation-revocation hearings and summary courts-martial—and *pro se* child-support cases—lack these features, they do not require counsel, even though the former can trigger months or years in prison. Due process balancing favors keeping *pro se* fathers evenly matched with *pro se* indigent mothers seeking to enforce child-support orders. Indigence is a prerequisite to appointing counsel, so the indigence determination cannot itself require counsel. And States need flexibility to conserve their scarce resources for appointed counsel in criminal cases, where the Sixth Amendment requires lawyers and where defendants need them most.

ARGUMENT

I. COURTS ARE NOT DIVIDED ON WHETHER, WHEN A MOTHER SEEKS TO ENFORCE A CHILD-SUPPORT ORDER *PRO SE*, A COURT MUST *SUA SPONTE* APPOINT COUNSEL BEFORE JAILING A NONPAYING FATHER FOR CIVIL CONTEMPT

Petitioner errs in claiming that twenty-two appellate decisions "direct[ly] conflict" with the decision below. Pet. 3, 12. The decisions he cites, *id.* at 12-19, are inapposite. Most involved criminal cases,

cases prosecuted by the State or by a plaintiff's lawyer, or cases not involving child support. Not one of the cited cases' holdings squarely conflicts with the decision below.

1. A majority of the cases relied upon in the petition involved proceedings prosecuted by the State. There is no indication that the courts that decided these cases would apply a similar rule in a civil dispute between two *pro se* parties, whose power and resources are roughly equal. Thus, the Supreme Court of Michigan noted the need to counterbalance the State's lawyer: "[S]ince the *state's* representative at such a hearing is well versed in the laws relating to child support, fundamental fairness requires that the indigent who faces incarceration should *also* have qualified representation." *Mead* v. *Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990) (emphases added). The Supreme Court of Wisconsin similarly explained its ruling in terms of the imbalance of power between a State represented by counsel and an unrepresented defendant: "[W]here the state in the exercise of its police power brings its power to bear on an individual through the use of civil contempt as here and liberty is threatened, we hold that such a person is entitled to counsel." *Ferris* v. *State ex rel. Maass*, 249 N.W.2d 789, 791 (Wis. 1977)

More than a dozen other decisions, including all but one of the circuit decisions, are likewise distinguishable because they involved

suits initiated by lawyers for the State. *See In re Di Bella*, 518 F.2d 955, 957, 959 (2d Cir. 1975) (also noting that alleged contemnor in fact had counsel, and issue was not appointment of counsel but exclusion of counsel from critical stage); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973) (also dictum, because court found "no deprivation of due process or sixth amendment right to counsel," as alleged contemnor had counsel at the contempt hearing); *Ridgway* v. *Baker*, 720 F.2d 1409, 1411 (5th Cir. 1983) (brought by Texas Department of Human Resources at the prompting of Kansas); *Sevier* v. *Turner*, 742 F.2d 262, 265 (6th Cir. 1984) (brought by a judge, a referee, and an agent of the Tennessee Department of Human Resources, all of whose salaries were funded by fathers' purge payments); *United States* v. *Anderson*, 553 F.2d 1154, 1155 (8th Cir. 1977) (per curiam) (listing Assistant U.S. Attorney as counsel); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1368 (9th Cir. 1972) (per curiam) (same); *People* v. *Lucero*, 584 P.2d 1208, 1210, 1214 (Colo. 1978) (brought by District Attorney before grand jury; issue was exclusion of retained counsel, rather than appointment of counsel, and any error was harmless); *Black* v. *Div. of Child Support Enforcement*, 686 A.2d 164, 166-68 (Del. 1996) (thrice framing its holding as limited to "*State-initiated* contempt proceedings" and twice adding qualifier "civil" (emphasis added)); *McNabb* v. *Osmundson*, 315 N.W.2d 9, 10 (Iowa 1982) (en banc) (brought by

County Attorney); *Pasqua* v. *Council*, 892 A.2d 663, 666, 670 (N.J. 2006) (brought by Probation Division; listing Assistant Attorney General as counsel); *Tetro* v. *Tetro*, 544 P.2d 17, 19 (Wash. 1975) (brought by county prosecutor); *Bradford* v. *Bradford*, No. 86-282-II, 1986 WL 2874, at *1 (Tenn. Ct. App. Mar. 7, 1986) (brought by District Attorney General); *see also Andrews* v. *Walton*, 428 So.2d 663, 664-65 (Fla. 1983) (brought by Department of Health and Rehabilitative Services); *Colson* v. *State*, 498 A.2d 585, 585-86 (Me. 1985) (listing Assistant Attorney General as counsel); *Duval* v. *Duval*, 322 A.2d 1, 2 (N.H. 1974) (brought by Department of Probation); *State ex rel. Dep't of Hum. Servs.* v. *Rael*, 642 P.2d 1099, 1100-02 (N.M. 1982) (brought by Department of Human Services; listing Assistant Attorney General as counsel); *Krieger* v. *Commonwealth*, 567 S.E.2d 557, 559 (Va. Ct. App. 2002) (brought by attorney for Commonwealth).

2. As explained *infra* at 24-28, the civil/criminal distinction determines the Sixth Amendment right to counsel. One of the cases agreeing with the decision below distinguished contrary authority on this ground: "[W]e find a great factual difference" between "a criminal prosecution involving the inordinately unbalanced power of the state's prosecutorial forces and resources" and cases such as this one, where "the 'adverse' party, the mother of the children, was not represented by counsel." *In re Calhoun*, 350 N.E.2d 665, 666-67 (Ohio 1976) (per

curiam). Several of the cases cited above are additionally distinguishable because they involved proceedings that the court viewed as criminal or quasi-criminal. *See Ridgway*, 720 F.2d at 1413-14 & n.7 (noting that Texas law viewed the proceedings as criminal or quasi-criminal, that the State judge had labeled the proceedings "'quasi criminal,'" and that the possible sanctions were punitive and not just remedial); *McNabb*, 315 N.W.2d at 11 (noting that Iowa law did not differentiate civil from criminal contempts, citing *Knox* v. *Mun. Ct.*, 185 N.W.2d 705, 707 (Iowa 1971)); *Colson*, 498 A.2d at 587-88 (incarceration grew out of nonpayment of previously imposed criminal fine); *Tetro*, 544 P.2d at 19 (treating contempt proceeding as "quasi-criminal" under Washington precedents); *see also Cnty. of Santa Clara* v. *Cnty. Super. Ct.*, 5 Cal. Rptr. 2d 7, 8, 13 (Cal. Ct. App. 1992) (under California law the proceeding was "criminal in nature").

3. In other cases, unrepresented defendants were unevenly matched against plaintiffs' lawyers, a factor some courts deemed significant. *Calhoun* suggested that "unbalanced power" could be present where "the 'adverse' party, the mother of the children," *was* "represented by counsel" while the father was not. *Calhoun*, 350 N.E.2d at 666-67. *See Walker* v. *McLain*, No. CIV-84-817-T, at 2 (W.D. Okla. May 23, 1984) (noting that alleged contemnor had to pay attorney's fee to plaintiff's attorney), *rev'd and remanded*, 768 F.2d

1181 (10th Cir. 1985); Br. of Appellant at 1, 1993 WL 13134396, at *1, *Sanders* v. *Shephard*, 541 N.E.2d 1150 (Ill. Ct. App. 1989), *aff'd*, 645 N.E.2d 900 (Ill. 1994); *Rutherford* v. *Rutherford*, 464 A.2d 228, 229, 231, 233-34 (Md. 1983) (alternative holding); *Peters-Riemers* v. *Riemers*, 663 N.W.2d 657, 660 (S.D. 2003); *see also* Br. of Appellant at 1-2, *Adkins* v. *Adkins*, 248 S.E.2d 646 (Ga. 1978) (referring to award of plaintiff's attorney's fees); *Rodriguez* v. *Eighth Judicial Dist. Court*, 102 P.3d 41, 45 (Nev. 2004).[3]

4. Many of the cases cited in the petition are inapposite because they do not involve contempts in child-support proceedings, which are relatively simple, but rather other types of cases with "legal issues of some complexity." *Rutherford*, 464 A.2d at 238 (Murphy, C.J., concurring in part and dissenting in part) (distinguishing civil contempts in child-support cases on this ground). *See*, *e.g.*, *Anderson*, 553 F.2d at 1155 (IRS summons); *In re Di Bella*, 518 F.2d at 956 (grand jury subpoena); *In re Kilgo*, 484 F.2d at 1217 (same); *In re Grand Jury Proceedings*, 468 F.2d at 1368 (same); *Lucero*, 584 P.2d at

[3] Most of the intermediate-state-court opinions cited by petitioner, *see* Pet. 17 n.9, are distinguishable on the same ground: the plaintiffs in those cases were represented by attorneys, creating what courts may have perceived as an imbalance of power. *See Emerick* v. *Emerick*, 502 A.2d 933, 933-34 (Conn. App. 1985), *cert. dismissed*, 510 A.2d 192 (Conn. 1986), *later proceeding* 613 A.2d 1351, 1353 (Conn. App. 1992), *cert. dismissed*, 617 A.2d 171 (Conn. 1992); *In re Marriage of Stariha*, 509 N.E.2d 1117, 1118-19 (Ind. Ct. App. 1987); *Hunt* v. *Moreland*, 697 S.W.2d 326, 327 (Mo. Ct. App. 1985); *Ullah* v. *Entezari-Ullah*, 836 N.Y.S.2d 18, 19 (N.Y. App. Div. 2007); *Ex parte Walker*, 748 S.W.2d 21, 21 (Tex. App. 1988).

1210 (same); *Sanders*, 645 N.E.2d at 901 (failure to produce a minor child); *Allen* v. *Sheriff of Lancaster Cnty.*, 511 N.W.2d 125, 126-28 (Neb. 1994) (failure to pay debt owed to third party under dissolution decree) (alternative holding), *overruled on other grounds by Smeal Fire Apparatus Co.* v. *Kreikemeier*, 782 N.W.2d 848, 864 n.53, 867 (Neb. 2010); *Wold Family Farms, Inc.* v. *Heartland Organic Foods, Inc.*, 661 N.W.2d 719, 721, 725-26 (S.D. 2003) (per curiam) (corporate officers held in contempt for failing to produce financial records) (alternative holding), *abrogated by Sazama* v. *State ex rel. Muilenberg*, 729 N.W.2d 335, 343 (S.D. 2007); *Ferris*, 249 N.W.2d at 790 (failure to comply with environmental agency's order to clean up unlicensed solid-waste-disposal site); *see also Ne. Women's Ctr., Inc.* v. *McMonagle*, 939 F.2d 57, 68-69 (3d Cir. 1991) (disobeying injunction in civil RICO case) (alternative holding); *Colson*, 498 A.2d at 586 (failure to pay criminal fine); *Krieger*, 567 S.E.2d at 559 (public nuisance action).

5. Petitioner cites several other cases that do not squarely address the issue here. Pet. 16-17. *Otton* v. *Zaborac* explicitly "base[d its recognition of a right to counsel] on the right to jury trial in a contempt proceeding for nonpayment of child support recognized in *Johansen* v. *State*, 491 P.2d 759 (Alaska 1971)." 525 P.2d 537, 538 (Alaska 1974). *Johansen*, however, grounded that right in State statutes and precedents, never mentioning the U.S. Constitution. 491 P.2d at 766. Johansen

seems only to have claimed that "he was denied the constitutional safeguards guaranteed to him by the Alaska Constitution." *Id.* at 761. Alaska has long interpreted its State constitutional right to counsel in civil cases more broadly than the U.S. Constitution requires. *See V.F.* v. *State*, 666 P.2d 42, 44-45 & nn.2, 3 (Alaska 1983) (expressly rejecting *Lassiter*, 452 U.S. at 31-32, in finding a right to counsel in the Alaska Constitution in proceedings to terminate parental rights).

In *Choiniere* v. *Brooks*, the defendant—unlike petitioner—had specifically requested court-appointed counsel. 660 A.2d 289, 289 (Vt. 1995) (mem.). More importantly, "*Choiniere* was a summary entry order," in which "the right-to-counsel issue was raised sua sponte by the Court and was neither briefed nor argued by the parties. Not surprisingly, the entry order contains no meaningful discussion or analysis of the issue." *Russell* v. *Armitage*, 697 A.2d 630, 639 (Vt. 1997) (Morse, J., concurring). The Vermont Supreme Court endorsed *Choiniere*'s position in *Russell*, but with an important qualification: *Russell* noted that the case was "more like a criminal proceeding" because the request for incarceration was made by an "attorney for the State." *Id.* at 634-35 & n.1 (majority opinion). And *Russell*'s right-to-counsel observation was dictum, as the court there affirmed the contempt order because Russell in fact had counsel at the hearing that resulted in his incarceration. *Id.* at 635-36.

Finally, petitioner cites the Ohio Supreme Court's decision in *In re Calhoun* as finding no right to counsel. 350 N.E.2d 665; Pet. 18. While *Calhoun* broadly supports the reasoning and decision below, it also rested on several alternative holdings: Calhoun had failed to sign and verify the petition and to specify the jailer as required by State statute, and his habeas suit was inappropriate because he had not shown the inadequacy of an appeal. 350 N.E.2d at 667.

6. The only decision cited in the petition that even possibly conflicts with the decision below is *McBride* v. *McBride*, 431 S.E.2d 14 (N.C. 1993). *McBride* does not indicate whether the mother who brought that case was represented by counsel at the contempt hearing, so it may not squarely conflict with the decision below. At most, petitioner has shown a conflict between the North Carolina and South Carolina Supreme Courts, involving decisions seventeen years apart. No federal court of appeals has yet resolved this precise issue. If this issue were important and recurring, one would expect to see more development in the lower courts. The dearth of decisions on the precise question presented militates against this Court's review.

II. A NUMBER OF GRAVE VEHICLE PROBLEMS WOULD LIKELY PREVENT THIS COURT FROM REACHING AND RESOLVING THE QUESTION PRESENTED

This case suffers from multiple serious vehicle problems that would likely prevent this Court from resolving the question presented.

1. First, this suit is moot because petitioner has completed his twelve-month sentence, and it is unclear what relief petitioner seeks or how it would redress any past injury. It is thus no longer a case or controversy justiciable under Article III. Direct appeals are generally moot once a defendant completes his sentence, absent collateral consequences of the conviction. *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Petitioner has not alleged any such collateral consequences here.

In a similar case, the Seventh Circuit rejected on Article III grounds a nonsupporting father's challenge to his incarceration for contempt without appointed counsel. There, as here, the father had finished serving his sentence before the case reached the appeals court. Writing for the Seventh Circuit, Judge Posner noted that "it is highly uncertain that" "even though he is financially unable to comply, he will be prosecuted" again. *Mann* v. *Hendrian*, 871 F.2d 51, 53 (7th Cir. 1989). "So it is a matter of speculation whether he will again find himself prosecuted for contempt unless he deliberately violates the support order," and a nonsupporting father cannot establish Article III standing by announcing a plan "to flout the order." *Id.*

Even if petitioner could show that he was likely to face another contempt sanction without willfully violating the support order, he cannot show that the sanction would evade review. He and other fathers may move to stay the contempt sanction pending appellate

review, as some fathers (even acting *pro se*) have done. A proper vehicle would be such a case, or one in which the father remains imprisoned. Many of the cases cited earlier met those requirements.[4]

2. Second, petitioner never timely raised the right-to-counsel issue in the trial court, but only on appeal. Other defendants have timely raised that issue.[5] Moreover, neither petitioner nor his amici briefed below the alternative argument based on the *Mathews*/*Lassiter* due process balancing test, nor did the decision below discuss it. Pet. App. 3a, 11a-15a; Br. *Amici Curiae* ACLU et al. 1 (S.C. S. Ct.) (framing issue exclusively as defendant's "Sixth Amendment right to counsel"); Pet. 25 n.14 (raising issue for first time on certiorari in a footnote). Petitioner and his amici treated that test as inapplicable to any proceeding involving incarceration, which they argued should be governed by *Argersinger*'s categorical Sixth Amendment rule. Pet. App. 11a-12a. Petitioner has thus forfeited this alternative claim.

---

[4] *See, e.g.*, *Black*, 686 A.2d at 167 (family court postponed ruling on contempt order pending appellate review); *Sanders*, 645 N.E.2d at 903 (father remained imprisoned at time of appeal); *McNabb*, 315 N.W.2d at 10 (volunteer counsel had court suspend sentence pending motion and certiorari); *Rutherford*, 464 A.2d at 232 n.3 (circuit court stayed enforcement of contempt order pending appeal); *McBride*, 431 S.E.2d at 15 (defendant released pending appeal); *Peters-Riemers*, 663 N.W.2d at 662 (trial judge stayed jail sentence pending appeal); *Wold Family Farms*, 661 N.W.2d at 722 (appellate court granted *pro se* motion staying contempt order pending appeal); *Colson*, 498 A.2d at 586 (court stayed commitment order pending appeal); *In re Calhoun*, 350 N.E.2d at 667 (declining to find case moot because appellant had been released on his own recognizance pending appeal and was thus still under restraint); *Rodriguez*, 102 P.3d at 45 (contempt order stayed and defendant released pending review); *Duval*, 322 A.2d at 2 (contempt order stayed pending appeal).

[5] Multiple fathers appearing *pro se* have requested counsel. *See, e.g.*, *Sanders*, 541 N.E.2d at 1153; *Choiniere*, 660 A.2d at 289; *Rael*, 642 P.2d at 1101; *Cnty. of Santa Clara*, 5 Cal. Rptr. 2d at 8.

3. There is no reason to believe that the assistance of counsel would have affected the outcome here. In response to previous orders to show cause, petitioner or someone on his behalf had paid his arrears. He had more than twenty-one months to comply with this support order, but between April 2006 and January 2008 made no payments apart from $200 in the month immediately after the arrest warrant. Family-court records reflect, and petitioner admits, that he held a succession of jobs, several of which ended shortly after wage withholding began.[6] Most importantly, petitioner himself admitted that he failed to pay because he had indulged in illegal drugs, blamed only two of the twenty-one-plus months' nonsupport on disability, and admitted that "I know I done wrong." Pet. 17a. Petitioner now speculates about a host of legal defenses for which a lawyer's help might have been useful, Pet. 26-27 & n.17, but offers no evidence that any of them would have applied in his case.

4. Finally, one of petitioner's arguments actually threatens to take this case well outside the question presented, which is limited to "a civil contempt proceeding." Pet. i. Despite that framing of the question presented, petitioner later questions whether his proceeding was in fact a civil contempt, characterizing it as "wholly punitive" and

[6] *Cf. supra* at 4 n.1 (noting that many nonsupporting fathers develop "Acquired Income Deficiency Syndrome," changing or quitting jobs or hiding income to avoid garnishment).

thus criminal. Pet. 29 n.20. This equivocation about how to characterize the proceeding raises the danger that this Court will not even be able to decide the question presented and might have to dismiss the writ of certiorari as improvidently granted.

III. THE DECISION BELOW IS CORRECT

A. The Sixth Amendment Right to Counsel Is Limited to "Criminal Prosecutions," in Which Defendants Face Prosecutors' State Power as Well as Criminal Stigma

The Sixth Amendment right to counsel applies only to "criminal prosecutions" where defendants face not only loss of liberty but also (1) criminal-justice professionals wielding the enormous power of the State, and (2) the stigma of a criminal conviction. Neither condition applies here, because civil-contempt proceedings are not criminal prosecutions.

1. *No Imbalance of Prosecutorial Power.* The text of the Sixth Amendment limits its protections to "all criminal prosecutions." U.S. Const. amend. VI. Criminal defendants need appointed defense lawyers to balance the scales since "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime [and to hire] [l]awyers to prosecute" them. *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963). Thus, this Court has consistently limited the Sixth Amendment right to counsel to criminal cases, where defendants must face State prosecutors. *See, e.g.*, *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 (1972) (understanding *Gideon*

and *Powell* v. *Alabama*, 287 U.S. 45 (1983), as relevant to "any criminal trial" and "all such criminal prosecutions"); *Scott* v. *Illinois*, 440 U.S. 367, 372-73 (1979) (reading *Argersinger* as drawing the outer boundary of "the constitutional right to appointed counsel in state criminal proceedings"); *Alabama* v. *Shelton*, 535 U.S. 654, 657 (2002) (reading *Argersinger* and *Scott* as limited to "any criminal prosecution . . . for the charged crime" (internal quotation marks omitted)).

Petitioner errs in quoting *Johnson* v. *Zerbst* for "'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.'" Pet. 21 (quoting 304 U.S. 458, 4[62-]63 (1938)). The original quotation was not so truncated, but continued: ", wherein the prosecution is presented by experienced and learned counsel." 304 U.S. at 463; *see also id.* (limiting holding to "criminal proceedings"). Here, petitioner faced no criminal "prosecution" nor any "experienced and learned counsel," but only a *pro se* mother and the straightforward, indisputable factual issue of whether he paid, or could have paid, the sums certain of his child-support obligation.

Loss of liberty is a necessary but not sufficient condition to trigger a Sixth Amendment right to counsel. Where defendants are not outmatched by adversarial professional prosecutors, they do not need defense lawyers to balance the scales. Even though probation-

revocation hearings often trigger additional months or years in prison for convicted criminal defendants, they are not adversarial and do not automatically require defense counsel. *Gagnon*, 411 U.S. at 787, 790. Those proceedings are brought not by adversarial prosecutors but by probation officers, without formal procedures or rules of evidence. *Id.* at 788-89. Introducing defense counsel would trigger an arms race, requiring the State to bring in counsel on the other side and encumbering simple hearings with adversarial procedures. *Id.* at 787-88. So too here.

This Court reiterated these points when it rejected a Sixth Amendment or due process right to counsel for military courts-martial in *Middendorf* v. *Henry*, 425 U.S. 25, 34 (1976). *Middendorf* explicitly rejected the bright-line rule advanced by petitioner, which would require counsel before depriving any defendant of liberty: "A summary court-martial may impose 30 days' confinement at hard labor, which is doubtless the military equivalent of imprisonment. Yet the fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable." *Id.* at 34-35; *accord id.* at 37. Summary courts-martial are not adversarial proceedings and involve no opposing lawyers. There is no prosecutor, but instead a "presiding officer acts as judge, factfinder, prosecutor, and defense counsel." *Id.* at 32. Requiring defense lawyers would necessitate prosecutors, complicating

an otherwise simple and nontechnical proceeding. *Id.* at 45. Neither the Sixth Amendment nor due process requires defense counsel, because there is no prosecutorial imbalance of power to rectify.

2. *No Criminal Stigma at Stake.* Moreover, the Sixth Amendment right to counsel applies only where a defendant faces the stigma that accompanies the State's criminal prosecution. Petitioner faces no such stigma here.

This Court has repeatedly emphasized criminal stigma as a key consideration triggering criminal-procedure protections. *Apprendi* v. *New Jersey* extended the Sixth Amendment right to jury trial to sentence enhancements because "both the loss of liberty and the stigma attaching to the offense are heightened." 530 U.S. 466, 484 (2000). *In re Winship* required proof beyond a reasonable doubt because a juvenile-delinquency conviction imposes *both* "the stigma of a finding that he violated a criminal law and . . . the possibility of institutional confinement." 397 U.S. 358, 367 (1970). In *In re Gault*, a factor calling for appointed counsel was that the label "juvenile . . . 'delinquent' . . . has come to involve only slightly less stigma than the term 'criminal' applied to adults." 387 U.S. 1, 23-24 (1967).

Conversely, loss of liberty by itself, without additional stigma, is insufficient to trigger the right to counsel. Probation-revocation hearings often deprive convicted criminal defendants of their liberty

for months or years but impose no additional stigma. *Cf. Gagnon*. That theme surfaced explicitly in *Middendorf*. Though the offense charged in *Middendorf* was punishable with loss of liberty, it "carrie[d] little popular opprobrium" and no "stamp of 'bad character' with conviction." 425 U.S. at 39. Thus, neither the Sixth Amendment nor due process guaranteed a right to appointed counsel.

A civil-contempt sanction carries far less stigma than a criminal conviction; it neither labels defendants as felons nor shames them with rap sheets. Nor do civil contemnors have to list their civil-contempt convictions on job applications or register as offenders. *Cf. Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) (recognizing these as important kinds of stigma imposed by criminal convictions). Thus, the Sixth Amendment's protection against criminal stigma does not apply.

3. *Civil-Contempt Proceedings Are Not Criminal Prosecutions*. "Criminal contempt proceedings, *unlike civil proceedings*, could require such protections as the Sixth Amendment right to counsel . . . ." 27 James Wm. Moore et al., *Moore's Federal Practice* § 642.03[1], at 642-14 (3d ed. 2010) (emphasis added). Contempt sanctions to enforce child-support orders are civil because the sanction is conditional, designed to make the plaintiff whole by forcing the defendant to pay what he owes. "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the

sentence is punitive, to vindicate the authority of the court." *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). "The paradigmatic coercive, civil contempt sanction" is jailing a defendant for refusing to pay alimony "until he complies." *Int'l Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 828 (1994) (citing *Gompers*, 221 U.S. at 442); *see also Chadwick* v. *Janecka*, 312 F.3d 597, 607-08 (3d Cir. 2002) (Alito, J.) (holding that imprisoned contemnor in alimony case had no right to criminal procedures). Refusal to pay alimony is indistinguishable from petitioner's refusal to pay child support.

Though petitioner questions the relevance of the conditional sentence, *Gompers* treats the purge clause as dispositive. "If imprisoned, . . . 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." *Gompers*, 221 U.S. at 442 (citation omitted). "If the relief imposed here is in fact a determinate sentence with a purge clause, then it is civil in nature" and does not require criminal procedures. *Hicks ex rel. Feiock* v. *Feiock*, 485 U.S. 624, 640 (1988) (child-support case); *see also Shilitani* v. *United States*, 384 U.S. 364, 370 & n.6 (1966) (upholding as civil a two-year sentence including a purge clause); *Bagwell*, 512 U.S. at 828. That is exactly

the case here.[7] Petitioner's arguments to the contrary offer little reason to sweep away a century of workable, settled contempt law.

Finally, blurring the civil/criminal distinction would ensnare this Court in endless line-drawing difficulties. Extending the right to counsel invites interminable litigation about extending other criminal procedures to civil cases, including the rights to jury trial, a speedy and public trial, the privilege against self-incrimination, confrontation, cross-examination, and proof beyond a reasonable doubt. This Court briefly experimented with extending the double-jeopardy guarantee beyond criminal to certain civil penalties. *United States* v. *Halper*, 490 U.S. 435, 448-49 (1989). In doing so, *Halper* chose to disregard the civil/criminal divide, just as petitioner advocates here. *Id.* at 447. Just eight years later, this Court abrogated *Halper* and once again limited double jeopardy to criminal prosecutions. *Hudson* v. *United States*, 522 U.S. 93, 96 (1997). *Halper*'s line-drawing effort to denominate some civil penalties as punitive had quickly proven "unworkable." *Id.* at 102. *Halper*'s mistake cautions against repeating the error here. The civil/criminal distinction determines whether criminal procedures apply.

---

[7] The contempt is civil so long as the defendant is allowed to avoid the sanction by proving his inability to comply. In civil cases, defendants may bear the burden of proving their inability to pay. *Hicks*, 485 U.S. at 637-38; *United States* v. *Rylander*, 460 U.S. 752, 757 (1983). Petitioner was given ample opportunity to prove his inability to comply, but frankly conceded that he could have complied but instead indulged in illegal drugs. Pet. App. 17a. Further, the court gave petitioner work-release privileges, but there is no evidence in the record that he exercised them to purge his child-support obligation. There is little doubt that "'he carrie[d] the keys of his prison in his own pocket.'" *Gompers*, 221 U.S. at 442 (citation omitted).

B. Due Process Does Not Require the Appointment of Counsel in *Pro Se* Proceedings to Enforce Child Support

1. Petitioner claims that the Due Process Clause creates a right to counsel far broader than that imposed by the Sixth Amendment. But the Due Process Clause of the Fourteenth Amendment simply incorporates the Sixth Amendment right to counsel, making it apply to State criminal prosecutions exactly as it does to federal ones. *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3034-36 & n.12 (2010) (interpreting *Gideon*, 372 U.S. at 341, 343). The scope and content of the right are unchanged.

2. Petitioner cites only one case that arguably recognized a categorical right to counsel outside a traditional criminal prosecution: *In re Gault*, which involved a juvenile-delinquency proceeding. Pet. 22. In *Gault*, police arrested a fifteen-year-old, brought him before a judge, filed a formal charging instrument and affidavit, and testified against him. The court sentenced the teenager to six years' confinement, even though an adult convicted of the same offense would have faced a maximum of two months' incarceration. 387 U.S. at 4-9. Thus, *Gault* considered the prosecution by a professional police officer "comparable in seriousness to a felony prosecution." *Id.* at 36.

Though the majority opinion in *Gault* relied on due process, *id.* at 41, Justice Black's concurrence recognized that due process mattered because it incorporated wholesale the criminal procedures

required by the Fifth and Sixth Amendments. *Id.* at 61 (Black, J., concurring). Chief Justice Burger likewise read both *Winship* and the earlier *Gault* decision as holding that "all juvenile proceedings are 'criminal prosecutions'" within the meaning of the Sixth Amendment. *In re Winship*, 397 U.S. 358, 375-76 (1970) (Burger, C.J., dissenting). *See also id.* at 365-66 (majority op.) (reading *Gault* as equating delinquency adjudication with criminal prosecution because the proceedings are "'comparable in seriousness to a felony prosecution'" and thus "need . . . criminal due process safeguards" (quoting *Gault*, 387 U.S. at 36)); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 n.12 (1973) (reading *Gault* as holding that the right to appointed counsel applied because the juvenile-delinquency proceeding, "while denominated civil, was functionally akin to a criminal trial"). Thus, *Gault*'s right-to-counsel holding is better understood as resting on the Sixth Amendment.

Even if *Gault* creates a categorical due process right to counsel beyond the Sixth Amendment, it is limited to those proceedings that are criminal in all but name. *Gault* involved (a) a prosecution brought by an experienced criminal-justice professional against an unrepresented minor; (b) an unconditional sentence of six years' confinement; *and* (c) "only slightly less stigma" than a criminal conviction. 387 U.S. at 4-9, 23-24, 36. All three factors combined made the juvenile-delinquency proceedings "comparable in seriousness to a

felony prosecution," 387 U.S. at 36, and thus required appointed counsel. Not one of those factors is present here.[8]

3. In an effort to expand the right to counsel beyond criminal prosecutions, petitioner relies heavily on *Lassiter*'s supposed "determination . . . that the right to counsel applies in any proceeding, civil or criminal, that could lead to incarceration." Pet. 22 (characterizing *Lassiter*, 452 U.S. 18). That is not, however, *Lassiter*'s holding. *Cf. Middendorf*, 425 U.S. at 34-35, 37 (explicitly rejecting this proposed rule). *Lassiter* held that a parent has *no* right to appointed counsel in a proceeding to terminate her parental rights. The Court stated that loss of liberty is a *necessary* condition for claiming a right to counsel. 452 U.S. at 25 ("*only where* the litigant may lose his physical liberty"); *id.* at 26-27 ("*only when*, if he loses, he may be deprived of his physical liberty") (emphases added). But *Lassiter* did not itself involve a threat of imprisonment, and this Court had no occasion to—and did not—hold or suggest that it is a *sufficient* condition. As explained *supra* at 24-28, a defendant must also show at least that he faces the

[8] Petitioner cites *Vitek* v. *Jones* as recognizing a *per se* right to counsel outside a traditional criminal prosecution. 445 U.S. 480, 497 (1980) (plurality opinion). That decision, however, has little precedential value. Only a plurality of the Court would have recognized a *per se* right to counsel. In his controlling concurrence, Justice Powell explicitly rejected the proposed *per se* right to counsel. He would have allowed the representation of a licensed psychiatrist or even perhaps a layman, rather than an attorney, to satisfy the convicted felon's rights in a hearing concerning his transfer to a mental institution. *Id.* at 497, 499 (Powell, J., concurring in part and concurring in the judgment). He particularly stressed "the capability of the inmate," *id.* at 498, who by the very nature of the issue will often be of unsound mind.

prosecutorial power of the State, an imbalance of power, and the stigma of a criminal conviction. Not one of these prerequisites is present here.

2. Except in the rare case that is criminal in all but name, as in *Gault*, due process does not require a categorical right to counsel. As an initial matter, judges' longstanding power to jail for civil contempt without appointing counsel underscores the lack of any unwritten due process right to counsel. *See Burnham* v. *Superior Ct. of Cal.*, 495 U.S. 604, 619 (1990) (plurality opinion) (noting that a "process of law . . . sanction[ed by] settled usage both in England and in this country" necessarily amounts to due process) (internal quotation marks omitted).

Even if this Court were to revisit the constitutionality of this power, there is no need and no place for petitioner's proposed categorical rule. At best, petitioner would have to satisfy the three-factor balancing test of *Mathews* and *Lassiter* to establish whether counsel is necessary in the particular circumstances at hand. Courts must balance "[a] the private interests at stake, [b] the government's interest, and [c] the risk that the procedures used will lead to erroneous decisions." *Id.* at 27.[9] Balancing these three factors, courts have properly found that they do not support a right to counsel in

[9] *Cf. Medina* v. *California*, 505 U.S. 437, 445-46 (1992) (explaining that where a criminal procedure is "grounded in centuries of common-law tradition," courts should determine whether the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (internal quotation marks omitted).

child-support civil-contempt cases. *See Rodriguez*, 102 P.3d at 50-51; *Rael*, 642 P.2d at 1102-03.

3. As mentioned, petitioner has forfeited this fundamental-fairness claim by failing to raise it below. *Supra* at 22. Assuming *arguendo* that the issue survives his forfeiture, several points relevant to this balancing test merit special consideration. First, the government has an interest in keeping *pro se* fathers evenly matched with *pro se* mothers seeking to enforce child-support orders, instead of disadvantaging the latter or having to hire lawyers for both sides.

The government also has a strong interest in conserving scarce indigent-defense dollars for "criminal prosecution[s]," where the Sixth Amendment expressly guarantees counsel. Indigent criminal defense is chronically overburdened and strapped for cash. Criminal "defense services in the U.S. are not adequately funded, leading to all kinds of problems. These include a lack of funds to attract and compensate defense attorneys; pay for experts, investigative and other support services; cover the cost of training counsel; and reduce excessive caseloads." Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice* iv (2004). Imposing a civil *Gideon* requirement on public defenders and other appointed lawyers, on top of the existing strain of criminal cases, would make this already-terrible situation worse.

Governments are entitled to engage in triage, reserving free lawyers for those cases expressly included within the Sixth Amendment's criminal scope.

The private interests of civil contemnors are substantially weaker than those of criminal defendants, to whom the Sixth Amendment guarantees appointed attorneys. Civil contemnors face no State prosecutors or criminal stigma, often (as here) have sentences capped at one year, and often (as here) can free themselves by participating in work release. Criminal defendants need lawyers most.

To the extent that a delinquent father has any defense to a contempt order, it would typically involve the straightforward factual issues of whether there was nonpayment (often conceded) and whether the defendant had the ability to pay (indigence). Determining indigence is rarely complex, and such determinations ordinarily are and must be made without counsel. A defendant has no right to appointed counsel until he first shows his indigence. *See, e.g.*, 18 U.S.C. § 3006A(b) (2006); Cal. Gov't Code § 27707 (2008); Fla. Stat. § 27.52 (2010); Minn. Stat. § 611.17 (2010); S.C. Code Ann. § 17-3-30 (2009); *State* v. *Hudson*, 228 A.2d 132, 135 (Conn. 1967); *Schmidt* v. *Uhlenhopp*, 140 N.W.2d 118, 121 (Iowa 1966); *State* v. *Dean*, 471 N.W.2d 310, 314-15 (Wis. Ct. App. 1991) (defendant must first prove indigence by a preponderance of the evidence). Indigence, in other

words, is not a determination that itself requires counsel; it is a simple factual prerequisite to appointing counsel. A lawyer is no more needed in child-support cases than in appointment-of-counsel proceedings. Holding otherwise would greatly impede appointment of counsel, as every defendant would first have to receive an appointed lawyer to figure out whether the defendant was entitled to an appointed lawyer.[10]

4. The merits of this case, however, simply are not presented for this Court's review. As explained above, review of the merits would be fatally hampered by (a) serious mootness concerns; (b) petitioner's failure to raise the due process balancing claim in any State court; (c) the lack of any showing that counsel would have affected the outcome; and (d) petitioner's questioning whether this contempt proceeding was civil. Too many obstacles obstruct this Court's ability to reach and resolve the question presented.

---

[10] Even though amici offer tendentious research done during the pendency of and for purpose of this litigation, their evidence confirms that there is little need for lawyers because courts are carefully evaluating the merits. In a majority of cases (54%), judges decline to find the nonsupporting father in contempt. Br. *Amici Curiae* Ctr. for Fam. Pol'y & Practice et al. (CFFP Br.) 17. 80% of those held in contempt alleged no disability or injury limiting their ability to work. *Id.* at 18. Many failed to pay support because they were drug users. *Id.* Others hid their income, earning money from criminal or other "underground" sources. *Id.* at 20; NACDL Br. 16. Petitioner and his amici cannot infer from the raw fact of nonpayment and contempt that many parents are being *erroneously* held in contempt and confined. Pet. 31-32; NACDL Br. 13-14; Constitution Project Br. 22; *see also* CFFP Br. 18-19 (faulting judges for carefully questioning and "looking for some minor flaw in the obligor's story"). On the contrary, judges appear to be carefully sifting fathers who cannot pay from fathers who choose not to pay, instead of rubber-stamping findings of contempt.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STEPHANOS BIBAS
Counsel of Record
NANCY BREGSTEIN GORDON
University of Pennsylvania Law School Supreme Court Clinic
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

Counsel for respondent Rebecca L. Rogers and proposed respondent Larry E. Price, Sr.

STEPHEN B. KINNAIRD
PANTEHA ABDOLLAHI
Paul, Hastings, Janofsky & Walker LLP
875 15th Street N.W.
Washington, DC 20005
(202) 551-1842

September 24, 2010