No. 10-10

IN THE

Supreme Court of the United States

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

DEREK J. ENDERLIN
ROSS & ENDERLIN, P.A.
330 East Coffee Street
Greenville, SC 29601

KATHRINE HAGGARD HUDGINS
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
1330 Lady Street, Ste. 401
Columbia, SC 29201

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
CATHERINE M.A. CARROLL
SONYA L. LEBSACK
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 10-10

MICHAEL D. TURNER,

Petitioner,

v.

REBECCA L. ROGERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

Michael Turner spent a year in jail after being adjudged by a South Carolina court to be in contempt of an order to pay child support that he could not pay. The Supreme Court of South Carolina nonetheless held that Turner, "an indigent defendant," had no right to appointed counsel at the hearing. Pet. App. 2a. That decision was irreconcilable with this Court's precedent and fundamental principles of due process.

Respondents portray this case in nearly fictional terms. The contempt proceedings leading to Turner's incarceration were not a private matter between Turner and a "*pro se* mother." The machinery of the State was involved at every step. Rebecca Price assigned her right to child support to the State, as she was legally required to do because she had received public assistance benefits. Pet. Br. 8. As required by

South Carolina law in public assistance cases, the enforcement proceedings against Turner commenced automatically because he was in arrears. Pet. Br. 6-7. It was the family court and court clerk, not Ms. Price, that initiated contempt proceedings against Turner and made the minimal showing necessary to establish contempt. Pet. Br. 10-11; Pet. App. 16a-17a. Ms. Price need not even have appeared at any stage of the proceedings—though the Department of Social Services (DSS) often does.

Respondents speculate that petitioner had the ability to pay his child-support arrearage but chose not to, or that he caused his own inability through drug use or other activity. But the state supreme court resolved the constitutional question presented in this case on the assumption that Turner is "an indigent defendant." Pet. App. 2a. That premise was not disputed below, and the family court made no contrary finding. Pet. App. 6a-7a. Moreover, Turner testified to his limited means and provided the family court a copy of his disability benefit application (JA 135a-136a; Pet. Br. 11 n.7). The appropriate forum to determine whether petitioner has the ability to meet his child-support obligations is not this Court, but the family court—where petitioner could, with the assistance of counsel, have presented a defense that would have precluded his imprisonment. Petitioner was denied that assistance in this case, and in consequence was sent to jail in violation of due process.

ARGUMENT

I. THIS CASE IS NOT MOOT

Although Turner has completed the jail term imposed by the contempt order under review, his claim

fits easily into the mootness exception for cases that are capable of repetition yet evading review. Pet. Br. 20-27; *see* U.S. Br. 13-15.[1]

A. The Controversy Is Capable Of Repetition

Respondents argue (Br. 27) Turner cannot establish jurisdiction because he will not be incarcerated again for contempt unless he "'deliberately violates the [child-]support order,'" and the Court should presume he will not. Under South Carolina law, however, an arrearage alone triggers the court clerk's obligation to issue a rule to show cause. Pet. Br. 6, 25 n.14. Once the rule issues, the obligor bears the burden of proving he should not be held in contempt, and if he fails to carry that burden, he may be imprisoned without any further showing of misconduct. *Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986); *see also Maggio* v. *Zeitz*, 333 U.S. 56, 75-76 (1948). Absent appointment of counsel, it is reasonably likely Turner would not be able to meet that burden and would thus be incarcerated again, as has happened repeatedly.

Nor is there any merit to respondents' contention (Br. 27) that Turner is unlikely to face incarceration again without appointment of counsel because he has recently been assisted by pro bono counsel. The question presented does not concern the voluntary appearance of counsel, but rather an indigent's constitutional right to be informed of his right to counsel and, if he cannot afford an attorney, to have counsel appointed to

[1] Since the filing of petitioner's opening brief, Turner has been released from incarceration on a prior contempt order, brought back before the family court at a hearing where DSS appeared through counsel, and ordered to appear again at another contempt hearing scheduled for May 4, 2011.

assist him. That an attorney has appeared voluntarily to assist Turner in certain proceedings does not ensure that counsel will appear at future hearings or that the family court will refrain from ordering incarceration in counsel's absence. *See* U.S. Br. 15-16 n.5. Respondents' rule would effectively discourage incarcerated indigents from seeking or accepting pro bono legal assistance and instead require them to continue without representation lest their right-to-counsel claims become moot. Nothing in this Court's precedent, or Article III, requires that result.

B. The Issue In This Case Is Highly Likely To Evade Review

Respondents do not dispute that a twelve-month order is ordinarily too short to be fully litigated prior to its expiration, but they nonetheless contend that this controversy does not "evade review." Respondents' assertions misconstrue this Court's precedents.

1. Citing *St. Pierre* v. *United States*, 319 U.S. 41 (1943), respondents argue (Br. 23-25) that Turner's case is moot because he did not seek a stay of the contempt order in the state courts or this Court before completing his jail term. *St. Pierre*, however, institutes no such requirement. Pet. Br. 23.[2] In *St. Pierre*, the Court considered whether a criminal defendant had saved his case from mootness, notwithstanding the expiration of his sentence, by diligently prosecuting his appeal. *See* 319 U.S. at 43. As subsequent treatment of *St. Pierre* by this Court and the courts of appeals demonstrates,

[2] None of the cases relied on by respondents (Br. 24 n.5) cites *St. Pierre*, much less reads it to engraft an additional element onto the "capable of repetition, yet evading review" test.

this avenue of preserving a case from mootness has been eclipsed by the collateral consequences doctrine. *See Sibron* v. *New York*, 392 U.S. 40, 57 (1968); *see also*, *e.g.*, *Ethredge* v. *Hail*, 996 F.2d 1173, 1176-1177 (11th Cir. 1993).

St. Pierre is also not controlling here because this case comes to this Court from a state-court system, where the elements of mootness and the requirements for obtaining a stay are not necessarily the same as those in the lower federal courts. Although a South Carolina court may grant a stay to preserve a case from mootness, *see* S.C. App. Ct. R. 241(c)(2), South Carolina law follows a "less restrictive" approach to mootness that may have made a stay unnecessary to preserve jurisdiction in Turner's case. *Byrd* v. *Irmo High Sch.*, 468 S.E.2d 861, 864 (S.C. 1996). Indeed, the Supreme Court of South Carolina decided Turner's case after his sentence had expired without noting any issue of mootness. Pet. App. 1a-5a; *see also State* v. *Passmore*, 611 S.E.2d 273, 281 (S.C. Ct. App. 2005) (challenge to expired one-year contempt sentence not moot). Respondents' argument reduces to the proposition that, even while the state courts retained jurisdiction over his case, petitioner should have sought a stay from *this* Court—before a final judgment issued from the state supreme court—to preserve *this* Court's jurisdiction in the eventuality that the state courts would rule against him. No decision of this Court suggests that such heroic efforts are needed to avoid mootness.

Respondents relatedly contend (Br. 26) that the issues in this case will not evade review because Turner could apply for a stay of a future contempt order. But respondents fail to explain why the possibility that a court might grant a stay in a *future* case means *this* case is moot. Even if an incarcerated *pro se* litigant

could anticipate the need for a stay to preserve his case from mootness and successfully file an application, granting the stay is within the court's discretion.[3] And there is no reason to believe that the stay application, any more than the contempt order itself, could be litigated before the contempt order could expire.

That is precisely the situation here. The contempt orders issued against petitioner have imposed maximum jail terms as short as 90 days to one year (Pet. Br. 22), which could well be too short to litigate a stay all the way to this Court. Finally, there is no reason to believe that the South Carolina courts would stay a future contempt order, given that the state supreme court has definitively ruled on Turner's right-to-counsel claim. *Cf. In re Decker*, 471 S.E.2d 459, 461 (S.C. 1995) (granting stay to resolve "novel question").

2. Citing *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), respondents further assert (Br. 25-26) that Turner's claim should be held moot because *other* litigants incarcerated for civil contempt could preserve the issue for this Court's review by seeking stays in their own appeals. Respondents misread *DeFunis*. In limited circumstances where a controversy was *not* likely to recur as to the complaining party, this Court has nonetheless exercised jurisdiction on the ground that complete litigation of the issue would likely be

[3] Obtaining a stay in South Carolina requires elaborate steps, and the South Carolina rules contemplate that a stay application will be counseled. S.C. App. Ct. R. 241(d)(3)-(4) (petition must be "verified by the client" and contain "legal arguments with supporting points and authority); *id.* R. 241(d)(6) (if seeking order ex parte, "moving party's attorney" must certify efforts made to give notice).

impossible in future cases involving other parties. *See Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *see also Honig* v. *Doe*, 484 U.S. 305, 335-336 (1988) (Scalia, J., dissenting). The Court has not held the reverse—that even where there is a reasonable expectation that the complaining party himself will be subject again to the same action, jurisdiction nonetheless is defeated because another litigant might be able to obtain review of the issue in another case. *DeFunis* does not so hold. The Court dismissed that case because DeFunis's challenge was "not 'capable of repetition' so far as [DeFunis] is concerned," and, unlike *Roe*, DeFunis's constitutional claim could be raised by other litigants and decided in sufficient time in future cases. 416 U.S. at 319. That analysis does not suggest that where a controversy *is* capable of repetition yet evading review as to the very litigant before the Court, his claim may yet be moot because another party's claim in another case might not evade review.

Respondents suggest (Br. 29 n.8) that petitioner or other contemnors could avoid mootness issues by litigating the right-to-counsel question through a class-action suit under 42 U.S.C. §1983, where "relaxed mootness rules" supposedly would apply. But §1983 is not a vehicle for challenging the fact of incarceration. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973); *Heck* v. *Humphrey*, 512 U.S. 477, 481 (1994).[4] Accordingly, any

[4] Nor could Turner obtain review of his constitutional claim through a state habeas petition. *See* S.C. Code Ann. §17-27-20(a) (limiting state post-conviction review to criminal cases); Order, *Strange* v. *South Carolina* (S.C. Apr. 16, 2008) (unpublished) (petitioner incarcerated for civil contempt could not challenge contempt order through state habeas petition). Although federal habeas might have provided a suitable vehicle, Turner presumably would

such contemnor would have to complete his incarceration before bringing suit. At that point, however, respondents' mootness objections would simply transfer to the issue whether the former contemnor had standing to sue. *See O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974).

3. Finally, respondents argue (Br. 28-29) that Turner's case is moot because vacatur of the contempt order would provide Turner with "no tangible benefit." If Turner were to prevail in this appeal, however, he would have the benefit of a binding determination from this Court that he cannot be incarcerated on future civil contempt orders without representation by counsel. Turner's case thus stands on identical footing with cases in which this Court has rejected claims of mootness notwithstanding that the particular redress for which the case was litigated had already been granted or could no longer be granted. In each of those cases, the Court emphasized that the petitioner would benefit by being armed with a favorable ruling when a similar controversy arose. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979); *cf. Citizens United* v. *FEC*, 130 S. Ct. 876, 895 (2010). That is equally true here.

---

have had to exhaust available state remedies, including his direct appeal, *see* 28 U.S.C. §2254(b)(1)(A), by which time the same mootness question would have arisen.

II. TURNER WAS ENTITLED TO APPOINTED COUNSEL

A. Precedent Holds That An Indigent Litigant Facing Incarceration Is Entitled To Appointment Of Counsel

In a variety of contexts, this Court has held that a defendant facing incarceration is entitled to appointed counsel. Pet. Br. 27-37. In the criminal context, that right stems from the Sixth Amendment. But this Court has made clear that the assistance of counsel is an essential requirement of due process where a defendant's liberty is at stake, *see, e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Cooke* v. *United States*, 267 U.S. 517, 537 (1925), and that the right accordingly is not limited to "criminal prosecutions" within the meaning of the Sixth Amendment. Rather, the Court has held that the right to appointment of counsel applies also in civil proceedings that are "comparable in seriousness to a felony prosecution" because they "carry with [them] the awesome prospect of incarceration in a state institution." *In re Gault*, 387 U.S. 1, 36-37 (1967); *see also Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 25-27 (1981); *Vitek* v. *Jones*, 445 U.S. 480, 493-494, 497 (1980) (plurality).[5]

Thus, as in a criminal prosecution, a defendant facing incarceration in a civil proceeding stands to lose "the most elemental of [his] liberty interests." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529-530 (2004); *see also Gault*, 387 U.S. at 36-37. And, as in a criminal prosecution, an individual defendant facing incarceration even

[5] Respondents seek (Br. 45-46) to distinguish *Gault* on the ground that the juvenile delinquency proceeding at issue was equivalent to a criminal prosecution. As petitioner has explained (Br. 30-31 n.17), that is not so.

in a nominally civil case "requires the guiding hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), to identify, develop, and present his defense. *See Gault*, 387 U.S. at 36; *Vitek*, 445 U.S. at 496-497.

Respondents cite only two cases in which this Court has held the right to appointment of counsel inapplicable in proceedings leading to incarceration. Both are inapposite. In *Middendorf* v. *Henry*, 425 U.S. 25 (1976), this Court rejected Sixth Amendment and Due Process challenges to the military's use of summary courts-martial to try servicemembers for minor offenses without counsel. In doing so, however, it cited special considerations uniquely applicable to the military and the "particular deference" owed to Congress's determinations in military matters. *Id.* at 43. The Court also emphasized that servicemembers had the right to forego the summary court-martial and be tried instead at a more formal proceeding where counsel would be provided. *Id.* at 28-29, 46-48. None of these considerations applies here.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the Court held that indigent probationers are not categorically entitled to appointment of counsel in all probation revocation proceedings. *Id.* at 786-791. This holding rested in part on the recognition that probationers enjoy only the "limited due process right[s] of one who … has been convicted of a crime." *Id.* at 789; *see also id.* at 781. As this Court has explained, the "dispositive factor" in *Gagnon* was that the probationer had previously been convicted of a felony offense, following a criminal trial in which his right to counsel was ensured, and thereafter enjoyed diminished due process rights. *Alabama* v. *Shelton*, 535 U.S. 654, 664 (2002).

Moreover, unlike the contempt hearing here—a formal judicial proceeding—the probation revocation hearings at issue in *Gagnon* were informal proceedings that took place outside the courtroom. Introducing counsel, the Court reasoned, could transform the hearing into a more formal proceeding and transform the hearing body into something "more akin to … a judge." *Gagnon*, 411 U.S. at 787. The Court also emphasized that counsel would play little role because the ground for revocation in most cases would be the straightforward fact that the probationer had been convicted of another crime. *Id.* at 787, 789. Those considerations are absent here. Pet. Br. 35-37, 45-48; *infra* pp. 14-16. Indeed, *Gagnon* held that counsel "[p]resumptively … should be provided" when the issues were more complex. 411 U.S. at 790-791.[6]

B. There Is No Basis For Creating An Exception To This Court's Right-To-Counsel Precedent For Civil Contempt Proceedings That Result In Incarceration

Respondents advance several reasons why a civil contempt hearing should be exempt from the general principle that a defendant facing incarceration should

---

[6] Respondents' reliance (Br. 43) on *Parham* v. *J.R.*, 442 U.S. 584 (1979), is similarly misplaced. The Court there upheld procedures for committing a minor to a state mental hospital—without separately considering any right-to-counsel-claim—because the informality and inherently medical nature of such proceedings negated the need for "judicial-type" safeguards. *Id.* at 613. Moreover, the child's interests were entrusted in part to the parents' judgment, *id.* at 603-604, and a "formalized … adversary contest" risked "significant intrusion into the parent-child relationship," *id.* at 610.

have a right to appointed counsel. There is no warrant for such an exception.

1. Respondents focus on the truism that civil contempt is not a "criminal prosecution" within the meaning of the Sixth Amendment. But as discussed, the Court has recognized that the Due Process Clause provides a right to appointed counsel for indigent defendants in *civil* proceedings that may result in incarceration. *Supra* p. 9; Pet. Br. 30-34. As *Lassiter* explained, "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel." 452 U.S. at 25.

Respondents' formalism is particularly misplaced in the contempt context, where an otherwise "classic civil contempt sanction" (Pet. App. 3a) becomes impermissibly punitive when imposed erroneously on an indigent defendant who lacks the ability to comply, but cannot establish his defense. *See Maggio*, 333 U.S. at 72. Civil and criminal contempts are distinguished mainly by whether the sanction serves a coercive or punitive purpose. *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). But the "conditional" nature of a coercive civil contempt sanction depends on the contemnor's ability to comply with the underlying court order. *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966). Where a defendant lacks that ability, the sanction—even if cloaked by a purge clause—is "purely punitive." *Maggio*, 333 U.S. at 72. In a true criminal contempt proceeding, the court could not impose a punitive sanction absent the protections applicable to such a proceeding. *See* Pet. Br. 29-30, 39-40. Incarcerating a contemnor for "civil" contempt where that sanction lacks coercive force and is purely punitive imposes the precise sanction that could not be imposed in a criminal

contempt proceeding without the defendant's having the assistance of counsel. *Cooke*, 267 U.S. at 537.[7]

This analysis does not seek to "retroactively convert" (Resp. Br. 37-38) Turner's civil contempt order into a criminal prosecution. Rather, it reflects that the due process inquiry focuses on the risk that a defendant will be *erroneously* deprived of his liberty. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).[8] In the civil contempt context, erroneously incarcerating a defendant who lacks the ability to comply has the same effect as if the order contained no purge clause. *See Walker* v. *McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985) ("[T]he jail is just as bleak no matter which label is used."). Accordingly, distinguishing between civil and criminal contempt for purposes of the right to counsel makes little sense when the distinction between them is maintained only if the defendant can comply with the court

---

[7] Respondents claim (Br. 34 n.9) the right to counsel applies in criminal contempt only because it is a crime subject to the Sixth Amendment. Petitioners have shown that is incorrect. *See* Pet. Br. 29-30 & n.16; *Cooke*, 267 U.S. at 537; *In re Oliver*, 333 U.S. 257, 275 (1948).

[8] Citing *Medina* v. *California*, 505 U.S. 437 (1992), respondents contend (Br. 46-47) the Court should not consider the balance of interests under *Mathews*, but should instead defer to South Carolina's legislative judgment. *Medina*'s deferential standard, however, applies when evaluating the validity of state *criminal* procedures, as to which the Bill of Rights "speaks in explicit terms." 505 U.S. at 443-446. By contrast, this Court has applied *Mathews* to examine right-to-counsel questions in other civil contexts. *Lassiter*, 452 U.S. at 27. Under *Mathews* balancing, indigent civil contemnors facing incarceration are entitled to appointed counsel because of the heavy weight of their individual liberty interest—an interest recognized in *Lassiter* and other cases.

order—the very issue the defendant requires the assistance of counsel in presenting.

2. Respondents next contend that appointment of counsel is unnecessary in civil contempt proceedings because establishing the inability-to-pay defense is a straightforward factual matter for which most defendants do not require counsel. As petitioner and amici have demonstrated, however, presenting evidence and argument in support of the inability-to-pay defense are *not* straightforward undertakings, and appointed counsel would accordingly provide a significant benefit to accused contemnors. Pet. Br. 35-37, 45-48; NACDL Br. 22-26; Legal Aid Br. 14-18, 23-25; Patterson Br. 15-22.

Respondents' suggestion that a defendant is likely to establish his defense merely by putting into plain words his inability to pay, without a lawyer's help, is contrary to fundamental tenets of our adversarial system of justice. Courts are not required to credit mere assertions, and if the defendant "offers no evidence," he has not met his burden. *Maggio*, 333 U.S. at 75; *see also* Pet. Br. 35 n.20, 45-46. Indeed, respondents repeatedly fault Turner (*e.g.*, Br. 39) for having provided only "bare assertions" of indigence. Having a contempt defendant complete an "understandable form" (U.S. Br. 24) would hardly be more effective where, as the United States acknowledges (*id.* at 25), the court could simply overlook or "disbelieve[]" the defendant's recitation of his assets and income.[9] Indeed, in advance of

[9] As amici explain, establishing an inability-to-pay defense to civil contempt is more burdensome than establishing eligibility for appointment of counsel in a criminal case. Legal Aid Br. 16-17. For example, South Carolina has adopted a "presumption" of eligibility if a defendant's "net family income is less than or equal to the [federal] Poverty Guidelines." S.C. App. Ct. R. 608(b)(4).

his hearing, Turner supplied to the family court just such a form—a copy of his application for disability benefits. Pet. Br. 11 n.27; JA 135a. If appointed, counsel would have known to call the court's attention to the application and present corroborating evidence. Instead, the court ignored it. Pet. App. 17a-18a.

Moreover, establishing an inability-to-comply defense frequently implicates questions of law, as respondents' arguments demonstrate. A judge might suspect, for example, that a defendant could not satisfy the defense of inability to pay because his indigency resulted from drug use or intentional underemployment. But whether the inability-to-comply defense may be rendered inapplicable by such conduct is a legal question beyond the capability of the lay defendant to address. *See* Pet. Br. 36 & n.21. Similarly, respondents' speculative suggestion that Turner might have earned money in jail through work release invites legal arguments about the interpretation of prison regulations, what constitutes an "inability" to comply, and what purge conditions, if any, can remediate that present inability.[10] A lay defendant likely could not spot or respond to such issues.

Nor is it sufficient for the judge to ask questions of the defendant, rather than the defendant's own lawyer. The judge is not an advocate for the defendant, and from a lay defendant's perspective, questions from the bench would be as "intricate, complex and mysterious" as questioning by opposing counsel—and likely even more intimidating. *Johnson* v. *Zerbst*, 304 U.S. 458, 463

[10] At least one court has found the use of work release as a purge condition to be "patently unlawful." *Arrington* v. *Department of Human Res.*, 935 A.2d 432, 449 (Md. 2007).

(1938). Moreover, the proposal to burden the judge with responsibility for investigating and drawing out any available defenses hardly advances the State's interest in streamlining and reducing the cost of child-support enforcement proceedings. *Cf. McKaskle* v. *Wiggins*, 465 U.S. 168, 184 (1984); Pet. Br. 49. If appointed, counsel would relieve the court of that burden by investigating the facts, identifying relevant defenses, and framing them properly for the court's consideration.[11]

3. Finally, neither the interests of the custodial parent nor the interests of the State warrant denying the right to appointed counsel to an indigent defendant facing incarceration for civil contempt.

Respondents contend that recognizing a right to appointed counsel will unfairly disadvantage custodial parents, who may lack counsel. But at least in "IV-D" public-assistance cases subject to South Carolina's Rule 24 (*see* Pet. Br. 5-7), the custodial parent has no burden in initiating the proceeding or establishing the obligor's contempt. Those proceedings are initiated automatically by the court clerk, who can establish contempt *prima facie* by showing the defendant's failure to pay. Even outside the IV-D context, any custodial parent in South Carolina may request DSS's assistance in enforcing a support order as if it were a IV-D case. Pet. Br. 5 n.1. The defendant, in contrast, bears a heavy burden to establish the inability-to-comply defense, and—

[11] Respondents cite a study (Br. 54-55) for the proposition that lawyers are unlikely to make a difference, but as its authors concede, the study is "useless" for determining the value of legal representation. Greiner & Pattanayak, *What Difference Representation?* 43, 47 (Feb. 12, 2011) (unpublished draft).

unlike the custodial parent—faces up to a year in jail if he cannot.

Recognizing a right to appointed counsel in civil contempt proceedings that could lead to incarceration also will not frustrate enforcement of child-support orders. As the United States acknowledges (Br. 23-24 n.8), "[t]here is no evidence" that incarceration is an effective means of securing payment from low-income noncustodial parents, who constitute a substantial proportion of child-support obligors. *See also* Pet. Br. 48-49; CFFPP Br. 16-22; Patterson Br. 6, 8-9; Legal Aid Br. 19-23; NACDL Br. 6-8. Appointing counsel to help an indigent defendant demonstrate that he cannot afford to pay, and thus cannot legally be incarcerated, does not delay payments that would otherwise be made. As to obligors who can afford to pay some portion of their arrearages, counsel can help identify the enforcement measures most likely to yield compliance, which very often will be measures other than incarceration. *See* U.S. Br. 23; Legal Aid Br. 24-25; Patterson Br. 18-21.

Nor does the State's financial interest in declining to fund appointed counsel outweigh the contempt defendant's liberty interest or his need for counsel. Pet. Br. 49-50. As the United States agrees (Br. 21), the State incurs "substantial expense" incarcerating obligors who cannot pay their arrearages. *See* Patterson Br. 22-27. And by refusing to employ more effective means of child-support enforcement in favor of maintaining its "court-based approach," South Carolina has paid more than $72 million in penalties to the federal government. U.S. Br. 6 & n.4. In contrast, numerous States have long and successfully provided for appointment of counsel in civil contempt proceedings that may result in incarceration, including many of

respondents' State amici, who tellingly cite no evidence of resulting financial harm. *See* Texas Br. 1, 11-12, 15-16. Respondents and amici Senators likewise cite no evidence of a significant burden on state fiscs except the assertion of one unidentified New Jersey official that the State no longer pursues incarceration in cases involving indigent child-support obligors to avoid having to appoint counsel. Resp. Br. 61; Senators Br. 25. Even if true, all this would show is that New Jersey sensibly assesses an obligor's indigence before any contempt hearing, instead of seeking to incarcerate an indigent who cannot legally be incarcerated for civil contempt. Senators Br. 8a.[12]

C. A Case-By-Case Approach To The Right To Counsel Would Not Satisfy Due Process

Citing *Gagnon*, respondents and the United States contend that any due process right to appointed counsel in civil contempt proceedings should apply only in cases of exceptional complexity. Resp. Br. 62-63; U.S. Br. 26-29. As explained, however (*supra* pp. 10-11), the Court in *Gagnon* declined to find a categorical right to appointed counsel in probation revocation hearings only because of the informal nature of the proceeding and

---

[12] The Government cites (Br. 29-31) the federal political branches' decision not to reimburse States for the cost of appointing counsel in child-support enforcement proceedings. But that federal policy judgment does not determine the degree of process that is due in state contempt proceedings under the Due Process Clause. And if it did, the "balance" struck by the federal government would foreclose both appointment of counsel *and* incarceration of indigent contemnors. *See* U.S. Br. 30-31; 45 C.F.R. §304.23(i) (no federal funding for "[a]ny expenditure for jailing of parents in child-support enforcement cases").

the diminished nature of the liberty interests at stake, and because revocation usually resulted from a criminal conviction—an event the parole board could note without need of additional facts or legal argument. 411 U.S. at 787.

This Court has not applied *Gagnon*'s case-by-case approach outside the probation revocation context when incarceration has been at stake.[13] Nor have the lower courts extended *Gagnon* beyond probation revocation or analogous proceedings. *See*, *e.g.*, *United States* v. *Eskridge*, 445 F.3d 930, 932 (7th Cir. 2006) (revocation of supervised release); *Drayton* v. *McCall*, 584 F.2d 1208, 1220 (2d Cir. 1978) (rescission of parole); *Pope* v. *Chew*, 521 F.2d 400, 405 (4th Cir. 1975) (revocation of conditional pardon). Outside that limited context, this Court has consistently held that the due process right to counsel in cases involving a defendant's incarceration is categorical. *Supra* Part II.A. Here, none of the considerations that supported a case-by-case approach in *Gagnon* applies in the civil contempt context. Establishing the inability-to-comply defense is not the simple, straightforward undertaking respondents

[13] Respondents cite (Br. 48-49) other decisions as rejecting a "categorical" right to counsel, but none (other than *Gagnon*) involved commitment to state confinement. *See Lassiter*, 452 U.S. 18 (termination of parental rights); *Mathews*, 424 U.S. 319 (termination of disability benefits); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (entitlement to benefits); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (loss of good-time credits); *cf. Parham*, 442 U.S. 584 (deciding no right-to-counsel issue). The United States (Br. 26) cites *Middendorf*, but the Court expressly declined to extend *Gagnon* in that case, holding instead—for reasons that do not apply here, *see supra* p. 10—that no right to counsel applied in summary courts-martial. 425 U.S. at 42-43.

depict. Defendants face a heavy burden to meet it—and face jail if they fail—in *all* cases. *Supra* pp. 14-16; Pet. Br. 50 n.24.

Though it agrees that Turner's incarceration violated his due process rights, the United States contends (Br. 23-25) that a case-by-case approach to appointment of counsel would adequately protect those rights if the State adopted other procedures to ensure an accurate determination of the contempt defendant's ability to pay. As discussed, however, the proposed alternatives do not suffice given the nature of the showing the defendant must make. *Supra* pp. 14-16. They are also unworkable. For example, the suggestion (U.S. Br. 25) that due process might be satisfied if the family court "question[ed] the contemnor about his finances" begs the question how thoroughly the court must inquire and how carefully the court must consider the defendant's responses. Similarly, the United States offers no way to determine whether due process would be satisfied if a defendant completed an "understandable form" (Br. 24), but the family court did not state on the record whether it had reviewed or considered the information provided. The Government's proposals, like a limited case-by-case right to counsel, are thus constitutionally insufficient to reduce the risk that a contempt defendant who cannot comply with the court order will nonetheless be erroneously incarcerated.

D. Respondents' Slippery-Slope Arguments Fail

Respondents erroneously predict (Br. 40-41) that petitioner's position will require application of other criminal procedural protections to civil contempt cases. This claim stems from respondents' mistaken view that applying the right to appointed counsel here would require "[e]xtending the Sixth Amendment" to civil

contempt proceedings. Resp. Br. 40. As explained, *supra* p. 12, petitioner's argument does not depend on characterizing civil contempt proceedings as "criminal prosecutions." Accordingly, other Sixth Amendment protections would not apply unless the Court separately determined that fundamental fairness required it. Thus, the Court's determination in *Gault* that the Due Process Clause required appointment of counsel in juvenile delinquency hearings, 387 U.S. at 14, 41, did not prevent the Court from subsequently holding the right to a jury trial inapplicable. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 541, 543-551 (1971) (plurality); *see also id.* at 553-555 (Brennan, J., concurring in part and dissenting in part); Pet. Br. 30 n.17. In the civil contempt context, it is settled that the jury trial right and the reasonable doubt standard do not apply. *International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 827 (1994). But the right to counsel is, as this Court has long recognized, a unique procedural right. And here, it would play an especially significant role in helping indigent contempt defendants establish inability to comply and maintaining the civil character of the proceeding. Pet. Br. 41 n.23.

Joined by the United States, respondents also claim petitioner's position, if adopted, would require appointment of counsel in other civil proceedings threatening a loss of liberty, such as immigration, customs detention, post-conviction collateral attacks, or extradition. Resp. Br. 40; U.S. Br. 31-32. None of those proceedings is before the Court, however, and very different considerations would apply in each case.

In the immigration context, the weight of the government's interest and the nature and purpose of removal proceedings might well distinguish them from other civil proceedings in which the Court has

recognized a right to appointed counsel, as was true in the context of summary courts-martial in *Middendorf*. *See Demore* v. *Kim*, 538 U.S. 510, 521-522 (2003). Indeed, the United States argues as much (Br. 31-32). Similarly, considerations of comity and the extremely limited nature and purpose of a judicial proceeding to determine whether an individual is extraditable might distinguish extradition proceedings from other civil proceedings involving a loss of liberty. *See, e.g.*, *Ordinola* v. *Hackman*, 478 F.3d 588, 607-609 (4th Cir. 2007) (Traxler, J., concurring) (discussing 18 U.S.C. §3184).

Respondents' other examples (Br. 40) fare no better. Customs detention is a law-enforcement function, carried out by border patrol agents, that involves no judicial proceeding at all. *See, e.g.*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 539 (1985). A customs detainee's procedural rights are governed by the Fourth and Fifth Amendments, *see id.* at 537-540, including any right to counsel before custodial interrogation, *see, e.g.*, *United States* v. *Moya*, 74 F.3d 1117, 1119 (11th Cir. 1996).

As to habeas, this Court has already determined that a convicted defendant has no federal right to counsel when collaterally attacking his conviction. *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987). But this is because, unlike in a civil contempt proceeding, the assistance of counsel in a post-conviction collateral attack serves "'not as a shield to protect [the defendant] against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.'" *Id.* (quoting *Ross* v. *Moffitt*, 417 U.S. 600, 610-611 (1974)). Moreover, whereas a civil contempt defendant may lose the most fundamental of liberty interests, a petitioner bringing a collateral attack is incarcerated—and his

liberty interests diminished—because of his underlying criminal conviction, not the habeas proceeding. *See District Attorney's Office* v. *Osborne*, 129 S. Ct. 2308, 2320 (2009); *Shelton*, 535 U.S. at 665. Nothing in petitioner's position would require appointment of counsel in such circumstances.

CONCLUSION

The decision of the Supreme Court of South Carolina should be reversed.

Respectfully submitted.

DEREK J. ENDERLIN
ROSS & ENDERLIN, P.A.
330 East Coffee Street
Greenville, SC 29601

KATHRINE HAGGARD HUDGINS
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
1330 Lady Street, Ste. 401
Columbia, SC 29201

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
CATHERINE M.A. CARROLL
SONYA L. LEBSACK
SHIVAPRASAD NAGARAJ
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MARCH 2011