

No. 10-10

**In the
Supreme Court of the United States**

MICHAEL D. TURNER, PETITIONER

v.

REBECCA L. ROGERS, ET AL.

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA*

**BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO,
FLORIDA, HAWAII, MAINE, MISSISSIPPI, NEW HAMPSHIRE,
SOUTH CAROLINA, UTAH, VIRGINIA, AND WYOMING
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

GREG ABBOTT
Attorney General of Texas

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

DANIEL T. HODGE
First Assistant Attorney
General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

BILL COBB
Deputy Attorney General
for Civil Litigation

DAVID C. MATTAX
Director of Defense
Litigation

[Additional Counsel Listed
On Inside Cover]

ADDITIONAL COUNSEL FOR AMICI

LUTHER STRANGE
Attorney General of Alabama

THOMAS C. HORNE
Attorney General of Arizona

JOHN W. SUTHERS
Attorney General of Colorado

PAMELA JO BONDI
Attorney General of Florida

DAVID M. LOUIE
Attorney General of Hawaii

WILLIAM J. SCHNEIDER
Attorney General of Maine

JIM HOOD
Attorney General of Mississippi

MICHAEL A. DELANEY
Attorney General of New Hampshire

ALAN WILSON
Attorney General of South Carolina

MARK L. SHURTLEFF
Attorney General of Utah

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

BRUCE A. SALZBURG
Attorney General of Wyoming

TABLE OF CONTENTS

	Page
Interest of Amici Curiae.....	1
Summary of Argument.....	1
Argument.....	2
I. The Writ Should Be Dismissed Because Turner’s Case is Moot.....	2
A. Turner Cannot Satisfy the “Capable of Repetition” Doctrine by Proclaiming His Intent to Willfully Defy a Child-Support Order or Assuming that State Courts Will Erroneously Hold Him in Civil Contempt if He is Unable to Pay.....	4
B. Turner Cannot Satisfy the “Capable of Repetition” Exception to Mootness Unless He Establishes that he Will be Unable to Retain Pro Bono Counsel in Future Civil- Contempt Proceedings.....	9
II. The Constitutional Right to Appointed Counsel Extends Only to “Criminal Prosecutions,” Not Civil Proceedings.....	11
III. The Relaxed Procedures of the South Carolina Family Courts Present No Need for Appointed Counsel in the Broadest Category of Cases.....	17
Conclusion	20

TABLE OF AUTHORITIES

Cases:

<i>Alabama v. Shelton</i> , 535 U.S. 654 (2002).....	7, 8
<i>Albright v. Oliver</i> , 510 U.S. 266 (1994).....	14
<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	16, 17
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972).....	8
<i>ASARCO Inc. v. Kadish</i> , 490 U.S. 605 (1989).....	11
<i>Betts v. Brady</i> , 316 U.S. 455 (1942)	12, 13
<i>Cardinal Chem. Co. v. Morton Int’l, Inc.</i> , 508 U.S. 83 (1993).....	10, 11
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983).....	4-6, 11
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	11
<i>FEC v. Wis. Right to Life, Inc.</i> , 551 U.S. 449 (2007).....	3, 6

<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	12, 13
<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	13
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993).....	15
<i>Honig v. Doe</i> , 484 U.S. 305 (1988).....	4
<i>Moseley v. Mosier</i> , 206 S.E.2d 624 (S.C. 1983)	5
<i>O’Shea v. Littleton</i> , 414 U.S. 488 (1974).....	4
<i>S.C. Dep’t of Soc. Servs. v. Flemming</i> , 244 S.E.2d 517 (S.C. 1978)	18
<i>Scott v. Illinois</i> , 440 U.S. 367 (1979).....	7, 8
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998).....	3
<i>St. Pierre v. United States</i> , 319 U.S. 41 (1943).....	3
<i>United States v. White</i> , 344 F.2d 92, 93 (4th Cir. 1965).....	9

Constitution, Statutes, and Regulations:

U.S. Const. amend. VI.....	13
U.S. Const. amend. X	12
U.S. Const. amend. XIV § 1	7
18 U.S.C. 3006A	9
S.C. Code Ann. § 63-3-620.....	5
S.C. Fam. Ct. R. 2(a)	19
S.C. Fam. Ct. R. 7.....	18
S.C. Fam. Ct. R. 7(c).....	17, 18
S.C. Fam. Ct. R. 7(e).....	17, 18
S.C. Fam. Ct. R. 25.....	19
S.C. R. Civ. P. 5(a).....	19
S.C. R. Civ. P. 8(d).....	19
S.C. R. Civ. P. 12(b).....	19
S.C. R. Civ. P. 38	19
S.C. R. Civ. P. 39	19
S.C. R. Civ. P. 40	19

S.C. R. Civ. P. 42	19
S.C. R. Civ. P. 43(b)(1).....	19
S.C. R. Civ. P. 49	19
S.C. R. Civ. P. 50	19
S.C. R. Civ. P. 51	19
S.C. R. Civ. P. 55	19
S.C. R. Civ. P. 56	19

Other Authorities:

Akhil Reed Amar, <i>The Constitution and Criminal Procedure</i> 140 (1997).....	13
3B Charles Alan Wright & Arthur R. Miller, <i>Federal Practice and Procedure</i> § 732 (3d ed. 2010)	9
David A. Strauss, <i>Common Law, Common Ground, and Jefferson's Principle</i> , 112 Yale L.J. 1717 (2003).....	13
Federal Crimes Act of 1790, ch. 9, 1 Stat. 112 (1790)	13

INTEREST OF AMICI CURIAE

Petitioner Michael Turner invites this Court to create a constitutional right to appointed counsel in civil-contempt proceedings. Although many of the amici States already provide appointed counsel to civil contemnors, the amici States have a substantial interest in defending their constitutionally protected prerogatives under the Tenth Amendment. These include the right to control their own fiscs by deciding whether and when to allocate funds for appointed counsel in cases outside the “criminal prosecutions” enumerated in the Sixth Amendment.

SUMMARY OF ARGUMENT

1. Turner’s case is moot because his sentence for civil contempt expired before he filed his petition for a writ of certiorari, and he does not suffer any collateral consequences from that sentence. His “capable of repetition but evading review” argument fails because, under South Carolina law, inability to pay child support is a complete defense in civil-contempt proceedings. Turner’s “capable of repetition” argument therefore assumes either that he intends to defy his child-support obligations in the future, or else that state-court judges will mistakenly imprison him for civil contempt when he is unable to pay. Neither of these assumptions can be reconciled with this Court’s precedent: parties may not keep a moot dispute alive by promising to violate their legal obligations, or by indulging assumptions that state officials will violate or misapply state law. It is not enough for Turner to allege that he is likely to be jailed again; he must demonstrate a “reasonable expectation” that he will suffer incarceration while

making every effort to satisfy his child-support responsibilities.

2. Turner cannot escape the text of the Sixth Amendment, which guarantees the right to counsel only in “criminal prosecutions.” And the Fourteenth Amendment’s Due Process clause cannot reasonably be construed to require a categorical right to appointed counsel in any class of civil proceedings, when the Sixth Amendment explicitly addresses the right to counsel and extends it only to “criminal prosecutions.” Nor can Turner avoid the Tenth Amendment, which reserves to the States the authority to decide when to provide appointed counsel, often at taxpayer expense, in proceedings that fall outside the “criminal prosecutions” described in the Sixth Amendment. Although many of the amici States already provide appointed counsel to civil contemnors as a matter of legislative grace, they should not be punished for this beneficence with a court ruling that transfers ever more of their decision-making powers to the federal judiciary.

3. South Carolina has chosen to establish a relaxed system of procedural rules in its family courts that are easily navigable by pro se litigants. The Constitution allows States to structure their family courts in this manner without requiring them to formalize proceedings with the provision of appointed counsel.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED BECAUSE TURNER’S CASE IS MOOT

Turner’s certiorari petition challenges procedures used years ago in a state-court proceeding that no

longer has any live or lasting effect. Turner long ago completed his twelve-month sentence for civil contempt and suffers no collateral consequences from this jail stint. And he does not seek retrospective relief in the form of money damages. His petition therefore fails to present a case or controversy under Article III. See *Spencer v. Kemna*, 523 U.S. 1 (1998); *St. Pierre v. United States*, 319 U.S. 41 (1943).

Both Turner and the United States try to shoehorn this case into the “capable of repetition yet evading review” exception to mootness, but their efforts are glib. The capable-of-repetition doctrine requires a litigant to demonstrate, at the very least, that: “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). But South Carolina law prohibits courts from holding parents in civil contempt when they are *unable* to meet their child-support obligations. Only those who “wilfully violate” a child-support order are subject to a civil-contempt citation. That means Turner cannot establish any “expectation” of repeated imprisonment unless he announces plans to flout his child-support obligations, or asks this Court to assume that the South Carolina courts will violate or misapply their own law. The former approach is foreclosed by this Court’s precedent; the latter approach denigrates state officials and fails to establish a “reasonable” expectation of future injury. This Court should dismiss the writ of certiorari for lack of jurisdiction.

A. Turner Cannot Satisfy the “Capable of Repetition” Doctrine by Proclaiming His Intent to Willfully Defy a Child-Support Order or Assuming that State Courts Will Erroneously Hold Him in Civil Contempt if He is Unable to Pay

Many times this Court has held that litigants cannot establish an Article III case or controversy by announcing plans to spurn their legal obligations. See, e.g., *Honig v. Doe*, 484 U.S. 305, 320 (1988) (“[W]e generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”); *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974) (refusing to confer standing to seek injunctive relief when “the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law”). This is true even if a litigant could demonstrate a “reasonable expectation” of suffering a constitutional injury on account of his future misconduct. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for example, this Court held that a chokehold victim could not seek injunctive relief under Article III because he would suffer future harm only if he “illegally resist[s] arrest or detention” or the officers “disobey their instructions” and choke him without provocation. *Id.* at 106. This Court refused to indulge either assumption in concluding that Lyons’s claim for injunctive relief failed to present a live case or controversy under Article III.

Turner’s situation is no different from *Lyons*. Under South Carolina law, Turner cannot be jailed for civil contempt unless he “wilfully violates” a court’s child-support order; inability to pay is a

complete defense. See S.C. Code Ann. § 63-3-620; *Moseley v. Mosier*, 306 S.E.2d 624, 626 (S.C. 1983) (“Contempt occurs when a parent ordered to pay child support voluntarily fails to pay. When the parent is *unable* to make the required payments, he is not in contempt. The record in this case reveals that respondent faithfully paid each week as much child support as he could afford.”). *Moseley* exposes the sophistry of Turner’s efforts to invoke the “debtors’ prison” trope. Pet. Br. 17 (arguing that South Carolina has “no interest at all in maintaining a de facto debtors’ prison for child-support obligors who genuinely cannot pay”). Turner was jailed not because he was unable to afford his payments, but because he persistently failed to make *any* child-support payments, opting to spend his money on marijuana and methamphetamine rather than attempting to satisfy his legal obligations. J.A. 17a.

So the alleged constitutional injury for which Turner seeks redress—incarceration without the benefit of counsel—cannot repeat itself unless this Court assumes either that: (1) Turner will violate state law by willfully spurning his child-support obligations; or (2) South Carolina’s judges will misapply state law and hold Turner in civil contempt even though he lacks the means to pay. As in *Lyons*, neither of these assumptions can undergird a finding of “capable of repetition yet evading review” by this Court. The first assumption leaves those who plan willfully to violate their legal obligations better off than those who intend to obey them. The second supposes that state officials will violate or misapply state law, or otherwise exceed the scope of their authorized powers, whenever Turner faces his next round of civil-contempt proceedings. *Lyons* refused

to assume that the Los Angeles police officers would misapply their internal guidelines governing the use of chokeholds. South Carolina's judges are entitled to at least as much respect from this Court.

Of course, Turner wants this Court to believe that South Carolina's failure to provide appointed counsel will cause the state's family courts to mistakenly reject Turner's inability-to-comply defense and incarcerate him when he is truly unable to pay. See Pet. Br. 35, 45-46. Yet the record in this case indicates that the family court properly found Turner in "wilful[] violat[ion]" of his child-support obligations. Turner admitted in open court that he consumed illegal drugs while he failed to pay any child support. Illegal drugs cost money, and this fact alone supports the family court's refusal to accept Turner's inability-to-comply defense. Amici therefore do not see how Turner can establish a "reasonable expectation" that he will again suffer incarceration, absent an assumption that Turner will repeat the same misconduct that landed him in the clink the first time. And the "capable of repetition" doctrine does not allow Turner to escape mootness by showing that someone else might be wrongfully incarcerated by the South Carolina family courts. See *Wis. Right to Life*, 551 U.S. at 462 (requiring litigants to demonstrate "a reasonable expectation that the *same complaining party* will be subject to the same action again"); *Lyons*, 461 U.S. at 105.

Turner tries to distinguish *Lyons*, *Honig*, and *O'Shea* by re-characterizing the nature of his purported constitutional injury. He carefully avoids arguing that his actual-imprisonment-without-counsel is "capable of repetition" or likely to occur again. Instead, he claims only that he is likely to

face a new round of civil-contempt proceedings, in which he might “*face the prospect of incarceration* without having counsel appointed to assist in his defense.” Pet. Br. 26 (emphasis added). The problem for Turner, however, is that merely standing trial without the benefit of appointed counsel cannot qualify as a redressable constitutional injury. This Court has held repeatedly that States do not violate the Constitution if they withhold appointed counsel from defendants in trials that produce only a fine or an acquittal. This remains true even when an unrepresented defendant stands trial for an offense that *could* be punished by incarceration—so long as the actual sentence imposed eschews any term of imprisonment.¹ See, e.g., *Scott v. Illinois*, 440 U.S. 367, 373-374 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”); see also *Alabama v. Shelton*, 535 U.S. 654 (2002) (holding that States may not impose suspended or probationary sentences that might result in imprisonment in cases where the State withholds appointed counsel). Turner does not ask

¹ This holding logically follows from the text of the Fourteenth Amendment’s Due Process Clause. See U.S. Const. amend. XIV § 1 (“nor shall any State deprive any person of life, liberty, or property without due process of law”). If a defendant serves no jail time because he is acquitted, he has not been deprived of his liberty, and absent a deprivation of “liberty,” there can be no constitutional violation in a State’s failure to provide appointed counsel in a court proceeding.

this Court to overrule *Scott*, so he cannot characterize his next round of civil-contempt proceedings, in which he might “face the prospect of incarceration” (Pet. Br. 26) without appointed counsel, as a repeating constitutional injury under the capable-of-repetition doctrine. The defendant in *Scott* likewise “face[d] the prospect of incarceration without having counsel appointed to assist in his defense” (*ibid.*),² but it is settled that this alone does not violate the Constitution until the trial produces a sentence that provides for imprisonment.³

² The defendant in *Scott* was charged with a crime punishable by a year in jail, a fine of up to \$500, or both. The judge sentenced him only to a \$50 fine. See *Scott*, 440 U.S. at 368.

³ When Turner suggests that the right to appointed counsel can extend to “*any proceeding that* ‘may end up in the actual deprivation of a person’s liberty’” (Pet. Br. 28) (emphasis added), he overstates this Court’s holding in *Alabama v. Shelton* and quotes the opinion out of context. Here is what the Court actually said in *Shelton*: “We hold that *a suspended sentence* that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.” 535 U.S. at 658 (emphasis added). *Shelton* does not hold that States must provide court-appointed counsel whenever a *proceeding* might result in imprisonment. Rather, *Shelton* holds only that courts could not impose suspended or probationary *sentences* that might lead to imprisonment in trials where the State withheld appointed counsel. See also *id.* at 661 n.3 (“*Shelton* also urges this Court to overrule *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), to the extent those cases do not guarantee a right to counsel ‘in all cases where imprisonment is an authorized penalty.’ *We do not entertain this contention * * * .*”) (emphasis added) (internal citation omitted).

The alleged constitutional injury in this case is Turner's *sentence of imprisonment* without the benefit of counsel. That injury cannot recur unless this Court assumes that Turner will flout the child-support order *or* the state courts will wrongfully imprison Turner for contempt despite his inability to satisfy his child-support obligations. Neither of these assumptions is respectful of the States or consistent with *Lyons*.

B. Turner Cannot Satisfy the “Capable of Repetition” Exception to Mootness Unless He Establishes that He Will be Unable to Retain Pro Bono Counsel in Future Civil-Contempt Proceedings

Although Turner did not have a lawyer in his 2008 civil-contempt proceeding, he has managed to secure pro bono counsel both for his direct appeals and his separate 2010 civil-contempt hearing. Yet Turner maintains that this has no bearing on whether his alleged constitutional harms are “capable of repetition.” He characterizes his constitutional injury as “the failure of the family court to *appoint* counsel” (Pet. Br. 27), which he claims is likely to recur regardless whether Turner will be able to obtain pro bono representation in his future civil-contempt proceedings.

Once again, Turner errs by proceeding as if the mere failure to appoint counsel can qualify as a constitutional injury. A failure to appoint counsel does not violate the Constitution when a defendant is able to retain his own lawyer (either pro bono or with his own money). See 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 732 (3d ed. 2010) (citing *United States v. White*, 344 F.2d 92, 93 (4th Cir. 1965)); 18 U.S.C. 3006A (providing for appointed counsel only for criminal

defendants “financially unable to obtain adequate representation”). Turner does not challenge this longstanding proposition, so he cannot assert a recurring constitutional injury without providing *some* reason for this Court to believe that he will be unable to secure pro bono counsel in future civil-contempt proceedings.

The United States takes a different approach to this problem. It acknowledges that Turner’s ability to secure pro bono representation might defeat his capable-of-repetition argument, but thinks this can happen only if Turner’s pro bono counsel were “bound to represent [Turner] in every future contempt proceeding.” See U.S. Br. 15-16 n.5. This approach is too narrow. Turner’s lawyers cannot be allowed to evade the jurisdictional limits on this Court’s power if they intend to represent Turner in future civil-contempt proceedings, regardless whether they memorialize those intentions in a binding agreement. At the very least, this Court should extract a statement from Turner’s current lawyers that they have no plans to represent him in future contempt proceedings before considering Turner’s efforts to invoke the capable-of-repetition doctrine.

The United States also suggests that respondents bear the burden of proving mootness in this case. See U.S. Br. 16 n.5 (“There is no indication in the record, however, that pro bono counsel is under any such obligation * * * .”). But Turner invoked the federal courts’ jurisdiction when he asked this Court to review the state court’s judgment. He must therefore bear the burden of establishing that an Article III case or controversy existed at the time he filed his petition in this Court. See *Cardinal Chem.*

Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993) (“the initial burden of establishing [Article III] jurisdiction rests on the party invoking that jurisdiction”); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (“because ‘[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record,’ the party asserting federal jurisdiction when it is challenged has the burden of establishing it”); *Lyons*, 461 U.S. at 109 (“[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where *the named plaintiff can make a reasonable showing that* he will again be subject to the alleged illegality.”) (emphasis added); see also *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). The burden of proof falls on the party asserting mootness only when the federal courts’ Article III jurisdiction had been established earlier in the proceedings; this often occurs when the litigation was commenced in federal district court rather than state court. See, e.g., *Cardinal Chem. Co.*, 508 U.S. at 98 (“[O]nce that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result.”). But in this case, Turner’s sentence expired long before he turned to federal court.

II. THE CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL EXTENDS ONLY TO “CRIMINAL PROSECUTIONS,” NOT CIVIL PROCEEDINGS

Many States, including Texas, appoint counsel for indigent defendants in civil-contempt proceedings.

They have done so either as a matter of legislative grace or as a matter of state constitutional law. See, *e.g.*, Pet. 16-18 (citing examples). But this Court should not treat these voluntary actions by the States as evidence of a federal constitutional entitlement to appointed counsel in civil proceedings.

On occasion, this Court has invoked the views of the States to justify rulings that expand the constitutional right to appointed counsel. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), for example, this Court relied on the fact that twenty-two States filed an amicus brief supporting Mr. Gideon’s request to overrule *Betts v. Brady*, 316 U.S. 455 (1942), and noted that only three States supported Florida’s position that *Betts* should be retained.⁴ But the amici States oppose any attempt to use our voluntary decisions to provide counsel to the indigent in civil-contempt proceedings as a reason for this Court to entrench a fledgling civil-*Gideon* regime as a matter of federal constitutional law.

To begin, the Tenth Amendment prohibits this Court from imposing constitutional mandates on the States that have not attained the supermajoritarian pedigrees required by Articles V and VII.⁵ *Gideon*’s

⁴ See *Gideon*, 372 U.S. at 345 (“Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was ‘an anachronism when handed down’ and that it should now be overruled. We agree.”).

⁵ See U.S. Const. amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

decision to extend the right to appointed counsel to all felony cases may be hard to reconcile with the original understanding of the Sixth Amendment,⁶ but at least *Gideon* can be squared with the text of that provision, which states that in “criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.⁷ The right to appointed counsel that Turner seeks, by contrast, makes no pretense of respecting the Sixth Amendment’s explicit textual limitation to “criminal prosecutions”; it spurns *both* the language and original meaning of the Assistance of Counsel Clause. And it is not plausible to interpret the Fourteenth Amendment’s Due Process Clause as guaranteeing a right to appointed counsel that extends beyond the explicit right to counsel enshrined in the Sixth Amendment. See *Graham v. Connor*, 490 U.S. 386 (1989) (forbidding litigants from using the Due Process Clause to challenge excessive force used during a

⁶ The First Congress—the same Congress that approved the Sixth Amendment—enacted legislation providing for appointed counsel only in capital cases. See Federal Crimes Act of 1790, ch. 9, 1 Stat. 112, 118.

⁷ See also Akhil Reed Amar, *The Constitution and Criminal Procedure* 140 (1997) (noting that “[t]he text of the counsel clause can be read either way” on whether it protects the right only to retained counsel or also to appointed counsel); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale L.J. 1717, 1745 (2003) (noting that *Gideon*’s holding “fits comfortably with the language” of the Sixth Amendment, while acknowledging that “the original understanding of this provision was that the government may not forbid a criminal defendant from hiring a lawyer with his own money”).

seizure “[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct”).⁸

Turner notes that South Carolina’s civil-contempt proceedings may occasionally result in a judge mistakenly incarcerating one who is unable to comply with the court order, and suggests that such outcomes retroactively convert an otherwise civil proceeding into a punitive “criminal prosecution.” Pet. Br. 42. But this inherent risk of error in civil-contempt proceedings—which exists regardless whether a State provides for appointed counsel—cannot possibly require the States to treat *every* civil-contempt proceeding that results in imprisonment as a *de facto* “criminal prosecution” for Sixth Amendment purposes. If it did, this would trigger the full panoply of Sixth Amendment procedural protections—not only the right to counsel but also the right of jury trial and the evidentiary rules required by the Confrontation Clause. Nor can Turner plausibly maintain that the character of a civil-contempt proceeding depends on the correctness

⁸ See also *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (four-Justice plurality opinion) (“Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”) (citations and internal quotation marks omitted); *id.* at 281 (Kennedy, J., concurring in the judgment) (“I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process”).

of its outcome. *Any* type of trial will on occasion produce erroneous results, and the Constitution does not guarantee the right to an error-free trial, even in real criminal prosecutions. See, *e.g.*, *Herrera v. Collins*, 506 U.S. 390 (1993).

The amici States also oppose Turner's efforts to constitutionalize a right to appointed counsel in civil-contempt proceedings because it will open the door for litigants and courts to extend *Gideon* to habeas corpus proceedings and other civil proceedings that raise the specter of confinement. Although Turner purports to seek only a holding that requires appointed counsel in civil-contempt proceedings, he rests his argument on the principle that indigent litigants are entitled to appointed counsel whenever they are "facing incarceration." Pet. Br. 27. Having jettisoned the Sixth Amendment's explicit textual distinction between "criminal prosecutions" and civil proceedings, Turner proposes a test that will empower a broad swath of civil litigants to raise plausible constitutional claims for appointed counsel. This is especially true of habeas corpus petitioners challenging the legality of their confinement; like Turner, they will face continued incarceration (or even the death penalty) if their inability to obtain appointed counsel causes a post-conviction court to reject their claims. And although Turner's ambitions in this case appear modest, one need only glance at the amicus brief filed by the American Bar Association to see that the aspirations for a civil-

Gideon regime extend far beyond the civil-contempt proceedings at issue in this case.⁹

The danger in a case such as this is that the seemingly narrow holding that Turner seeks, combined with the willingness of many (though not all) States to provide appointed counsel to indigent civil contemnors, may cause this Court to discount the ways in which Turner’s proposal will infringe the States’ constitutionally protected prerogatives. The notion that States should provide appointed counsel for indigent litigants in civil-contempt proceedings may be an enlightened policy choice—indeed, it is a policy that many of the amici States have adopted without any prodding from this Court. But to freeze this benign policy into a requirement of federal constitutional law will shift control of a State’s fisc away from its elected officials and toward federal judges, who will impose on the States their own ideas of when they should provide appointed counsel in civil proceedings. As this Court noted in *Alden v. Maine*, 527 U.S. 706 (1999), many “important needs

⁹ See ABA Amicus Br. 3 n.8 (“Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, *postconviction relief*, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.”) (emphasis added); *id.* at 4 (“The ABA’s work in the area of legal services to low-income persons also has led it to conclude that counsel should be provided as a matter of right to low-income persons *in adversarial proceedings where basic human needs are at stake*, such as those involving sustenance, safety, health, or child custody determinations.”) (emphasis added).

and worthwhile ends compete for access to the public fisc,” and

[s]ince all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government.

527 U.S. at 751. The decision whether to expend a State’s limited public funds on providing appointed counsel in civil proceedings—much like the decision to waive sovereign immunity—belongs to that State’s officials and the people to whom they are accountable, not the federal judiciary.

III. THE RELAXED PROCEDURES OF THE SOUTH CAROLINA FAMILY COURTS PRESENT NO NEED FOR APPOINTED COUNSEL IN THE BROADEST CATEGORY OF CASES

Although South Carolina declines to provide appointed counsel in its child-support civil-contempt proceedings, it compensates by establishing procedural rules for its family courts that are more relaxed and informal, and less adversarial, than the rules that apply in ordinary civil proceedings. There are no jury trials, formal discovery, or summary judgments in South Carolina’s family courts. What’s more, South Carolina Family Court Rules 7(c) and 7(e) loosen the rules of evidence by allowing obligors to introduce unauthenticated documents, including W-2 forms, paycheck stubs, doctors’ and employers’

notes, and income-tax returns. These procedures are designed to be easily navigable by pro se litigants.

There are several notable aspects of the rules of procedure in South Carolina's family courts.¹⁰ First, the rules not only permit, but require, courts to admit certain unauthenticated documents and statements into evidence. South Carolina Family Court Rule 7(c) requires courts to admit unauthenticated doctors' notes.¹¹ And Rule 7(e) requires courts to admit unauthenticated wage statements and other financial documents.¹² Second, the family-court rules explicitly break from the South Carolina Rules of Civil Procedure in the following respects:

¹⁰ The South Carolina rules of court are available online at <http://www.judicial.state.sc.us/courtReg/>.

¹¹ See S.C. Fam. Ct. R. 7 ("The following documents and written statements shall be admissible without requiring that the persons or institution issuing the documents or statements be present in court: * * * (c) The written statement by a physician showing that a patient was treated at certain times and the type of ailment.").

¹² See S.C. Fam. Ct. R. 7 ("The following documents and written statements shall be admissible without requiring that the persons or institution issuing the documents or statements be present in court: * * * (e) A written statement of an employer showing wages either weekly or monthly for a given period of time and W-2 statement, income tax returns and other reports of like nature.").

Apart from these exceptions, the state courts have recognized that S.C. Fam. Ct. R. 7 was not intended to "supplant the substantive rules of evidence." See *S.C. Dep't of Soc. Servs. v. Flemming*, 244 S.E.2d 517 (S.C. 1978).

- They require that defendants receive notice of every hearing. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 5(a).
- They provide that the failure to file a responsive pleading cannot be deemed an admission. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 8(d).
- They preclude courts from converting motions to dismiss into summary-judgment motions. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 12(b).
- They prohibit jury trials. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 38, 39, 40, 42, 51.
- They permit leading questions on direct examination as well as cross-examination. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 43(b)(1).
- They prohibit special verdicts, interrogatories, directed verdicts, defaults, and summary judgments. Compare S.C. Fam. Ct. R. 2(a), with S.C. R. Civ. P. 49, 50, 55, 56.

Third, the South Carolina family-court rules encourage informal discovery and permit formal discovery only upon court order or the parties' stipulation.¹³

¹³ See S.C. Fam. Ct. R. 25 ("Recognizing the unique nature of the court's jurisdiction and the need for a speedy determination thereof, the prompt voluntary exchange of information and documents by parties prior to trial is encouraged. However, formal depositions or discovery shall be conducted only by stipulation of the parties or by court order upon application therefor in writing. Such an order may prescribe the manner, time, conditions, and restrictions pertaining to the deposition or discovery.").

S.C. Fam. Ct. R. 2(a) does provide, however, that that "[i]n addition to the rules set forth in Sections I, II and III of these

Finally, as explained in respondents' brief, empirical evidence confirms that the child-support civil-contempt proceedings in South Carolina family court differ from the formal, adversarial criminal trials that require appointed counsel. Litigants do not question or cross-examine witnesses; judges handle all the questioning. And although many litigants are cited for contempt, only a few are actually confined. Judges carefully tailor the purge amounts and timing to an obligor's ability to pay, which helps contemnors avoid confinement. In the rare cases where lawyers appeared, they performed only tasks that pro se litigants would be equally capable of doing. There is no need for a right to appointed counsel in such simple proceedings.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction. In the alternative, the judgment of the Supreme Court of South Carolina should be affirmed.

Rules of Family Court, the South Carolina Rules of Civil Procedure (SCRCP) shall be applicable in domestic relations actions to the extent permitted by Rule 81, SCRCP."

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

DANIEL T. HODGE
First Assistant Attorney
General

OFFICE OF THE ATTORNEY
GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@oag.state.tx.us
(512) 936-1700

BILL COBB
Deputy Attorney General
for Civil Litigation

DAVID C. MATTAX
Director of Defense
Litigation

FEBRUARY 2011