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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in case 10-10, Turner v. Rogers.

5 Mr. Waxman.

6 ORAL ARGUMENT OF SETH P. WAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WAXMAN: Mr. Chief Justice, and may it
9 please the Court:

10 Due process requires the assistance of
11 counsel before an alleged civil contemner can be
12 incarcerated. That categorical rule flows from the
13 imposition by a court in a formal adversary proceeding
14 of what this Court has termed, quote, "the awesome
15 prospect of incarceration." Certainly --

16 JUSTICE SCALIA: It's -- it's a formal
17 adversary proceeding in a very limited sense and not in
18 the sense that caused us to require counsel to be
19 provided in criminal proceedings where the other side is
20 armed with the legal knowledge that the poor defendant
21 does not have. Many of these proceedings do not involve
22 counsel on the other side, do they?

23 MR. WAXMAN: Well, Justice Scalia, the
24 answer is yes and no. I don't think that you can call
25 this nonadversarial because the -- because South

1 Carolina, as a matter of --

2 JUSTICE SCALIA: I'm talking of counsel. Is
3 it not true that many, perhaps most, of these
4 proceedings do not have counsel on the other side? It
5 is the wife who is trying to get payment of -- of the --
6 of the defaulted alimony and does not have counsel --

7 MR. WAXMAN: I think it is -- the contrary
8 is true. According to the government statistics, 70
9 percent of noncustodial parents either have no income or
10 have income less than \$10,000, and, therefore, in a
11 State -- in every State that accepts TANF funds, which
12 is every State, they are represented by the State
13 agency, and South Carolina in this case has made a rule
14 that in-State cases -- and that also includes nonwelfare
15 cases where the -- a custodial parent has chosen to be
16 represented by the State -- the State entirely carries
17 its prosecutorial burden by filing a rule to show cause
18 and an affidavit showing the arrearages, and that places
19 the burden, which South Carolina says is a heavy burden,
20 on the defendant to prove inability to comply as a
21 condition of maintaining his liberty. In this --

22 JUSTICE ALITO: Well, if we agree with you,
23 isn't this going to create an imbalance? Now, in this
24 case, Ms. Rogers was not represented by counsel at this
25 proceeding, was she?

1 MR. WAXMAN: Ms. Rogers -- in most of the
2 proceedings, and it does vary from one to the other. In
3 all -- let's put it this way: In all of the
4 proceedings, the charges and the State's prima facie
5 case of willful contempt was established by a State
6 employee.

7 JUSTICE ALITO: Yes. The State employee
8 sends out the -- the rule to show cause and proof that,
9 evidence that the -- the noncustodial parent is in
10 arrears on the child payments. So, let's see what would
11 happen if counsel is then appointed in one of these
12 cases, where both the custodial parent and the
13 noncustodial parent are indigent and perhaps not very
14 well educated.

15 Counsel is appointed for the noncustodial
16 parent, and counsel comes in and says this is the income
17 of my client, and he's hurt, he was hurt on the job, all
18 his -- his income is Social Security disability
19 benefits, and he doesn't have enough money to pay child
20 support. Now, the custodial -- the non -- the custodial
21 parent who has no attorney says: He's not really hurt,
22 I see him, I see him walking around, he's going hunting,
23 he's shooting baskets, he's driving around in a new car.
24 It may not be the -- the title may not be in his name,
25 he's -- he's out on the street corner, he's buying

1 drugs, he's drinking alcohol, but I don't have a lawyer,
2 and I can't prove any of this.

3 So you've created a great imbalance there,
4 haven't you?

5 MR. WAXMAN: Not at all, Justice Alito.
6 First of all, in all -- in the -- in the majority of
7 cases the department of social services is in fact the
8 real party in interest and the moving party, and in any
9 private case, for a nominal fee the custodial mother can
10 have the department of social services act in that role
11 as Federal law requires the State to do. Second of
12 all --

13 JUSTICE SCALIA: So, why don't you argue for
14 a rule that -- that the State must provide counsel for
15 the defendant in these cases where it has provided
16 counsel or there is paid counsel on the other side?
17 Wouldn't that be fair?

18 MR. WAXMAN: That would certainly be more
19 than fair, and the number of instances -- let -- let's
20 be clear about this. The number of instances in which
21 the State will be required to appoint counsel for the
22 alleged civil contemner will be in cases where -- I
23 mean, there's no reason why the State of South Carolina,
24 when it issues the summons and the affidavit, says fill
25 out this form and let us know whether you have assets or

1 have income --

2 CHIEF JUSTICE ROBERTS: When you --

3 MR. WAXMAN: In all of those cases where
4 they believe that this is a turnip, not a deadbeat dad,
5 they will proceed with remedies other -- other than
6 incarceration. It's only when they want to proceed in
7 the face of a form that shows indigence and inability to
8 have counsel, that the State has to provide a lawyer
9 before it -- before it puts this man in jail.

10 CHIEF JUSTICE ROBERTS: When you asked --

11 JUSTICE GINSBURG: Mr. Waxman, in your
12 opening statement, you said whenever, in civil contempt,
13 a person is subject to incarceration he or she is
14 entitled to counsel. In your opening statement, you
15 didn't limit it to cases like the case we have before
16 us; that is, where the defense is I'm unable to pay.
17 Therefore, I can't get out of jail.

18 Are you limiting -- are you limiting your
19 argument to the case of a noncustodial parent or a
20 former husband who says I just haven't got the
21 wherewithal to pay? Or are you making a broader claim
22 that anytime someone is subject to incarceration they
23 must have counsel?

24 MR. WAXMAN: It is definitely the broader
25 claim; that is, this -- this decision about counsel has

1 to be determined ex ante, because the State -- and this
2 is our -- I suppose our more limited request for a
3 categorical rule. Where you have a State that has
4 placed the burden on the noncustodial parent --

5 JUSTICE KENNEDY: Well, my -- my question
6 just follows from what I think Justice Ginsburg must
7 have in mind. My understanding is that it's a
8 commonplace if the witness declines to testify even
9 though the witness has immunity, or the attorney or the
10 witness declines to produce a document, the judge says
11 you will remain in jail until you comply. In most of
12 the States, I think he's allowed counsel, but does the
13 broad statement that you -- or the broad argument that
14 you responded, that you're making when you answered
15 Justice Ginsburg's case, apply there, so we are in
16 effect saying in all these cases you must have appointed
17 counsel?

18 MR. WAXMAN: No, no, no. Our submission is
19 any case in which the State proposes to deprive somebody
20 with an unqualified right to liberty of that liberty by
21 actual incarceration, there is a right to counsel. Now,
22 there is a right to appointed --

23 JUSTICE KENNEDY: You're committed to
24 custody until you testify.

25 MR. WAXMAN: Well --

1 JUSTICE KENNEDY: "Mr. Bailiff, take him
2 out."

3 MR. WAXMAN: There -- the cases have
4 recognized a distinction, Justice Kennedy, between
5 direct contempt and indirect contempt. And direct
6 contempt, which is a witness in the courtroom refuses to
7 testify, the cases have -- both civil and criminal --
8 have not required the appointment of counsel or a jury
9 trial or anything like that. In -- in a case where the
10 grand jury witness refuses to testify, the cases all, to
11 my knowledge, do require the appointment of counsel
12 because there may be a defense, and someone is being
13 deprived of their liberty.

14 Now, I think it's important -- Justice
15 Ginsburg, you asked me if I have a more limited rule,
16 and in this instance, the limited rule is that certainly
17 counsel requires -- certainly the due process clause
18 requires the appointment of counsel where the State
19 places the affirmative burden on the contemner to
20 demonstrate as a matter of law and fact that he was
21 unable to comply, and, thus, that incarceration would
22 not be unlawful punishment, but lawful coercion. And
23 that is, I think, an important distinction. The --

24 JUSTICE SOTOMAYOR: Mr. Waxman, the
25 Solicitor General suggests that the failure in this case

1 or the failure to appoint counsel arises from a due
2 process complaint that the -- that the -- that the
3 Petitioner here didn't know that he had indigency as a
4 defense or what he needed to prove or to bring to court
5 to prove that. Why wouldn't the Solicitor General's
6 solution of saying, as long as a State tells a defendant
7 that they have a burden of proof and some contours of
8 what proof they need to supply or -- on that issue, that
9 that would satisfy due process? What can a lawyer do
10 when someone comes in and says, I'm not earning any
11 money, I can't earn it, blah, blah, blah, end of story?

12 MR. WAXMAN: The reason --

13 JUSTICE SOTOMAYOR: What do you need? Why
14 do you need --

15 MR. WAXMAN: The reason it doesn't satisfy
16 -- even if the -- even if the defendant is advised that
17 there is an inability-to-comply defense and that a
18 sentence imposed where there is an inability to comply
19 is unlawful under Gompers and Bagwell, and for that
20 matter under South Carolina law, is that the showing
21 that the -- the burden that the defendant has to
22 shoulder, the shoulder -- the showing that the defendant
23 has to make is both legal and factual, and neither one
24 of them is straightforward. It's legal, for example,
25 because there are lots of legal questions built into the

1 unable-to-comply defense, including what it means to be
2 unable to comply. Intentional underemployment, the
3 allegation made in this court that he's using up all his
4 income on drug use, the ability to --

5 JUSTICE SOTOMAYOR: He admitted that.

6 MR. WAXMAN: Well, no, he admitted that he
7 was a --

8 JUSTICE SOTOMAYOR: At least up until the
9 accident.

10 MR. WAXMAN: Yes. Exactly.

11 JUSTICE SOTOMAYOR: It was up until then.

12 MR. WAXMAN: But the point is that --
13 intentional underemployment, the drug use, the ability
14 to incarcerate somebody so that they can reduce their
15 arrearage on a work release program, perhaps the
16 requirement that he sell his \$1,500 car -- those are all
17 legal questions as to whether the defendant -- they
18 constitute an inability to comply.

19 JUSTICE SOTOMAYOR: And you don't think that
20 an individual is capable of saying, I can't -- I'm --
21 yes, I am, or no, I'm not using up my money on drugs;
22 that's my preference?

23 MR. WAXMAN: I mean, the -- the first of
24 all --

25 JUSTICE SOTOMAYOR: Or I have a \$1,500 car,
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1 but I need it to be able to do something else?

2 MR. WAXMAN: Justice Sotomayor, even leaving
3 aside all of those undecided questions under South
4 Carolina -- legal questions under South Carolina law,
5 even as to the facts that you've addressed, the burden
6 is not insignificant. Recall that a mere assertion -- I
7 mean, in this case this man filled out a form saying
8 that -- certifying that he had no income and one asset,
9 a car worth \$1,500. In order -- the -- the courts have
10 said that assertions don't satisfy it. He has to --

11 JUSTICE SOTOMAYOR: Where is that form in
12 the record?

13 MR. WAXMAN: Hmm?

14 JUSTICE SOTOMAYOR: Where is the form in the
15 record?

16 MR. WAXMAN: The form is in the trial
17 record; we did not include it in the -- in the Joint
18 Appendix. We can make it available to the Court. It --
19 it is in the trial record, and we didn't understand at
20 the time we were filing that the United States would be
21 making an argument that the submission of a, quote,
22 "simple form" would satisfy due process.

23 CHIEF JUSTICE ROBERTS: Counsel, you --

24 MR. WAXMAN: I thought of lodging it --

25 CHIEF JUSTICE ROBERTS: Counsel.

1 MR. WAXMAN: But I think the Court's lodging
2 rules --

3 CHIEF JUSTICE ROBERTS: Counsel!

4 MR. WAXMAN: Mr. Chief Justice, I'm sorry.

5 CHIEF JUSTICE ROBERTS: You have stressed
6 that the burden in this case is on the defendant. Would
7 your position be different if the burden were on the
8 complainant?

9 MR. WAXMAN: I think the case would -- our
10 case would not be as strong. To be sure, in the
11 criminal -- in the criminal contempt context, the
12 burden, of course, is on the State and to prove beyond a
13 reasonable doubt, but there is an acknowledged right to
14 counsel, and there was for decades before this Court
15 considered criminal contempt to be a crime within the
16 meaning of the Sixth Amendment.

17 So, I think we would still -- even if the
18 burden had shifted, the broader rule we're asking for
19 is, look, the -- here the State is sending a man to jail
20 repeatedly on the premise of exacting compliance with
21 court orders and on the theory that he holds the keys to
22 his own pocket because he can always choose to comply.
23 And our submission is that when the State uses that
24 sanction on the basis of that theory, due process
25 demands that it guarantee the assistance of counsel to

1 assure that the district court is right and that the
2 sentence imposed is lawfully coercive and not
3 unconstitutionally punitive.

4 JUSTICE KAGAN: Mr. Waxman --

5 MR. WAXMAN: That's our --

6 JUSTICE KAGAN: -- suppose the Court thinks
7 that -- suppose the Court looks at this record and
8 thinks this is a broken system and a violation of due
9 process, but requiring a counsel in every case may go
10 too far, and there may, in fact, be alternate procedures
11 that a State could adopt that would comply with due
12 process. And I know that this is not your submission;
13 it's, instead, the solicitor general's submission. But
14 if pressed on that point, what procedures do you think
15 would be capable of giving a person in this situation a
16 fair shake at this?

17 MR. WAXMAN: Certainly -- I mean, we think
18 that, given the way the adversary system works and given
19 the legal nature of the determination that a judge makes
20 depriving somebody of liberty, and given the significant
21 burdens that are faced in carrying the burden to
22 establish that, there are none. Due process requires
23 the application of what this Court in *Lassiter* called
24 the general rule or the presumption that civil or
25 criminal, when the State chooses to absolutely deprive

1 somebody fully at liberty of his liberty, it must
2 provide counsel.

3 I mean, I suppose the closest second would
4 be what Justice Powell, providing the fifth vote in
5 Vitek, provided, which is even in that case where the
6 decision was being made by a mental health professional
7 and the issue involved the transfer from somebody in
8 State prison to a State mental unit, a much diminished
9 liberty interest -- even Justice Powell, providing the
10 fifth vote, said, well, in light of the nature of the
11 decision being made and the decision-making body, I
12 wouldn't always require counsel --

13 JUSTICE KENNEDY: Well, I --

14 MR. WAXMAN: -- I would think that a trained
15 mental health professional would work.

16 JUSTICE SCALIA: Mr. Waxman, for those of us
17 who think the Due Process Clause doesn't contain
18 whatever we think it ought to contain, but -- but
19 contains what the people who ratified it thought it
20 contained, what's the earliest case that you have which
21 adopts the proposition that you're now espousing, that
22 whenever a civil contempt citation is imposed upon an
23 indigent person, that person is entitled to counsel as a
24 matter of due process?

25 MR. WAXMAN: Justice Scalia, if I had such a
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1 case, it would have appeared quite prominently in my
2 brief. There is no such case, but let me make two
3 points about history and what the Due Process Clause
4 means, notwithstanding what some of us might like it to
5 mean.

6 First of all, history -- the history is
7 very, very complicated, and it doesn't dictate the
8 answer. The traditional distinction along the lines was
9 not between civil or criminal contempt, but direct or
10 indirect contempt, and as I know Your Honor knows
11 because you've written it, traditionally at common law,
12 I mean, counsel was provided for civil cases and in
13 misdemeanor cases, but not felony cases.

14 The criminal/civil distinction in contempt
15 arose in this Court around the turn of the 20th century,
16 and it arose so that the courts could exercise more
17 supervisory review over the imposition of criminal
18 contempt by courts.

19 Now, in *Cooke and Oliver*, this Court, as I
20 said, long, long before it recognized that criminal
21 contempt was a Sixth -- a crime entitled to all Sixth
22 Amendment protections, held that because of the nature
23 of the deprivation of liberty, the appointment of
24 counsel was required. And our submission here is, as
25 this Court has recognized, the distinction between civil

1 and criminal contempt is the question of whether you
2 have coercive imprisonment or imprisonment as
3 punishment.

4 And in almost every case, the sentence
5 involves some aspect of both, and where the only thing,
6 the only thing, that keeps the coercive imprisonment
7 from being unconstitutionally punitive absent a jury
8 trial right and proof beyond a reasonable doubt and
9 counsel, is the ability to comply with the court's
10 order. And that burden is put on the defendant, even
11 though it is the State's burden to prove willfulness,
12 due --

13 JUSTICE SCALIA: Do you think --

14 MR. WAXMAN: -- fundamental fairness as due
15 process --

16 JUSTICE SCALIA: Whenever there is an
17 erroneous judgment in a civil contempt case, it becomes
18 a criminal contempt case; is that -- is that what you're
19 saying?

20 MR. WAXMAN: This -- this Court has said in
21 Bagwell and in Gompers that, in the event that the
22 sentence applied -- in Bagwell it was a fine; in Gompers
23 it was imprisonment -- served only punitive purposes and
24 could not be coercive because the defendant could not
25 comply, that sentence was unlawful because it had not

1 been imposed following a proceeding in which the
2 government --

3 JUSTICE BREYER: It doesn't -- I'm still
4 curious -- are you finished?

5 MR. WAXMAN: But, yes -- just in -- I'm
6 sorry, Justice Breyer, just to finish this sentence --
7 that is the sine qua non of the distinction, and the --
8 and unlike, for example, the immigration context and the
9 other contexts that the Government is relying on, this
10 is a situation in which the consequence of an error,
11 that is an erroneous outcome renders the detention an
12 unlawful criminal penalty. That is not true in any
13 other context.

14 JUSTICE GINSBURG: Are you saying all the --
15 all the trappings of criminal procedure come with it?
16 This case is focused on a right to counsel, but what
17 about burden of proof, what about a jury trial?

18 MR. WAXMAN: No, Justice Ginsburg, this
19 Court has made -- we're talking about a determination
20 ex ante, before the man is sent to jail, in this case
21 for repeated long periods, should he be appointed
22 counsel. This Court has already said that, in civil
23 contempt proceedings, there is no requirement of proof
24 beyond a reasonable doubt and there is no requirement of
25 proof of a jury trial, just as following Gault, this

1 Court said there is no requirement of a jury trial in a
2 juvenile commitment case.

3 JUSTICE SCALIA: My goodness, if -- if
4 you're relying for that proposition only on the fact
5 that we've already said it, why don't you also say we've
6 never said what you want us to say now? I mean, if
7 that's the only argument, we've already said it. If it
8 was wrong, we should unsay it.

9 MR. WAXMAN: It wasn't wrong, Justice
10 Scalia, and as we've pointed out, the majority of States
11 and all seven circuits that have spoken to this question
12 have all held that there is, in fact, a right to
13 appointed counsel before the State in an -- in an
14 assertedly civil contempt proceeding can deprive a human
15 being of his liberty.

16 JUSTICE SCALIA: But if all of the arguments
17 you're making to us are correct, why shouldn't the other
18 accompaniments of a full-dress criminal trial apply --

19 MR. WAXMAN: Because --

20 JUSTICE SCALIA: -- so he has counsel, but
21 the burden's been put on him, rather than on the State,
22 to prove, in fact, that he -- whether or not he is
23 indigent?

24 MR. WAXMAN: Because the proceeding is
25 civil. It is not our contention that this is a criminal

1 proceeding, and this Court in Maggio and in Hicks v.
2 Feiock made clear that shifting the burden, so long as
3 the -- so long as the imprisonment is meant to be
4 coercive, shifting the burden is not unconstitutional
5 and because --

6 JUSTICE ALITO: Why is it that --

7 MR. WAXMAN: I'm sorry -- and because it is
8 a civil proceeding --

9 JUSTICE SCALIA: It's an illogical
10 distinction, is what I'm saying.

11 MR. WAXMAN: Well --

12 CHIEF JUSTICE ROBERTS: Maybe Justice Alito
13 can --

14 MR. WAXMAN -- I'm not sure, but --

15 CHIEF JUSTICE ROBERTS: -- can ask his
16 question.

17 MR. WAXMAN: Yes, Justice Alito?

18 JUSTICE ALITO: Why isn't something like
19 what the Solicitor General suggested adequate here? The
20 State provides a very clear form for the noncustodial
21 parent to fill out, and then in court the judge goes
22 through it step by step: Are you working? How much are
23 you making? Any -- do you have any other money? What
24 expenses do you need for living?

25 And then if you run into some of these

1 complicated legal problems or arguably complicated legal
2 problems that you referred to, maybe in particular cases
3 there would be need for the appointment of counsel. But
4 why isn't that adequate to deal with this situation
5 rather than a categorical rule that you have to have
6 counsel appointed in every case where there's an issue
7 about ability to pay?

8 MR. WAXMAN: It's -- that submission is
9 inconsistent with how the adversary process works, and
10 more importantly, Justice Alito, it misunderstands the
11 nature of the burden. Unlike in *Gagnon v. Scarpelli*,
12 where the mine-run of cases only involved the parole
13 revocation board to determine whether somebody had
14 subsequently been convicted, here the mine-run of cases
15 involves things that -- that an uncounseled, lay, often
16 undereducated, often incarcerated defendant can't do.

17 For example, just the --

18 JUSTICE ALITO: Do you think the issue here
19 is more complicated than the issue about whether
20 somebody's probation should be revoked?

21 MR. WAXMAN: Well, what *Gagnon v. Scarpelli*
22 said was in any -- in the mine-run of cases, all that is
23 required with respect to somebody who has a highly
24 reduced liberty interest in an informal proceeding is
25 whether or not they have subsequently been convicted,

1 yes or no. And if it's any more than that binary
2 factor, counsel probably is going to be required. And
3 our submission is the mine-run of these cases involve
4 the marshaling of evidence and testimony that
5 uncounseled, uneducated defendants --

6 JUSTICE GINSBURG: Mr. Waxman --

7 MR. WAXMAN: -- are not likely to be able to
8 do and legal questions.

9 JUSTICE GINSBURG: Mr. Waxman, you mentioned
10 Lassiter, and you mentioned something that Lassiter said
11 in passing, but what was at stake there was deprivation
12 of parental status. And the Court said sometimes, in
13 some cases, yes; but we're not going to make an
14 across-the-board rule.

15 Now, that deprivation, some people think, is
16 the worst possible, for a custodial parent to be told
17 you're no longer a parent, you no longer have a child.
18 And yet, the Court said we're not going to provide
19 counsel in every case, because in some cases the person
20 can get a fair hearing without counsel.

21 MR. WAXMAN: Right. And what the Court --
22 and recognizing that Lassiter is dicta, because it did
23 consider that context, what it said is we have to -- we
24 have to do the Mathews v. Eldridge balancing against a
25 generalization, what -- a "preeminent generalization"

1 that exists in our case law, which is that there is a
2 presumption that an indigent defendant has a right to
3 appointed counsel only when he loses or may be deprived
4 of his liberties. Since that doesn't apply here, we
5 have to do the Mathews v. Eldridge balancing against the
6 presumption that cuts the other way.

7 JUSTICE KENNEDY: My concern is -- and it's
8 been brought up in some of the other questions that
9 Justice Ginsburg asked earlier. I just have the sense
10 that there are thousands of these hearings around the
11 country, and they're -- and they're very important in
12 order to ensure child support, and that if we adopt your
13 rule, in many cases where counsel are now waived or not
14 present because of the -- the noncompliant parent is
15 going to ask for counsel and that we're going to change
16 the entire landscape of domestic relation proceedings,
17 the Heisenberg principle.

18 MR. WAXMAN: Justice Kennedy, the vast
19 majority of jurisdictions require counsel and provide
20 counsel, and there is no -- we would think that if this
21 were --

22 JUSTICE KENNEDY: In every case? I mean,
23 doesn't the defendant have to -- or the -- or the
24 noncompliant parent have to ask for counsel?

25 MR. WAXMAN: I believe the rule is that if
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1 you have a right to counsel, the court is required to
2 advise you that if you -- that you have one, and if you
3 are unable to afford --

4 JUSTICE KENNEDY: My question is: Do you --
5 are there any data -- are there any data to show that in
6 most of these cases, counsel does, in fact, appear?
7 My --

8 MR. WAXMAN: I'm not aware --

9 JUSTICE KENNEDY: My assumption is not, but
10 I just --

11 MR. WAXMAN: I'm not aware of data one way
12 or the other. We're only asking this Court to conform
13 this Court's due process jurisprudence with the vast
14 majority of State and lower Federal courts that have
15 found it --

16 JUSTICE GINSBURG: Does that go for alimony
17 and palimony as well as child support?

18 MR. WAXMAN: It would go to any instance in
19 which an alleged civil contemner is facing
20 incarceration --

21 JUSTICE GINSBURG: So, the answer is yes, it
22 would cover.

23 MR. WAXMAN: Yes, and can demonstrate an
24 inability to afford counsel in the same way that happens
25 in misdemeanor cases.

1 May I reserve the balance of my time?

2 CHIEF JUSTICE ROBERTS: Thank you,

3 Mr. Waxman.

4 Ms. Kruger.

5 ORAL ARGUMENT OF LEONDRA R. KRUGER

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING REVERSAL

8 MS. KRUGER: Mr. Chief Justice, and may it

9 please the Court:

10 In civil contempt proceedings to enforce
11 orders for child support, due process requires a
12 meaningful opportunity to be heard on the simple and
13 straightforward, but critical, question that
14 characterizes remedial sanctions in this area: whether
15 the nonpaying parent has the ability to pay. Such --

16 JUSTICE KAGAN: Ms. Kruger, you say that the
17 procedures here were inadequate but that counsel in
18 every case is not necessarily required. You say
19 alternate procedures can provide people in this
20 situation with a fair shake.

21 But then, when you look at the procedures
22 that you actually say would comply with due process,
23 they are remarkably anemic. Basically, you say that a
24 form has to be provided. You don't require that there
25 be anybody attached to the court, the kind of person

1 that Justice Powell might have been talking about in
2 Vitek, some kind of caseworker to assist the person with
3 whatever questions he might have about the form or about
4 how to fill it out. You don't require that the court
5 make any findings. You don't require that the court
6 even ask any questions.

7 Apparently, your idea of the procedure is
8 just to give a person a form. Am I reading you right?

9 MS. KRUGER: No, I don't think you are,
10 Justice Kagan. I think that we would say that there are
11 three fundamental requirements for due process in this
12 area. The first is both information regarding the
13 nature of the inquiry that's going to be made at the
14 hearing --

15 JUSTICE SOTOMAYOR: I'm sorry. I'm not
16 hearing you. Could you speak more loudly?

17 MS. KRUGER: I'm sorry. Certainly.

18 The first is -- as, Justice Sotomayor, you
19 referenced earlier, the first is information in advance
20 of the hearing that a critical question to be answered
21 at the hearing is going to concern ability to pay and a
22 form or other type of procedure that would elicit
23 information that's relevant to the alleged contemner's
24 financial condition.

25 The second would be a hearing at which the
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1 alleged contemner has the opportunity to respond to any
2 further inquiries that may be triggered by information
3 that's already been provided. This is, I think, a
4 common feature of many systems outside of South Carolina
5 which, by case law, have recognized that when a court
6 has concerns that information on a financial affidavit
7 might be misleading or inaccurate, they have a duty to
8 inquire further and to require supporting documentation
9 as necessary to confirm or dispel concerns about the
10 accuracy of the information.

11 And then, finally, I think we would require
12 an express finding that the -- the alleged contemner has
13 the ability to satisfy the purge conditions such that
14 the person can be said, not only theoretically, but also
15 realistically, to have the keys to the jail cell in
16 their pocket.

17 JUSTICE SOTOMAYOR: Counsel, as I -- and
18 then I think one of the deficiencies in addressing your
19 argument is that I don't really know what the State's
20 procedures are. Your -- your co-counsel, or Mr. Waxman,
21 has said that there was actually a form. I don't know
22 what that form looks like.

23 The only thing that does seem missing that
24 the State clearly provides is a requirement that the
25 judge explain what the basis of his contempt finding is.

1 I'm looking at 60a and 61a, and this judge left it
2 completely blank. So, is this a due process violation
3 facially, or is this a due process violation as applied,
4 meaning it's just not clear to me whether South -- the
5 State's process, in fact, has all of the elements that
6 you're speaking about or how I make that judgment and
7 whether the -- we didn't grant cert on the question of
8 whether, as applied, there was a failure or not.

9 I mean, one of the difficulties in this case
10 is that there was really very -- no findings by the
11 judge whatsoever.

12 MS. KRUGER: I think that's right, and I
13 think it's also right that South Carolina, at least
14 insofar as the record reveals, doesn't require a finding
15 that the alleged contemner has the ability to comply
16 with a purge condition, as opposed to requiring a
17 finding of willful violation of the court's order.

18 JUSTICE SOTOMAYOR: Well, the -- the form,
19 the order for contempt of court itself, 61a, does
20 require the judge to fill out an answer as to whether he
21 thinks the defendant is gainfully employed or has the
22 ability to make the payments. So, it was just absent
23 here.

24 MS. KRUGER: The -- the question on the form
25 relates to a past condition, as opposed to present

1 ability to comply with a purge condition. So, the two
2 inquiries are distinct.

3 JUSTICE SCALIA: Why -- why isn't the
4 requirement that the judge satisfy himself that there's
5 a willful failure to comply with the order? Why doesn't
6 that amount to saying the judge has to satisfy himself
7 that this individual cannot pay, or can pay?

8 MS. KRUGER: Justice --

9 JUSTICE SCALIA: It's not willful if he can
10 pay.

11 MS. KRUGER: Well, if --

12 JUSTICE SCALIA: If -- if he can't pay.

13 MS. KRUGER: If he can't pay --

14 JUSTICE SCALIA: You know what I mean.

15 MS. KRUGER: I do know what you mean.

16 (Laughter.)

17 MS. KRUGER: I understand you, Justice
18 Scalia. I think there are two separate questions, both
19 of which concern ability to pay, but one of which is
20 retrospective and the other is prospective.

21 The question whether the alleged contemner
22 has willfully violated a child support order is a
23 retrospective question. During -- that the -- the
24 alleged contemner missed child support payments because
25 he wasn't gainfully employed and didn't have the ability

1 to comply. And then the question for purposes of
 2 determining an appropriate sanction is, does this person
 3 have the present ability to comply such that sending
 4 that person to jail might reasonably be expected to
 5 induce them to -- to --

6 JUSTICE SCALIA: I see.

7 MS. KRUGER: -- carry out their financial
 8 obligation?

9 CHIEF JUSTICE ROBERTS: Counsel, did -- just
 10 to be clear, your answer to the question presented is
 11 no, right? It was not error for the South Carolina
 12 court to say there's no constitutional right in this
 13 type of a proceeding to appointed counsel?

14 MS. KRUGER: That's correct, Mr. Chief
 15 Justice. We think that there is no categorical right to
 16 appointed counsel in all civil contempt proceedings
 17 or --

18 JUSTICE GINSBURG: Is there a State -- we've
 19 been told that, in many States, appointment of counsel
 20 for an indigent, noncustodial parent who has -- who has
 21 child custody arrears, that counsel is automatic. You
 22 have described something less than counsel. Is there
 23 any model, any State where there is such a procedure so
 24 one might find out how it's working?

25 MS. KRUGER: I don't think that there is any
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1 one place you can look in order to see what features
2 States are employing. We know anecdotally from talking
3 to individuals who are responsible for running programs
4 in individual States that they do ordinarily, even in
5 States that don't categorically require the appointment
6 of counsel, satisfy each of the three procedural
7 protections that I outlined earlier in response to
8 Justice Kagan.

9 So, for example, in New Mexico, which hasn't
10 recognized a categorical right to appointed counsel,
11 there is a solicitation of financial information in
12 advance of the hearing. That information is reviewed by
13 a caseworker, who will make the decision whether or not
14 to refer the case to civil contempt proceedings. There
15 is a hearing at which further information is explored or
16 elicited, and ultimately there's a determination made
17 whether the alleged contemner has the ability to comply.

18 JUSTICE GINSBURG: What about an aid who is
19 not counsel? I mean, the family court has a lot of
20 auxiliary people like child advocates who are there to
21 assist people who need some kind of representation, but
22 not necessarily a lawyer. Is that any part of yours --
23 of what you would propose?

24 MS. KRUGER: I think it would certainly be
25 open to the Court to consider whether or not having the

1 assistance of a layperson who may not necessarily be a
2 lawyer would be a requirement of due process, but I
3 think given the nature of the inquiry which goes to
4 financial condition, it's the kind of information that
5 individuals provide on a regular basis without the
6 assistance of either competent lay people or lawyers
7 with legal expertise. It seems unnecessary to satisfy
8 the commands of fundamental fairness in order to create
9 that requirement across the board; in much the same way,
10 I think it's unnecessary to appoint counsel in every
11 case, as opposed to taking the modest and relatively
12 inexpensive steps that we've outlined in order to ensure
13 a meaningful opportunity to be heard.

14 JUSTICE GINSBURG: Is the form you have in
15 mind something different than the form, the IFP form,
16 that would be filled out say, by a 2255 petitioner?

17 MS. KRUGER: I don't think it would, Justice
18 Ginsburg, but precisely what the form would contain
19 would have to be tailored to the law in the relevant
20 jurisdiction. So, where the determination is made on
21 the basis of assets and income, it would be appropriate
22 for the form to elicit that information. Where in other
23 jurisdictions the law is clear that the other
24 information may be relevant to that inquiry, it would be
25 appropriate for the form to elicit that information as

1 well. But I think in substance the form would look very
2 much like the form that this Court sees on a regular
3 basis attached to its petitions for writs of certiorari
4 and would also look very much like forms that are
5 commonly applied in jurisdictions across the country in
6 child support programs in order to establish the amount
7 of child support obligation in the first place. South
8 Carolina employs such a form for that purpose, and I
9 think it would be a relatively trivial matter for South
10 Carolina to use a similar form for the purpose of
11 enforcement.

12 JUSTICE KAGAN: Ms. Kruger, could you say a
13 bit more about the question that Mr. Waxman and Justice
14 Scalia were talking about: how often these proceedings
15 have the State on one side, how often they have the
16 custodial parent on one side, you know, whether there is
17 counsel for the opposite side in many of these cases?

18 MS. KRUGER: There is in some, but not all,
19 Justice Kagan. It's true that the State is often,
20 though not always, represented in these proceedings, not
21 always by lawyers as opposed to caseworkers or other
22 nonlawyer personnel who work for the departments of
23 social services.

24 CHIEF JUSTICE ROBERTS: Thank you, Ms.
25 Kruger.

1 Mr. Bibas.

2 ORAL ARGUMENT OF STEPHANOS BIBAS

3 ON BEHALF OF THE RESPONDENTS

4 MR. BIBAS: Mr. Chief Justice, and may it
5 please the Court:

6 Mrs. Rogers and custodial mothers and
7 parents like her need simple, fast, civil procedures to
8 probe fathers' chronic failures to support their
9 children. Today I'll make two points. First, this case
10 is moot. Second, a per se right to appointed counsel is
11 not essential to prevent fundamental unfairness.

12 First, this case is moot. On remand, there
13 is no possible redress for Petitioner. He seeks an
14 advisory opinion but fails to bear his burden of proving
15 that his case will evade review because he could get a
16 stay. Litigants must preserve questions by seeking
17 stays or supersedeas where available. Only where there
18 is no procedure of which Petitioner could have availed
19 himself to stay confinement, because a State statute had
20 a blanket denial of bail pending appeal, did this Court
21 in Sibron find that a dispute could not be stayed and so
22 would evade review.

23 JUSTICE GINSBURG: The South Carolina
24 Supreme Court, as I understand, heard this case after he
25 was released, so they didn't consider it moot.

1 MR. BIBAS: Your Honor, the issue was not
2 briefed or argued or raised. My client had no lawyer,
3 filed no brief, made no argument. So, we don't know
4 what they considered or held. They made no reference to
5 it.

6 CHIEF JUSTICE ROBERTS: Suppose --

7 JUSTICE GINSBURG: But it was a fact, was it
8 not, that he was already released?

9 MR. BIBAS: Yes, that's correct, Your Honor.

10 CHIEF JUSTICE ROBERTS: I suppose -- we have
11 held, haven't we, that States can have different
12 concepts of mootness than the Federal one?

13 MR. BIBAS: Yes, Your Honor, that's right.
14 And South Carolina deals with this issue -- obviously,
15 in this Court the question is an Article III question.
16 And because the evading review doctrine is an exception
17 to Article III's normal requirements that Federal courts
18 have jurisdiction only over live cases or controversies,
19 it should be construed narrowly, only where essential to
20 preserve review. Here Petitioner didn't ask for a stay;
21 if he had asked --

22 JUSTICE SOTOMAYOR: Counsel, do we have
23 jurisdiction over any matter that isn't rendered in a
24 final judgment in State court?

25 MR. BIBAS: No, Your Honor.

1 JUSTICE SOTOMAYOR: So, if we don't have
2 jurisdiction over anything but a final judgment, how
3 could we ever grant a stay if the State refused to?

4 MR. BIBAS: I -- your -- if --

5 JUSTICE SOTOMAYOR: The State refused to
6 grant a stay.

7 MR. BIBAS: I --

8 JUSTICE SOTOMAYOR: And why would South --
9 why would the State here have granted a stay, if it
10 believes there's no Sixth Amendment right whatsoever to
11 counsel? How could that litigant ever evade mootness?

12 MR. BIBAS: Your Honor is correct that the
13 relief would be coming from the South Carolina State
14 courts, and South Carolina ruled 241(c) appears to be
15 tailor-made for this situation. And it instructs courts
16 to consider whether a stay is necessary to preserve
17 jurisdiction of the appeal or to prevent a contested
18 issue from becoming moot. Our position is --

19 JUSTICE SOTOMAYOR: Can you point to any
20 case involving support payments in which the South
21 Carolina court has ever granted a stay?

22 MR. BIBAS: The closest I can point to is
23 *Berry v. Ianuario*, a South Carolina State court case
24 involving parental termination -- termination of
25 parental rights from a family court, where the South

1 Carolina Supreme Court stayed the matter. And so, if
2 Petitioner had asked, there's a substantial likelihood
3 the court would have granted a stay through the South
4 Carolina Supreme Court. At this point, under Rule 23,
5 this Court could affirm a stay.

6 JUSTICE SCALIA: Did the Petitioner know
7 about Rule 23? Where had he learned about that? He
8 didn't have counsel, right?

9 MR. BIBAS: He had counsel as of no later
10 than 3 weeks after the trial court hearing. He had
11 counsel for 11 months of his sentence.

12 JUSTICE SCALIA: Okay, before -- before it
13 got up to the --

14 MR. BIBAS: That's right, 11 months before
15 the case became moot.

16 On the merits, a civil contempt case does
17 not, as my adversary suggests, quote, "sound in criminal
18 contempt" and require counsel, quote, "precisely to
19 ensure that the proceeding remain civil."

20 JUSTICE KENNEDY: Is it correct for me to
21 think of both the Petitioner's argument and your
22 response as a Mathews v. Eldridge problem?

23 MR. BIBAS: No -- Your Honor, I believe the
24 main argument here, and the only one the Petitioner
25 argued in the courts below, is an absolute categorical

1 right that any loss of liberty equals an absolute right
2 to counsel.

3 JUSTICE KENNEDY: Well, it -- it does seem
4 that absolute right and Mathews v. Eldridge is not quite
5 a -- a good fit, but it seems to me that most of Mr.
6 Waxman's argument can be subsumed within the Mathews v.
7 Eldridge framework.

8 MR. BIBAS: Yes, that is his fallback
9 argument, though it wasn't developed in the courts
10 below, but I think it's important to note that because
11 his argument approaches and, in fact, leads with an
12 absolute claim -- to note the breadth of the rule. So,
13 picking up on your question to Mr. Waxman, Justice
14 Kennedy, it's important to note not only that
15 Petitioner's rule would reach other civil contempts
16 beyond child support, but because any loss of liberty is
17 the overwhelming factor in his calculus, it would apply
18 to tens of thousands of immigration and extradition
19 cases each year.

20 Petitioner's reply brief does not deny this,
21 saying only that they might or might not be
22 distinguishable. And immigration, we would submit, is
23 an a fortiori from this case. The legal issues there
24 are more complex, the deprivation is more severe, the
25 confinement not purgeable. Any ruling --

1 JUSTICE KENNEDY: But just -- just assume
2 that we could somehow block out that category. If you
3 could focus just on the domestic relations support
4 proceedings, would there be a basic change in the way
5 those proceedings are being conducted in other States,
6 if we ruled in favor of Petitioner and said there's an
7 absolute right?

8 MR. BIBAS: Yes, Justice Kennedy, there'd be
9 a massive change. Trial judges need to know ahead of
10 time which sets of procedures to apply, civil or
11 criminal.

12 JUSTICE GINSBURG: Isn't it -- isn't it true
13 that most States in child support cases, when the
14 defendant says I have no money, will appoint counsel?

15 MR. BIBAS: That is not true of most States,
16 Justice Ginsburg. My understanding is 15 States
17 recognize it as a constitutional matter, 11 additional
18 States by statute, rule, or practice appear to recognize
19 a statewide right to counsel. So, there's a bear
20 majority. At least 17 States do not have a statewide
21 right, and the remaining 7 are unclear.

22 So, we're talking about reformulating rules
23 in a huge number of States that probably affect hundreds
24 of thousands of cases. I'd ask the Court to consider
25 the Office of Child Support Enforcement study that's in

1 the appendix to the Senators' brief. It's the best
2 empirical evidence we have of how these proceedings
3 work.

4 And the evidence is relevant both to the
5 need for these procedures in the balancing test Justice
6 Kennedy refers to, but also the apparent relatively low
7 reason to believe there's a large error rate here.
8 According to that study, many parents -- non-supporting
9 parents are cited for contempt and purged of their
10 contempt; many fewer are, in fact, confined. It is --
11 appears to be the threat that coerces enforcement and
12 deters violation. Many parents do not pay up until
13 after the contempt hearing and confinement is imminent.
14 So, States would have to appoint counsel in a large
15 number of cases, most of which wind up purging. So, the
16 first point to note is that --

17 JUSTICE GINSBURG: I thought the point was
18 it's -- it's only if the defendant -- the claim is only
19 if the defendant does not have the keys in his pocket
20 because he has no money. So, in cases where typical a
21 recalcitrant spouse won't pay until he's threatened with
22 jail, that wouldn't come in this category. I thought
23 Mr. Waxman was speaking about people who do not have the
24 keys in their pockets because they simply cannot -- they
25 do not have the wherewithal to pay.

1 MR. BIBAS: Yes, Your Honor, but very, very
2 many non-supporting parents protest the same. And so,
3 it is true that the slice of those brought to civil
4 contempt hearings is only a small fraction of the
5 overall caseload.

6 JUSTICE KENNEDY: Yes, and I -- and I
7 suppose you could say that in -- in advance that the
8 judge and the appointing authority simply wouldn't know.

9 MR. BIBAS: Exactly, Justice Kennedy. Trial
10 judges need to be able to protect themselves. They need
11 to be able to know when they go into a hearing whether
12 to apply civil or criminal procedures, and that's this
13 Court's lesson in Hicks v. Feiock.

14 Hicks said a judge needs to know ex ante
15 based on a couple of simple rules, quote, "If the relief
16 imposed here is in fact a determinate sentence with a
17 purge clause, then it is civil," then civil procedures
18 apply. And if the remedy runs to the injured party,
19 then it is civil.

20 But to -- even cases that have overturned
21 erroneous civil contempts, do not, as my brother
22 Mr. Waxman suggests, become punitive and criminal.
23 Maggio and Shillitani recognize that they remain civil.
24 Shillitani declined to find a right to indictment or
25 jury trial because it was a civil case.

1 To go back to the --

2 JUSTICE SOTOMAYOR: Counsel, I -- I took the
3 Solicitor General's position to be -- they may accuse me
4 of not being accurate in what I took their position to
5 be, which is the rule would be simple. You, a State,
6 are free to run these procedures as you choose, but not
7 to provide counsel, you have to meet some minimum
8 Mathews v. Eldridge requirements. And so, the rule is
9 simple. The State can do what it wants, but it has to
10 provide minimum due process, and they've previously set
11 forth the three. All right?

12 So really the answer is, no, you're not
13 automatically entitled to a lawyer if you're providing
14 minimum due process. If you're not, then you have to
15 provide a lawyer.

16 MR. BIBAS: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: All right? What's wrong
18 with that rule? That, I think, is what the Solicitor
19 General is suggesting. So, first, what's wrong with the
20 rule? And then, second, in a case in which I did not
21 see and haven't yet a form that really talks about or
22 tells the contemtor about his defense and what he needs
23 to prove, yes, he did get a hearing but not a hearing
24 that explored his statement that he'd been looking for
25 work and couldn't find it, and a form, a judgment that

1 doesn't address his current ability to pay. How does
2 the South Carolina system comply with those minimums of
3 due process?

4 MR. BIBAS: Yes, Your Honor. First, I'll
5 talk about the Solicitor General's suggestions that you
6 raise and then talk about the specific procedures here.
7 We think the Solicitor General's suggestions are
8 interesting, they're worth exploring. They were raised
9 for the very first time at the merits stage here; so,
10 there's been no development. We don't know what other
11 States are doing, the range of options out there, the
12 nonconstitutional measures which in the criminal context
13 for guilty pleas were developed through rulemaking, Rule
14 11, lots of testimony and inquiry. That's appropriate
15 for development when presented and allowing those other
16 bodies the first crack at them.

17 JUSTICE SCALIA: Mr. Bibas, I have a
18 question about -- about the position of the Government
19 in this case. The Government agrees with you that you
20 don't need counsel, but says that we ought to reverse
21 the judgment anyway because there were -- because the
22 other aspects of due process which the Government
23 asserts would make it unnecessary to provide counsel did
24 not exist in this case.

25 Did you think, under our ordinary rules,
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1 we -- we can do that?

2 MR. BIBAS: No, Your Honor, that's beyond
3 the question presented.

4 JUSTICE SCALIA: Question presented was just
5 whether counsel was necessary, right?

6 MR. BIBAS: That's correct. And I
7 suppose --

8 JUSTICE SCALIA: It's fully within the power
9 of the Government to say why, you know, in general
10 counsel is not necessary because these other procedures
11 are good enough. But then to come forward and say,
12 moreover, those procedures were not applied in this case
13 and, therefore, you should reverse, that's -- that's a
14 new point, it seems to me, isn't it?

15 MR. BIBAS: Yes, Your Honor, and as Justice
16 Sotomayor pointed out, that's not what this Court
17 granted certiorari on. And this is a case --

18 JUSTICE GINSBURG: What about you -- you
19 stressed that this falls on the civil side. So, why
20 shouldn't we take Rule 54(d) as our model and say that
21 instructs the court that you give parties the relief to
22 which they are entitled, even if they haven't asked for
23 that relief, even if they've asked for something that
24 they can't get?

25 MR. BIBAS: Justice Ginsburg, I don't
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1 believe this is a question about relief. I believe this
 2 is a question about what constitutional right is
 3 implicated. This case arises from a State court. The
 4 failure to raise the issue below is jurisdictional and
 5 is not -- that issue is not before the --

6 JUSTICE SOTOMAYOR: I don't know that that
 7 answers my question, because the way I phrased the
 8 question was very specific. South Carolina -- there's
 9 no constitutional right to counsel in every proceeding,
 10 but the question presented was whether South Carolina
 11 erred that an indigent defendant has no constitutional
 12 right to appointed counsel in any civil contempt
 13 proceeding. And if the answer to that is, if the civil
 14 contempt proceeding does not comply with minimum due
 15 process requirements, counsel is required.

16 MR. BIBAS: Your Honor, I respectfully --

17 JUSTICE SOTOMAYOR: Then isn't that an
 18 answer to the question presented?

19 MR. BIBAS: I don't read the question
 20 presented that way, Your Honor --

21 JUSTICE SOTOMAYOR: We can argue about that
 22 later.

23 MR. BIBAS: Okay. Fine.

24 JUSTICE SOTOMAYOR: Okay? The point is --

25 JUSTICE SCALIA: I would think that the rule

1 would be that if -- if South Carolina has not complied
2 with minimum due process procedures, minimum due process
3 procedures are required, not counsel is required.

4 MR. BIBAS: Yes, Justice Scalia. In a case
5 presenting that issue, that's the appropriate remedy.
6 To go back to the --

7 JUSTICE BREYER: Think of what the
8 Government says should happen. You should give them a
9 form and the form should say do you have money to pay or
10 not. All right. So, what did happen? Did the judge
11 ever ask him?

12 MR. BIBAS: Here's what happened, Justice
13 Breyer: The rule to show cause, at Joint Appendix 50a,
14 said in all capital letters "must bring proof of
15 employment." This was Petitioner's sixth hearing. He
16 was familiar with the issues before. At Petition
17 Appendix 17a --

18 JUSTICE BREYER: Did he bring some proof of
19 employment?

20 MR. BIBAS: He did not. He had --

21 JUSTICE BREYER: All right. So, why would
22 you put him in jail? He has no job.

23 MR. BIBAS: All right. He had -- he
24 explained that he, in fact -- tried to explain why he
25 didn't have the money, that he had been -- both his

1 drugs and 2 months of disability. The judge, on the
2 next page, Petition Appendix 18a -- he heard the
3 testimony, he saw his demeanor, he didn't believe him
4 and found him in willful contempt.

5 And, finally --

6 JUSTICE BREYER: You mean he didn't believe
7 him about what? That he had no money?

8 MR. BIBAS: That he did not have the money.

9 JUSTICE BREYER: Okay. So, he -- he thought
10 he did have the money.

11 MR. BIBAS: That's our reading of Petition
12 Appendix 18a.

13 JUSTICE BREYER: Do we --

14 JUSTICE KAGAN: Well, we couldn't really
15 tell, could we, Mr. Bibas? Because he completely
16 ignored the question. The entire transcript is less
17 than two pages long. Mr. Turner talked about how he had
18 no money and he was disabled. The court completely
19 ignored him. The court also ignored the questions on
20 the form for the order of contempt about whether he had
21 any money. The court ignored that as well.

22 MR. BIBAS: Your Honor, none of those -- you
23 are correct; none of those is filled out. But what I
24 wanted to explain is that due process looks at the
25 totality of the State procedures, and the State has

1 three mechanisms in place by which Petitioner, having
2 counsel, could have challenged this. He could have
3 challenged both the factual and legal findings on
4 appeal. Family courts repeatedly overturn such
5 judgments on appeal.

6 JUSTICE BREYER: I'm actually trying to
7 find --

8 JUSTICE SCALIA: I don't understand all of
9 this discussion. The question presented is not what due
10 process procedures are required in these cases. That is
11 not the question presented.

12 JUSTICE BREYER: Just out of curiosity --

13 JUSTICE SCALIA: It is simply whether
14 counsel is necessary. Isn't that the only matter that
15 we should be discussing?

16 MR. BIBAS: Yes, Your Honor. And --

17 JUSTICE BREYER: Fine, but I'd like to ask a
18 different question.

19 I'm trying to find out what happened here
20 that was different from what the Government suggests.
21 The Government suggests provide a piece of paper and to
22 ask certain questions. What I'd like to know is what's
23 different in this proceeding from what the Government
24 suggests?

25 MR. BIBAS: There was --

1 JUSTICE BREYER: That would have -- perhaps
2 on no one else, but could have an effect on the way I
3 decide the case.

4 MR. BIBAS: Yes, Your Honor. There was no
5 such form provided, and there was not a form --

6 JUSTICE BREYER: I understand there was
7 no -- look. If he asked the questions orally --

8 MR. BIBAS: Yes.

9 JUSTICE BREYER: -- I might be tempted to
10 say it doesn't matter. So, I'm trying to say what
11 really differed from what the Government wants?

12 MR. BIBAS: Whether in a form or orally, a
13 judge could ask such questions, as Justice Sotomayor
14 pointed out. There's a form in the appendix.
15 Whether -- what happened here or not is not the
16 question. The record is insufficient because Petitioner
17 didn't develop it.

18 JUSTICE SCALIA: The Government is not a
19 party here, is it?

20 MR. BIBAS: No, Your Honor.

21 JUSTICE SCALIA: It's just an amicus. So,
22 this expansion of the -- of the question presented from
23 whether counsel was necessary to what are the due
24 process procedures required is all at the suggestion of
25 an amicus; is that right?

1 MR. BIBAS: Yes, Your Honor. And so, to
2 focus on --

3 JUSTICE BREYER: And skip that one. What
4 I'm trying to figure out -- and I'm sorry, I may be the
5 only one trying to -- I'm trying to figure out what, in
6 general, is the fairness of such situations in -- where
7 the woman is normally the one with the child, the man is
8 normally the one who doesn't pay.

9 Is it true, for example, that in most such
10 situations across the country, the woman has a lawyer,
11 but the man doesn't? Is that true or isn't it true?
12 There must be some organization that's studied that.

13 MR. BIBAS: Yes, Your Honor. That's -- we
14 don't have good nationwide statistics. What I can say
15 is our understanding is that, first of all, Petitioner
16 is incorrect in saying that the government has a lawyer
17 here who is prosecuting. He is conflating the clerk of
18 the court issuing a ministerial rule to show cause with
19 the presence of a law-trained prosecutor. That is not
20 the case in South Carolina. That is not the case in
21 very many of the States.

22 JUSTICE BREYER: Okay. So, the answer to
23 what I think of, in my own mind only, as very relevant,
24 whether the woman has a lawyer but the man doesn't, is:
25 I don't know.

1 MR. BIBAS: It -- it is not across the
2 board.

3 JUSTICE BREYER: And that is the answer? We
4 don't have good information on that?

5 MR. BIBAS: We don't have good statistics as
6 to how often.

7 JUSTICE BREYER: Okay. Fine. Yes.

8 CHIEF JUSTICE ROBERTS: Counsel, do you know
9 why we're not hearing from the State of South Carolina?

10 MR. BIBAS: Because the State was not a
11 party to the proceeding.

12 CHIEF JUSTICE ROBERTS: No, no. I
13 understand that they were involved below. They decided
14 not to become a party before the State supreme court; is
15 that right?

16 MR. BIBAS: Yes, Your Honor.

17 CHIEF JUSTICE ROBERTS: Why aren't they
18 defending their procedures?

19 MR. BIBAS: Well --

20 CHIEF JUSTICE ROBERTS: It may be an unfair
21 question, since you don't represent the State.

22 MR. BIBAS: Right. I don't know. All I can
23 say is Mrs. Rogers went -- anticipating that she would
24 receive child support, Mrs. Rogers went off welfare in
25 2003. After that point, the State ceased to have a

1 direct financial interest, and the State has written a
2 couple of letters in the Joint Appendix saying that
3 because we are not a party to the suit, our financial
4 interest is not directly implicated.

5 CHIEF JUSTICE ROBERTS: I think it would be
6 a great financial interest if they have to provide
7 counsel in these thousands and thousands of cases.

8 MR. BIBAS: That is a -- that is a broader
9 systemic interest, and the State did, in fact, join an
10 amicus brief to that effect in this case.

11 JUSTICE SCALIA: Could I ask a question
12 about your mootness point?

13 MR. BIBAS: Yes.

14 JUSTICE SCALIA: You say it's --it's not
15 capable of repetition and yet evading review, because
16 should this happen again, he could get a stay, as he
17 could have gotten in this case.

18 Do you have any case of ours which -- which
19 uses that reasoning and says the fact that in a future
20 case you may be able to get a stay suffices to establish
21 that this is not capable of repetition yet evading
22 review? It's -- it's a new argument to me. Is there
23 any case of ours that applies it?

24 MR. BIBAS: The closest is this Court's
25 decision in St. Pierre. A number of lower courts that

1 we cite have also followed St. --

2 CHIEF JUSTICE ROBERTS: But that can't
3 possibly be true, because we have cases applying the
4 rule that this is capable of repetition, yet evading
5 review. If the rule were you have to get a stay, we
6 wouldn't have any of those cases.

7 MR. BIBAS: They -- no, Your Honor. In
8 abortion cases, election cases, stays are practically
9 impossible. This is a different category of case, where
10 stays are available, and those cases also seek
11 prospective relief.

12 If I might go back to the financial interest
13 that you pointed out earlier, the reason the State would
14 care here -- it's not that -- there's a State fisc
15 interest that's substantial, but the reason that matters
16 to my clients is because the huge fiscal burden here
17 could deter many States from this enforcement. In fact,
18 it has.

19 In New Jersey, after the State supreme court
20 recognized in Pasqua a right to appointed counsel, New
21 Jersey stopped using civil contempt enforcement. When a
22 State has to appoint counsel and stops doing so, it
23 removes deterrence in a massive number of cases. That's
24 a --

25 JUSTICE GINSBURG: Do we have any -- any
Alderson Reporting Company

1 computation about what it would be -- what the counsel
2 fee would be, as opposed to keeping someone in prison
3 for a year?

4 MR. BIBAS: We don't have those numbers, but
5 I also believe that's not the correct inquiry, Your
6 Honor, because it's not just the few people who are
7 confined.

8 As I was saying earlier, if the percentage
9 of those going to these hearings were actually confined
10 is in the single digit percentages, as some of the
11 numbers in the States' appendix suggest, then you're
12 getting a huge leveraging effect of many people being
13 coerced into paying before going into confinement or
14 immediately after going into confinement. So, the State
15 can permissibly weigh those costs and benefits, and
16 that's for the State legislature.

17 To go back to Justice Breyer's question
18 earlier about what due process might require, I think
19 it's important to focus on that these procedures are
20 straightforward, informal procedures, navigable by
21 laymen. The most natural thing in the world when being
22 accused of not paying is to say: But I can't pay. And
23 to follow it up with an explanation. I applied for this
24 job; I'm out of work; I got sick. There are things
25 that --

1 JUSTICE BREYER: Did anybody look at housing
2 courts?

3 MR. BIBAS: No, Your Honor.

4 JUSTICE BREYER: I mean, housing courts -- I
5 would think it's fairly common somebody owes somebody
6 \$25, or whatever it is, the judge says pay it into
7 court, and what happens if they don't pay it into court?

8 MR. BIBAS: We haven't looked at that, Your
9 Honor, and I'm sure the same arises in administrative
10 appeals and small claims court, any number of places.
11 Here it's a simple intuitive issue, and South Carolina,
12 like other States, uses relaxed, informal rules of
13 evidence and procedure. There are effectively no rules
14 of hearsay or authentication.

15 JUSTICE ALITO: There are things the judge
16 could have asked, though, that -- and put on the record,
17 and it might have cleared this up. He could have -- the
18 Petitioner here said he wasn't working and he couldn't
19 work because he had been hurt, so the judge could have
20 asked for medical records to substantiate that.

21 And then the Petitioner admitted that until
22 recently, apparently, he had been taking meth, he had
23 been snorting coke. The judge could have said, all
24 right, you had the money then to buy those drugs; now,
25 where did you get that and why do you no longer have

1 that source of money? He could have gone through a few
2 simple steps, couldn't he, to make this -- to eliminate
3 the problems?

4 MR. BIBAS: Yes, Your Honor, and whether
5 that's salutary or ought to be considered in a future
6 case, it's not the question here. But that could be
7 worth exploring. It is much lower cost than appointing
8 counsel across the board.

9 It's important to note that --

10 JUSTICE KENNEDY: It's a little difficult to
11 write the opinion, if you are to prevail, saying there's
12 no absolute right, but there might be in some other
13 case, depending. We don't give much help to the system
14 that way, because it might be that ultimately we would
15 find that the balancing test is more complex than simply
16 appointing the counsel.

17 MR. BIBAS: I don't believe this Court has
18 to do that, Your Honor. In -- in cases such as Gagnon
19 and Lassiter, this Court laid out factors, said there's
20 no categorical right to counsel, and the lower courts --
21 our examination of the post-Gagnon cases suggests most
22 of them have said, well, this is a pretty routine case,
23 85, 90 percent of the time --

24 JUSTICE KENNEDY: Well, then you do think we
25 should lay out the factors? And, if so, what are the

1 factors?

2 MR. BIBAS: I -- I don't believe that it's
3 necessary because we can't conceive of a legal issue
4 here so complex that categorically a lawyer is
5 necessary.

6 JUSTICE SCALIA: Counsel, I don't understand
7 how we could say that if you do not meet minimum due
8 process procedures, you must meet more than minimum due
9 process procedures. I mean, once we say that it's
10 enough if you do A, B, and C, but this State has not
11 done A, B, and C, how can we say therefore you must
12 appoint counsel? All we can say is you must do A, B,
13 and C. I don't know of any instance where we impose
14 more than the due process minimum because you have
15 failed to comply with the minimum.

16 MR. BIBAS: Yes, Your Honor. Perhaps to go
17 back to Justice Kennedy's point, if -- if the Court were
18 concerned about more specific guidance, it could point
19 to at least in situations that involve relaxed informal
20 rules of procedure, where no rules of hearsay
21 authentication, no jury trials, informal discovery,
22 judges handle questioning, no State prosecutor, at least
23 there, there might be no right to counsel.

24 JUSTICE KENNEDY: Well, I -- I just don't
25 know that all those things are properly before us.

1 MR. BIBAS: Well, then, the appropriate
2 thing is to answer the question that was raised by
3 Petitioner in this case and not to go -- no need to go
4 beyond that, I would suggest.

5 Finally, let me point out that the closest
6 analogue in the legal system to the question here about
7 inability to pay child support is inability to afford
8 counsel. Our criminal justice legal system has
9 extensive experience with that under the CJA, the
10 Criminal Justice Act. In the Federal system and in most
11 States, the burden is on the defendant to show his
12 inability to pay counsel. He doesn't --

13 JUSTICE KAGAN: But, Mr. Bibas, practically
14 when those forms are used, the person fills out a form,
15 and mostly they're just accepted, aren't they?

16 MR. BIBAS: Your Honor, I don't believe
17 they're rubber-stamped. The statistics that I have seen
18 show denial rates of 10 to 20 percent, in some counties
19 as high as 35 percent. So, there is a meaningful
20 inquiry and meaningful denials, and all of those cases
21 would violate due process on Petitioner's logic. That
22 cannot be the tidal wave to hit the criminal justice
23 system. That is not an appropriate extension of due
24 process because the issues here and there are simpler,
25 far simpler than in *Lassiter*, a formal trial-type

1 adversarial procedure where nevertheless no categorical
2 right to counsel was required.

3 It's important to go back, if one looks at
4 the roots of the right to counsel in Powell and Gideon
5 and Zerbst, Powell talked about the need for the guiding
6 hand of counsel who are skilled in the science of law in
7 order to deal with technical defects in the charging
8 instrument, to deal with incompetent, irrelevant, or
9 evidence. In proceedings such as this, where there are
10 no formal rules of pleading or evidence, there is not a
11 need -- certainly not a need for a categorical right to
12 counsel.

13 If there are no further questions, may I
14 conclude?

15 Litigants can themselves argue the
16 commonsense issue of ability to pay, just as they can
17 address their ability to afford counsel without first
18 having counsel, and the cost of appointing counsel
19 across the board would deter States from enforcing
20 custodial parents' and their children's rights, as it
21 has in New Jersey. Thus, this Court should dismiss for
22 want of jurisdiction or else affirm.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Waxman, you have 3 minutes remaining.

25 REBUTTAL ARGUMENT OF SETH P. WAXMAN

1 ON BEHALF OF THE PETITIONER

2 MR. WAXMAN: I have three points. Thank
3 you, Mr. Chief Justice.

4 First of all, I mean this -- the crux of
5 this dispute comes down to whether this is some -- akin
6 to some sort of simple form that can be filled out that
7 any layperson, no matter how uneducated, can deal with.

8 Second, the question is how much of a burden
9 is this going to be on the States?

10 And, third, the question of whether or not
11 what counsel suggests as the Utah model or what he
12 denigrates as the New Jersey model would be a way to
13 square this circle.

14 First of all, counsel says he can't conceive
15 of a legal issue that can arise in this case. Let's
16 just look at this case as an example. There was
17 allegations of -- an admission of drug use. Does or
18 does that not constitute an inability to pay? That is a
19 legal question. It is not a factual question.
20 Inability to comply is a legal defense, not a factual
21 excuse.

22 The allegation was he's not employed, but
23 maybe he's not looking for work or he's underemployed.
24 Is that inability to comply for purposes of a coercive
25 contempt sanction? That is a legal question.

1 Our suggestion is he could be incarcerated
2 so that he could be placed on work release in a county
3 jail program and reduce his arrearage. Is that or is
4 that not a permissible application of a coercive
5 sanction of incarceration? The cases that we've seen
6 have said no, but it is an open legal question.

7 Even as to the marshaling of evidence, it is
8 his burden not to just say, oh, I can't pay. He
9 submitted a form that he filed for his disability
10 payments that said I have no income and I have a car
11 that's worth \$1,500. Did he have to pay that car --
12 sell the car to pay or not? That is a legal question.

13 In terms of burden, the State is paying --
14 there are approximately 15 percent of the State's jail
15 population in any given year that are noncustodial
16 parents that are serving terms, in this case two 6-month
17 terms and a year term, at the cost -- according to the
18 statistics, at the cost of between 13- and 17,000
19 dollars a year. South Carolina, because it refuses to
20 comply with the requirements of the Federal program, has
21 already paid \$72 million to the government in fines and
22 owes another 10. And if you want to really reduce the
23 cost, Justice Kennedy, and make this manageable, take
24 the system that they are applauding in Utah or
25 denigrating in New Jersey. When the court sends out its

1 order to show cause, it says: Please fill out this form
2 showing whether you have income, whether you have
3 assets, and whether you are unable to hire counsel. If
4 the --

5 JUSTICE ALITO: Well, we don't have the
6 Social Security disability form, but if the judge
7 credited that and accepted that your client is -- was
8 unable to work and had only the assets listed on that
9 form, would he not then automatically be -- have shown
10 that he had an inability to pay?

11 MR. WAXMAN: I think the answer is yes, but
12 we don't know whether the judge even looked at the form,
13 and we know from South Carolina law that a mere
14 assertion is not the marshaling of evidentiary support
15 that's required to carry the burden.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

19 (Whereupon, at 11:12 a.m., the case in the
20 above-entitled matter was submitted.)

21

22

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24

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A				
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