

No. 10-10

IN THE
Supreme Court of the United States

MICHAEL D. TURNER,
Petitioner,

v.

REBECCA L. ROGERS, ET AL.,
Respondents.

**On Writ of Certiorari to the
Supreme Court of South Carolina**

**BRIEF OF CENTER FOR FAMILY POLICY
AND PRACTICE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

The Center for Family Policy and Practice (“Center”) is a nonprofit public policy organization that focuses on the nationwide impact of national and state welfare programs, fatherhood initiatives, and child support policy on parents and their children who frequently navigate the family and social welfare systems without legal representation. The Center was established in 1995 with the help of the Ford Foundation under the Strengthening Fragile Families Initiative. Recognizing the limited advocacy and policy analysis of these issues from the perspective of very low-income men of color, the Center’s mission has been to concentrate on the perspective of these individuals, while also providing public education and technical assistance on the challenges and barriers unique to these individuals and their families.

SUMMARY OF ARGUMENT

Petitioner Michael Turner’s experience is not an anomaly. Across the United States, destitute, noncustodial parents are incarcerated for failing to meet child support obligations they have no means to pay. This is despite the fact that child support law

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici, their members, or their counsel made a monetary contribution to this brief’s preparation or submission. The parties have consented to the filing of this brief, except for the South Carolina Department of Social Services, which maintains that it is not a party and does not have authority to give such consent.

and policy is targeted elsewhere—at so-called “deadbeat dads” who have the ability to pay but choose not to do so.

Whatever their effectiveness in securing payments from noncustodial parents with the means to pay, the inflexible application of child support collection and enforcement measures has resulted in a disproportionate and destructive impact on low- and no-income noncustodial parents and their families. These measures are designed to ensure that child support payments are “automatic and inescapable”—no matter the circumstance. However, the vast majority of child support owed in the United States is owed by noncustodial parents who live in poverty. These parents lack the means to pay their child support debt, yet they are subject to the full panoply of enforcement measures, including “civil” incarceration for nonpayment of support.

Low-income noncustodial parents who lack the ability to pay their child support debts in full are more likely to face incarceration than are noncustodial parents who have the means to pay child support and refuse to do so. This is because more conventional and less severe enforcement measures (such as wage garnishment) are effective in securing support from those with the means to pay.

The end result is that jails across the United States house large numbers of low- and no-income parents who have been incarcerated (largely through civil contempt processes) for nonpayment of child support. For example, in South Carolina, where Michael Turner was incarcerated, surveys suggest that thirteen to sixteen percent of the county jail

population in South Carolina is made up of child support obligors. Recognition of a right to counsel in these circumstances would at least enable many low-income and no-income child support obligors to effectively assert their defense, such as an inability to comply, in order to avoid incarceration.

Finally, recognizing a right to counsel for indigent noncustodial parents in civil contempt proceedings that could result in incarceration will not undermine the child support enforcement system. The appointment of counsel in such circumstances appropriately recognizes the punitive nature of incarceration when the defendant lacks the ability to pay his or her full support obligations. There is also growing recognition that counsel in such cases can help prevent unjustified incarcerations that actually undermine the goals of the child support system by preventing noncustodial parents from earning income immediately as well as damaging their long-term employment prospects upon release.

ARGUMENT**I. INCARCERATION OF INDIGENT PARENTS FOR NONPAYMENT OF CHILD SUPPORT DOES NOT PROMOTE THE GOALS OF CHILD-SUPPORT ENFORCEMENT.****A. Earlier Child Support Reforms Targeted “Deadbeat Dads”—Those With The Ability To Pay, But Unwilling To Do So—In Order To Improve The Economic Condition Of Poor Children And To Recoup Government Welfare Costs.**

In 1996, Congress passed sweeping reforms of the federal welfare and child support enforcement systems. The new welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”)², ended Aid to Families with Dependant Children (AFDC)³, the then-existing federal welfare entitlement program, and replaced it with Temporary Assistance to Needy Families (TANF)⁴, a federal block grant program. Ron Haskins & Rebecca M. Blank, *Welfare Reform: An Agenda for Reauthorization*, THE NEW WORLD OF WELFARE 3-13 (Rebecca M. Blank & Ron Haskins eds., 2001). TANF replaced the AFDC entitlement program, imposed strict work requirements on

² Pub.L. 104-193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. §§ 601-617 (2006)).

³ Social Security Act, Pub.L. 74-271 §§ 301-303, 49 Stat. at 625-26 (1935).

⁴ PRWORA, Pub.L. 104-193 §§ 101-116, 110 Stat. at 2110-85 (1996).

recipients in exchange for government assistance, established time limits on receipt of welfare benefits, and required States to sanction those who do not engage in work or work-related activities. *Id.* The unmistakable message underlying PRWORA was that poor mothers must go to work to support their children. To achieve this welfare-to-work goal, the law provided short-term cash benefits, employment-related services to address the labor market barriers poor mothers experience, and supports (such as child care assistance) to enhance the likelihood that they would succeed in the workplace. *Id.*

The child support enforcement amendments in the PRWORA were as extensive and far-reaching as the welfare reforms. The primary purpose of these reforms was to improve the operation of child support systems so that more money would be collected from noncustodial fathers to help single mothers moving from welfare to work. The reforms also advanced the goal of welfare cost recovery, the government practice of seeking reimbursement of welfare costs through child support enforcement.⁵ Central features of the PRWORA included enhanced procedures for establishing paternity in nonmarital births, implementation of a national directory of new hires that would be used to locate nonpayers, and streamlined administrative procedures. *Id.* at 252-56. Another significant systemic change was

⁵ This practice was introduced in the landmark Child Support Act of 1974, which established the federal Office of Child Support Enforcement. See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 253 (2000).

implementation of mass case processing in lieu of judicial and quasi-judicial individualized proceedings. *Id.* Overall, the child support system became more automated and, particularly with respect to enforcement methods, more stringent and punitive. *Id.* As some described it at the time, “the new child support provisions are designed to ensure that child support payments are ‘automatic and inescapable.’”⁶

Much attention was focused on the economic plight of single-mother families and the failure of absent fathers to provide for their children. *Id.* at 252. The figures were sobering. Nearly half of all single-mother families were living in poverty. *Id.* About the same number relied on welfare to make ends meet. *Id.* They received almost no financial assistance from noncustodial fathers. Most fathers did not make any child support payments whatsoever and, for those who did, the amounts were meager. *Id.* Even more troubling was data regarding child support receipt in single-parent households receiving welfare. In 1994, when the proposed welfare reform measures were being debated, only 12.5% of single-parent families receiving welfare were receiving child support. *Id.* It was believed that the availability of child support from noncustodial fathers would raise some families above the poverty threshold.

Against this backdrop, the child support reforms of 1996 were propelled by widespread societal

⁶ *Id.* at 256 (quoting Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538 (1996)).

hostility toward “deadbeat dads,” a term that was applied indiscriminately to all noncustodial fathers who were delinquent on their payments. Brito, *supra*, at 263-64. The public viewed nonpaying fathers as men who could afford to pay child support but flagrantly chose not to, depriving their children of desperately needed economic support. *Id.* State agencies went so far as to post “wanted ads” of fathers who failed to support their children. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1001 (2005-2006). Subsequent media coverage of these “deadbeat” dads fueled public outrage, particularly because the popular image conveyed was that of a father who “enjoy[ed] a comfortable lifestyle” and yet shirked his child support obligation while his children lived in abject poverty. *Id.* This image was fairly applied to the many well-to-do fathers whose children were suffering economically, but it did not take account of the twenty-six percent of noncustodial fathers who are poor themselves.⁷

When considering the reform proposals, policymakers gave little thought to fathers with limited financial means or to how to help them meet their financial obligations to their children. *Id.* at 427. These poor fathers, characterized by some

⁷ See Elaine Sorensen & Chava Zibman, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, 75 SOC. SERV. REV. 420, 422 (2001) (examining 1997 child support data revealing that twenty-six percent of noncustodial fathers (2.8 million) were categorized as poor, while forty-two percent (4.5 million) of noncustodial fathers were able to pay support but did not).

researchers as either “dead broke”⁸ or as “turnips,”⁹ have limited ability to provide economic support to their noncustodial children. One empirical study found that twenty-three percent of noncustodial fathers are indeed “unable nonpayers.”¹⁰ About a quarter of poor fathers who do not pay child support are incarcerated and the remainder experience some or all of the following barriers to employment: limited education; limited work experience; health problems; criminal records; transportation barriers; lack of phone service; and housing instability. Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 424-26. The researchers’ conclusion—that it would be futile to pursue child support payments from these impoverished fathers—has been borne out. Jocelyn Elise Crowley, *The Politics of Child Support in America* at 164 (2003) (citing Mincy, *supra*, at 44-510). “In other words, nonresident fathers are rarely poor *and* paying child support (three percent).” Sorensen, *Getting to Know*

⁸ Maldonado, *supra*, at 1003.

⁹ Young, uneducated, never-married noncustodial parents who lack income to pay child support are called “turnips” after the phrase “You can’t get blood from a turnip.” Ronald Mincy & Elaine Sorensen, *Deadbeats and Turnips in Child Support Reform*. 17 J. POL’Y ANAL. & MGMT. 44, 45 (1998).

¹⁰ Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 423. Another study, reviewing data from the 1990 Survey of Income and Program Participation conducted by U.S. Census Bureau, estimated that between 16 and 33 percent of noncustodial fathers are unable nonpayers. Mincy, *supra*, at 47.

Poor Fathers Who Do Not Pay Child Support, supra, at 423.

Unnecessarily harsh application of child support laws do not provide assistance in gaining job skills and employment so that these “dead broke” dads are better able to support their children. Rather, harsh enforcement places the poorest fathers in an economically untenable position. It sets child support orders at levels that exceed their capacity to pay and then later punishes them for shirking their responsibilities when they are inevitably delinquent.¹¹

¹¹ Although low-income fathers and mothers encounter similar labor market barriers, fathers have not been provided with as many opportunities to participate in job placement, training and education programs. Elaine Sorensen & Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?*, THE URBAN INSTITUTE (April 2001) available at <http://www.urban.org/url.cfm?id=310334>. “In 1996, for example, only 6 percent of the fathers received job search assistance, compared with 11 percent of the mothers. The gap is even more striking for training/education classes, with only 4 percent of the fathers engaging in such activities, compared with 19 percent of the mothers.” *Id.* at 3. For a discussion of the Parents’ Fair Share program, a small-scale demonstration project implemented in the 1990s to improve fathers’ ability to pay support, see Earl S. Johnson & Fred Doolittle, *Low-Income Parents and the Parents’ Fair Share Program: An Early Qualitative Look at Improving the Ability and Desire of Low-Income Noncustodial Parents to Pay Child Support*, FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 253-301 (Irwin Garfinkel et al., eds. 1998).

B. The Current Child Support System Does Not Adequately Protect Against Poor Noncustodial Parents Being Ordered To Pay More Support Than They Can Afford.

Reforms to the child support system have resulted in ever-larger numbers of noncustodial parents who are under an order of support. See Elaine Sorensen, *Rethinking Public Policy Toward Low-Income Fathers in the Child Support Program*, 29 J. POL'Y ANAL. & MGMT. 604, 604 (2010). This development is consistent with the widely held view and expectation that all parents, including poor parents, should provide for their children. Recognizing the precarious economic situation that poor noncustodial parents are in, most state child support guidelines include alternative provisions for low-income payers and/or a self-support reserve.¹² Unfortunately, the existence of these provisions does not solve the problem. For the reasons discussed below, poor noncustodial parents are often ordered to pay support in amounts greater than they can afford.

Despite the existence of alternative “low-income parent” rules and the self-support reserve, the amount of child support low- and no-income fathers

¹² Most states include a self-support reserve in their guidelines. Paul Legler, *Low Income Fathers and Child Support: Starting Off on the Right Track*, POLICY STUDIES 11 (Jan. 30, 2003) available at <http://www.aecf.org/upload/publicationfiles/starting%20off.pdf>. It operates to set aside a portion of the payer’s income to cover minimal, basic living expenses. *Id.* The child support award is then calculated based on the remaining income. *Id.*

are actually ordered to pay often bears no relationship to their actual income and far exceeds their ability to pay. This mismatch between the award amount and low-income fathers' financial means results from several systemic practices, including "imputing income" when setting support orders; adding additional costs that were incurred by the State before the initial child support order was established; and failing to modify existing orders downward when circumstances warrant.¹³

1. Imputing of income

The child support guidelines used by States to set awards base child support on parents' earned income. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS § 2.03(a) (rev. ed. 2006). Often, however, the child support order of low- and no-income fathers is established based on imputed earnings rather than actual earnings. Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, CENTER FOR FAMILY POLICY & PRACTICE 10-11 (June 2004) *available at*

¹³ Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 108-115 (2008-2009). Not surprisingly, since the 1990s, child support orders have been regressive, with lower-income fathers being ordered to pay a much higher percentage of their income than higher-income fathers. See Irwin Garfinkel, Daniel R. Meyer, & Sara S. McLanahan, *A Brief History of Child Support Policies in the United States*, FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 14, 22-23 (Irwin Garfinkel et al. eds. 1998) (28 percent versus 10 percent).

http://www.cffpp.org/publications/effect_child.html. Income is typically imputed when the noncustodial father does not appear for the hearing and the court enters a default order. *Id.* In imputing income to the noncustodial father, the court makes an assumption about how much a father earns or should earn.¹⁴ Generally, the court will impute to the obligor the ability to earn the minimum wage¹⁵ and assumes a full-time, 40-hour week. However, assuming a minimum wage and 40-hour work-week overestimates the income of the low-income parents, who lack stable employment and often work less than 40 hours a week.¹⁶

¹⁴ Patterson, *supra*, at 108. Many states have developed alternate child support rules and formulas for common child support situations that raise special concerns, including cases involving low-income payers. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS §4.07(c) (rev. ed. 2006). State guidelines have taken three general approaches. Under the first approach, typically applied in situations where the payer falls below the poverty threshold, the guidelines set a presumptive (and rebuttable) award of \$50 per month for each child. *Id.* at §407(c)(i). The second approach sets a minimum child support award (usually falling somewhere between \$20 to \$50). *Id.* at §407(c)(ii). The award is mandatory and cannot be adjusted downward. *Id.* Under the third approach, the guidelines do not establish a presumptive child support amount and leave the amount to the discretion of the judge. *Id.* at §4.07(c)(iii).

¹⁵ Patterson, *supra*, at 108.

¹⁶ May, *supra*, at 10-11; Jessica Pearson & Esther Ann Griswold, *New Approaches to Child Support Arrears*, 59 POL'Y & PRAC. OF PUB. HUMAN SERVS., 33 (2001), available at http://www.ancpr.org/new-approachestoschildsupport_.htm.

2. Reimbursement of costs

Fathers of children receiving welfare are often required to reimburse the State for additional welfare costs that were incurred by the State before the initial child support order was even established. May *supra*, at 11. For example, the court may require the father to reimburse the costs of welfare benefits previously paid to the family. *Id.* Medicaid childbirth costs may be added to the initial order as well. *Id.*; *see also* Garfinkel, *supra*, at 22-23. Additional add-ons include fees for paternity testing, litigation costs, and interest and penalties.¹⁷ As a result, at the time the order is set, it is “front-loaded” with welfare costs (sometimes in the thousands of dollars) that are retroactively imposed on noncustodial fathers. *Id.* at 6-7. Coupled with imputed earnings, these practices result in child support orders that often exceed fifty percent of reported earnings among low-income fathers¹⁸ and

¹⁷ Vicki Turetsky, *Realistic Child Support Policies for Low Income Fathers*, CENTER FOR LAW AND SOCIAL POLICY 7 (March 2000), available at www.clasp.org/admin/site/publications/files/0061.pdf.

¹⁸ Elaine Sorensen, et al., *Assessing Child Support Arrears in Nine Large States and the Nation*, THE URBAN INSTITUTE 77 (July 2007) available at <http://www.urban.org/url.cfm?id=1001242>. “In 1997, a noncustodial father of two with earnings of \$500-700 per month could plausibly have faced a monthly support order equal to 40+ percent of his income in nine states, and 20-39 percent of his income in another 20.” Maureen R. Waller & Robert Plotnick, *Effective Child Support Policy for Low-Income Families: Evidence from Street Level Research*, 20 J. POL’Y ANAL. & MGMT. 89, 92 (2001).

burden them with an unmanageable child support arrearage from the outset.

3. Failure to provide downward adjustments

If there is a downward adjustment in the amount of the child support order, it must generally be pursued by the obligor.¹⁹ Poor noncustodial fathers are unlikely to have the skills to navigate a downward adjustment to their order to reflect detrimental changes in their financial circumstances, such as a job loss or a decline in earnings. May, *supra*, at 11-12. Although the employment status of low-income noncustodial fathers is often unstable and changeable, their child support orders are typically not modified to reflect their reduced earnings. *Id.* Poor fathers lack access to counsel, who could seek modification on their behalf when their earnings decline. *Id.* They are also unlikely to file a *pro se* petition in court seeking a downward modification. Patterson, *Civil Contempt and the Indigent Child Support Obligor*, *supra*, at 14. A recent study examining the experience of low-income families with the child support system revealed that many poor fathers lack awareness of the child support system

¹⁹ State child support guidelines allow parents to seek a modification of their child support order upon a showing that there has been a change in their circumstances that warrant an adjustment. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATIONS AND APPLICATIONS §5.01 (rev. ed. 2006). The obligor's involuntary unemployment or underemployment typically qualifies as the type of substantial change in circumstances that justifies a decrease in the amount of the child support order. *Id.*

and related court processes. Many fathers did not even know that they could seek a downward modification of their child support order or what steps to follow to obtain a reduction in the award.²⁰

Nor can poor fathers look to state child support personnel to update their orders when circumstances warrant, even though state agencies have the option to do so.²¹ Where downward modifications of child support awards are concerned, the States' fiscal interests are diametrically opposed to the economic interests of noncustodial fathers whose children receive welfare benefits. States have an incentive to not update orders when the father's income decreases because it results in a potential loss of revenue for the State. Garfinkel, *supra*, at 23. Empirical data assessing modification practices in several States confirm that child support offices tend not to pursue modifications in such cases where the child support order would be reduced.²²

²⁰ Waller, *supra*, at 106. Even the fathers who sought modifications at times of earnings loss reported difficulties. *Id.*

²¹ *Id.* Unlike prior law, child support agencies are no longer required to conduct periodic reviews and adjustments of child support orders. If requested by either the parent or the state (in the case of TANF cases), however, the agency must undertake this task at least once every three years. *Id.*

²² *Id.* A State's interest in recouping welfare expenditures is in tension with its goal of improving the economic wellbeing of children living in poverty. Mothers are required to assign their rights to collect child support to the state as reimbursement for welfare benefits. Because most States use the entire monthly support payment to recoup welfare expenditures, the child support collected does not enhance the family's living standard.

C. The Vast Majority Of Child Support Debt In The United States Is Owed By Destitute Noncustodial Parents Who Lack The Means To Pay.

As noted above, the child support system has not realistically taken account of the financial and work opportunities of a large number of nonpaying parents who owe support. Most of the fathers who do not pay child support payments are poor and unable to find

See Waller, *supra*, at 91. About a third of the States pass through \$50 of the collected child support to the child's family. *Id.* "In 2004, states collected approximately \$635 million in child support on behalf of TANF families and distributed about 27 percent of it to TANF families, keeping the rest to reimburse the federal and state governments for welfare costs." Laura Wheaton & Elaine Sorensen, *The Potential Impact of Increasing Child Support Payments to TANF Families*, THE URBAN INSTITUTE 1 (Jan. 2008), available at <http://www.urban.org/url.cfm?id=411595>. States could give families on welfare all the child support they collect through the assignment process. Doing so would remove many more families from poverty. *Id.* Even fathers who later reunite with their family are not shielded from state efforts to collect child support. In these cases, the child welfare system essentially pursues state-owed child support from low-income fathers who are residing with their children in intact families, thus reducing the economic resources available to the family and privileging recoupment of state welfare expenditures. *See* Turetsky, *Realistic Child Support Policies for Low Income Fathers*, *supra*, at 9; *see also* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1057-1063 (2007) (describing *Harvey v. Marshall*, 884 A.2d 1171 (Md. 2005) in which the noncustodial father gained custody of his four children and the state continued to pursue ten thousand dollars in arrearages that accumulated prior to the change in custody).

jobs that would enable them to pay child support. *See* Sorensen, *Getting to Know Poor Fathers Who Do Not Pay Child Support*, *supra*, at 422. About twenty-six percent of noncustodial fathers (about 2.8 million) are poor, and the vast majority of this group (approximately eighty-eight percent) does not pay any child support. *Id.* These fathers earned an average of \$5,627. *Id.* at 424. Further, one study found that sixty percent of poor fathers who do not pay child support are racial and ethnic minorities, and twenty-nine percent were institutionalized (mostly in prison) at the time of the interview. *Id.* at 423. Only forty-three percent of the men not in prison were currently working, and those employed at all in 1996 worked an average of just 29 weeks and earned \$5,627 that year. *Id.* Their barriers to employment²³ were also considerable: forty-three percent were high-school dropouts, thirty-nine percent had a health problem, and thirty-two percent had not worked in three years. *Id.* Overall, job prospects are not promising for men with already

²³ Welfare program administrators classify certain welfare recipients as "hard to employ" because of characteristics which act as "barriers to employment." Barriers to employment include: limited education, limited work skills, addictions, criminal records, and physical and mental health problems. *See, e.g.,* Pamela J. Loprest, et al., *TANF Policies For The Hard To Employ: Understanding State Approaches And Future Directions* THE URBAN INSTITUTE 8-9 (July 2007), *available at* <http://www.urban.org/url.cfm?id=411501>.

weak attachment to the labor force and other significant barriers to employment.²⁴

Low-income and even no-income parents are responsible for the greatest portion of unpaid child support, according to the U.S. Office of Child Support Enforcement (OCSE). Of the more than \$70 billion in child support debt nationally, seventy percent of all arrears due to the government (as reimbursement for welfare expenditures) are owed by noncustodial parents who have no quarterly earnings or earn less than \$10,000 annually.²⁵ Only four percent of child support arrears are held by noncustodial parents with more than \$40,000 in annual income.²⁶ The problem is nationwide; the child support caseloads in every State include very low-income fathers who have accumulated enormous arrearages and who have virtually no prospect of ever satisfying the debt. May, *supra*, at 9. The goal of recouping welfare expenditures incentivizes the State to aggressively pursue child support collections from the very poorest parents, rather than from middle- or upper-income parents, who do not have children in the welfare

²⁴ Dan Bloom, et. al., *Four Strategies to Overcome Barriers to Employment: An Introduction to the Enhanced Services for the Hard-to-Employ Demonstration and Evaluation Project, MDCR 2-3 (October 2007)* available at <http://www.mdcrr.org/publications/469/overview.html>.

²⁵ *Arrears Leveraging Pilot Project: Outcomes Achieved & Lessons Learned*, FAMILY WELFARE RESEARCH & TRAINING GROUP (March 2005) available at www.familywelfare.umaryland.edu/reports/debtleveraging.pdf.

²⁶ Sorenson, *Assessing Child Support Arrears in Nine Large States and the Nation*, *supra*, at 23.

caseload.²⁷ For these poor fathers, it is virtually inevitable that they will experience the full brunt of the child support enforcement system, including penalties, sanctions, and potentially even incarceration. May, *supra*, at 9.

D. The Poorest Noncustodial Parents Are Most Likely To Face Incarceration For Nonpayment Through The Civil Contempt Process, Even Though Such Harsh Enforcement Measures Were Developed With “Deadbeat Dads” In Mind.

The accumulation of unrealistic and excessive child support debts results in large part from subjecting impoverished noncustodial parents to an “automatic and inescapable” child support system that has reimbursement of welfare benefits as its primary focus and far too often does not account for the parents’ inability to pay. The low-income noncustodial parent who lacks attorney

²⁷ *Id.* The State’s interest in maximizing its revenue through pursuit of collections from poor fathers is also fueled by the federal government’s incentive payment system. Hatcher, *supra*, at 1050-51. Under this system, State’s have the potential to win financial awards based on their performance in several areas of child support enforcement. *Id.* Significantly, the program provides larger cash payments for child support collections from the State’s welfare caseload as compared to the non-welfare caseload. *Id.* The proceeds from welfare cost recovery together with potential extra cash payments from the federal government create a powerful incentive for states to pursue collections from poor fathers, even when to do so is tantamount to trying to get blood from a turnip.

representation frequently experiences the child support system as a virtually unstoppable chain of events that leads inevitably to unfathomable levels of debt that they have no hope of ever paying off. *C.f. In re Gault*, 387 U.S. 1, 26 (1967) (a low-income non-custodial parent requires counsel “to make skilled inquiry into the facts, to insist upon the regularity of the proceedings, and to ascertain whether [the parent-debtor] has a defense”).

It is therefore not surprising that many low-income noncustodial parents experience the full weight of the child support enforcement process.

The child support system has developed a broad arsenal of enforcement strategies. According to the federal Office of Child Support Enforcement, their automated enforcement tools are very effective when used with the parents in their caseload who are regularly employed or have assets. Vicki Turetsky, *Commissioners Voice: ‘Bubble Chart’ Mirrors Child Support Work Nationwide*, CHILD SUPPORT REPORT, Nov. 2010, at 2, available at <http://www.acf.hhs.gov/programs/cse/pubs/2010/csr/csr1011.pdf>. Automatic withholding of child support payments from employer payrolls accounts for seventy percent of all child support collections. *Id.* (“[T]raditional enforcement tools have been less effective for the approximately 25 percent of parents who owe child support but have a limited ability to pay.”). Child support is also secured from able-nonpayers through a range of alternative mechanisms, such as intercepting federal and state income tax refunds, seizing bank account balances, restricting or revoking occupational, professional and drivers’ licenses, and placing a lien on property. *Id.*

However, these conventional collection methods are not effective in collecting past due child support from noncustodial parents who lack stable, consistent employment and financial assets. *Id.* Indeed, utilizing these less severe sanctions with dead broke noncustodial parents would be futile. Wage assignment will not work if the parent is unemployed. Intercepting tax refunds will not work if the parent is not due a tax refund. Seizing bank balances will not work if the parent does not have assets squirreled away in an account. Denying a passport will not work if the parent lacks the resources to travel outside the country. Having failed to collect support by these traditional methods, the child support system often turns to more aggressive enforcement measures when pursuing collections from indigent parents. Though such tools were established to collect unpaid support from deadbeat dads—those able but unwilling to pay—it is the low-income parent who most likely faces the threat of incarceration through the civil contempt process. Consequently, the harshest enforcement sanctions tend to have the greatest impact on the men with the least capacity to pay child support.

The Center for Family Policy and Practice (“Center”), which has been studying the challenges and barriers faced by low-income fathers since 1995, examined the intersection of child support and incarceration (civil contempt and criminal charges for non-payment of child support) in several publications. In its studies of this issue, the Center found that in most States, there were reports of civil contempt arrests and incarcerations for nonpayment of child support. May, *supra*, at 40. Notably, civil contempt

arrests and incarceration outnumber criminal nonsupport arrests in many jurisdictions. *Id.* Some jurisdictions, such as Marion County, Indiana, routinely rely on civil enforcement. In that county, it is “reported that out of 80,000 to 100,000 open child support cases each year, about 3%, or 2,400 to 3,300, result in incarceration for nonpayment. Roughly 15-20 of these are criminal charges, and the rest are civil contempt.” May, *supra*, at 16. The Center’s studies examining data at the local level in Wisconsin confirmed that the most aggressive child support enforcement policies tend to have the greatest impact on the poorest parents who are unable to pay. The study revealed that in Madison and Milwaukee, Wisconsin there is a higher rate of arrests for nonpayment of child support for low-income minority parents than for other parents.²⁸ This is the case even though in Wisconsin, as in other States, inability to pay is a defense to civil contempt. See *Balaam v. Balaam*, 52 Wis. 2d 20, 29, 187 N.W.2d 867, 872 (1971).

In Dane County, which surrounds and includes the city of Madison, Wisconsin, there were 2,899 bookings to jail for nonpayment of child support (felony, misdemeanor, and civil contempt) from January 2000 to August 2003. Of these, more than 1,400 or forty-eight percent were African-American and fifty percent were white. By comparison, the

²⁸ May, *supra*, at 14-15 (the data in this study groups together felony, misdemeanor and civil contempt proceedings for nonpayment of child support).

African-American population of the county as a whole in 2000 was only four percent of the total population.

In Milwaukee County, a similar pattern is evident in the county's records. From April 1999 to April 2001, over 6,200 people who were booked in the county jail had nonpayment of child support listed as one of their offenses. *Id.*

II. RECOGNITION OF A RIGHT TO COUNSEL IN CIVIL CONTEMPT PROCEEDINGS THAT COULD RESULT IN INCARCER- ATION WOULD NOT BURDEN THE EFFECTIVENESS OF THE CHILD SUPPORT ENFORCEMENT SYSTEM

Appointing counsel to represent poor noncustodial fathers like Michael Turner in civil contempt proceedings where they face incarceration will not frustrate the child support enforcement system's important goal of obtaining economic support for children. The practice of repeated civil incarcerations of fathers like Michael Turner, whose indigence prevents them from paying their child support debts, is a wholly ineffectual way to collect child support. Turner's jail terms undoubtedly do far more to hinder his efforts to find stable employment than they do to provide economic security to his children. Not surprisingly, it was only on the one occasion when Turner was assisted by volunteer *pro bono* counsel at his civil contempt hearing that the proceeding addressed one of the barriers preventing Turner from maintaining stable employment. Brief of the Petitioner-Appellant at 15, n.10, *Turner v. Rogers*, No. 10-10 (U.S. January 4, 2011). His experience underscores how the provision of counsel

will likely do more to advance the goals of the child support system than will recurring jail sentences.

Turner's experience with the child support system is all too common. Other poor noncustodial fathers report similar dystopian experiences. A noncustodial father who participated in one study focus group explained: "I'm just tired of getting locked up every so often, every eight months or so. I don't have no bad record at all. But I keep getting locked up or child support, that's the main thing." Waller, *supra*, at 105. Absent appointed counsel to advocate on behalf of these "dead broke" fathers, they will far too often remain trapped in a seemingly inescapable child support enforcement loop.

These types of incarcerations of indigent noncustodial fathers undermine child support program goals. Most fundamentally, few obligors will generate income while incarcerated,²⁹ and incarceration may have a deleterious effect on their employment prospects upon release. Thus incarceration will further disable them from paying the required support.³⁰

In addition, there is growing recognition that the child support system's goals are well served if

²⁹ Some child support contemnors are able to engage in compensated work release while incarcerated.

³⁰ There are reported cases in which incarceration caused contemnors to lose jobs from which wage withholding was providing or could have provided some level of support. *See, e.g., Sevier v. Turner*, 742 F.2d 262, 265-66 (6th Cir. 1984); *Wilson v. Holliday*, 774 A.2d 1123, 1127 (Md. 2001).

appointed counsel prevents incarceration of indigent fathers by mounting an “inability to pay” defense. The child support field itself has come to recognize that the accumulation of large arrearages by low-income fathers is counterproductive to program goals. The Commissioner of the federal Office of Child Support Enforcement acknowledges that for this population the “growing body of research suggests that reduced orders and debt balances can improve employment and child support outcomes.” Turetsky, *Commissioners Voice: ‘Bubble Chart’ Mirrors Child Support Work Nationwide*, *supra* at 2. The federal government now urges state child support programs to examine the underlying reasons fathers are not paying child support and to provide job-related support and services to poor fathers to help them meet their support obligations. *Id.* The preference for jobs (not jail) for indigent non-payers has slowly taken root within the mindset of the child support community over the last decade. This new thinking has not yet transformed how child support systems operate nationwide. For the most part, the systemic and automated practices that contributed to Tuner’s multiple incarcerations remain the status quo. Understandably, implementing policy changes in a large and complex federal-state bureaucracy like the child support enforcement system will take time and resources. Nonetheless, demonstration projects, pilot programs and reforms at the federal, state and local level are taking place on several fronts.

First, States and localities are taking a close look at the large arrearages that have built up for low-income fathers. *See* Sorensen, *Assessing Child Support Arrears in Nine Large States and the Nation*,

supra, at 10. There is growing acknowledgement in the field that, as a practical matter, low-income fathers will never be able to pay the enormous debts they have accumulated and that, because of this, the very existence of the debt can discourage some fathers from even trying to repay it. Indeed, “the federal Office of Child Support Enforcement recently reissued a policy statement clearly stating that States have the authority to compromise unpaid welfare arrears owed to the government.” Turetsky, *Realistic Child Support Policies for Low Income Fathers*, *supra*, at 9 (citing HHS/OCSE, PIQ-89-2 (Feb. 14, 1989); PIQ-99-03 (March 22, 1999)). Some of the methods States use to manage uncollectible arrears include amnesty (debt forgiveness) programs for state-owed arrearages and the automatic suspension of orders when the father is in jail or participating in a job program. *Id.*

Second, there is a growing recognition that the arrearage problem is best handled through prevention. States are thus reconsidering the practice of routinely imputing income, setting large retroactive orders based on welfare debt and other costs that bear no relationship to the father’s ability to pay, and keeping orders current by implementing procedures to facilitate prompt review and adjustment of orders when appropriate. U.S. Office of Child Support Enforcement, Administration for Children and Families, Project to Avoid Increasing Delinquencies (July 2008) available at www.acf.hhs.gov/programs/cse/pol/DCL/2007/dcl-07-17a.pdf.

Third, there is widespread understanding that many low-income fathers who want to pay support

are unable to do so simply because of obstacles to full participation in the labor market. Child support enforcement efforts must be coupled with measures designed to improve the employment prospects and earnings of poor fathers.³¹ This approach is reflected in President Barack Obama's agenda for strengthening families, the Fatherhood, Marriage and Family Innovation Fund. The proposal, included in the administration's FY2011 budget proposal, would establish a new \$500 million dollar fund to provide grants to States to conduct and evaluate "comprehensive responsible fatherhood initiatives" and "comprehensive demonstrations to improve child and family outcomes in low-income families with serious barriers to self-sufficiency."³² While there exist state and local level pilot programs that provide comprehensive employment and other supportive services to low-income noncustodial parents,³³ the

³¹ There is considerable evidence that even if the child support system were effective in securing payments from poor fathers, the amounts would not be sufficient to lift their children out of poverty. No matter how aggressive and relentless the enforcement efforts, the reality is that these poor fathers have limited and unstable income. See Jane Waldfogel, *The Role of Family Policies in Antipoverty Policy*, CHANGING POVERTY, CHANGING POLICIES 242, 253-54 (Maria Cancian & Sheldon Danziger, eds. 2009).

³² U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement, *The Fatherhood, Marriage and Family Innovation Fund* (2010), available at http://www.acf.hhs.gov/programs/cse/pubs/2010/innovation_fund_one_pager.html.

³³ For example, in 2006 the New York legislature enacted the Strengthening Families Through Stronger Fathers Initiative, which, among other things, funded a three-year pilot program to

Obama administration's Fatherhood, Marriage and Family Innovation Fund would be the first such program at the federal level.

Like these other measures, appointment of counsel to indigent noncustodial parents in civil contempt proceedings that could lead to incarceration would serve to rationalize the child-support enforcement process by ensuring that obligors are incarcerated only when they truly have the ability to pay and that alternative steps are taken in cases of indigent obligors.

CONCLUSION

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

Respectfully submitted,

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provide employment services to low-income noncustodial parents. See Tess Tannehill, et al., *Strengthening Families Through Stronger Fathers Initiative: Process Evaluation Report*, THE URBAN INSTITUTE 2-3 (July 2009), available at <http://www.urban.org/url.cfm?ID=1001412>.