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 THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA; CHILDREN'S LAW CENTER; DC APPLESEED CENTER FOR LAW AND JUSTICE; AND THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Legal Aid Society of the District of Columbia ("Legal Aid") was formed in 1932 to provide civil legal aid to individuals, families, and communities in the District who could not otherwise afford to hire a lawyer, as well as to encourage measures by which the law may better protect and serve their needs. Over the last three quarters of a century, Legal Aid has helped tens of thousands of District residents obtain meaningful access to justice. Legal Aid staff and volunteers provide a continuum of services from client education to full representation before a court or an administrative tribunal, with primary focus on cases involving child support and custody disputes, domestic violence, access to public benefits, consumer protection, and landlord-tenant disputes. In child support cases, Legal Aid provides representation to custodial and non-custodial parents alike when they cannot afford counsel. In appropriate cases, Legal Aid advocates in support of courts' use of their civil contempt authority—including the authority to incarcerate contemnors—as a means of ensuring compliance with the law. Legal Aid has concluded from its experience in child support cases that incarceration for civil contempt is both fairer and more effective at securing the desired result—

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondents Rebecca L. Rogers (formerly Rebecca Price) and Larry E. Price, Sr. have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk. Respondent South Carolina Department of Social Services maintains that it is not a party to these proceedings and does not have authority to give such consent.

payment of child support—when the alleged contemnor is represented by counsel.

Children's Law Center is the largest non-profit legal services organization in the District of Columbia and the only organization that provides comprehensive representation specifically on behalf of children. Children's Law Center envisions a future for the District of Columbia in which every child has a safe home, a meaningful education, and a healthy mind and body. The organization's 70-person staff, together with hundreds of pro bono partners, work toward this vision by providing free legal services to 1,200 children and families each year and by using the knowledge gained from representing these clients to advocate for changes in the law. In addition to providing a comprehensive range of free legal services to children and their families, Children's Law Center is committed to sharing its expertise with the community, other professionals, and policymakers through training and technical assistance. As an organization dedicated to improving the lives of children, Children's Law Center is particularly concerned with preserving and protecting both the resources available to children through child support and the due process rights of families.

DC Appleseed Center for Law and Justice ("DC Appleseed") is a nonprofit organization dedicated to solving pressing public policy problems facing the District of Columbia area. To advance this mission, DC Appleseed works with volunteer attorneys, business leaders, and community experts to identify those problems, conduct research and analysis, make specific recommendations for reform, and advocate effective solutions. DC Appleseed's projects include working with broad coalitions, issuing reports, participating in regulatory proceedings, bringing

lawsuits, managing public education campaigns, and meeting with and/or testifying before governmental decision-makers. One of DC Appleseed's projects concerns the District of Columbia's child support system. In August 2007, after two years of study, DC Appleseed issued a comprehensive report on the DC system, and since then DC Appleseed has been involved in implementing changes to the system that would make it more effective and equitable for all of its stakeholders.

The National Law Center on Homelessness & Poverty ("The Law Center") is a nonprofit organization based in Washington, D.C. It was founded in 1989 with the mission to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. The Law Center strives to place homelessness in the larger context of poverty. By taking this approach, the organization aims to address homelessness as a very visible manifestation of deeper causes, including the shortage of affordable housing, insufficient income, and inadequate social services, including the lack of counsel for people experiencing poverty. The Law Center works with homeless people and their advocates to ensure that their constitutional and statutory rights are protected and supports efforts to ensure that legal counsel is made available to those who cannot afford representation. The Law Center also monitors and advocates against laws that "criminalize" homelessness by constructively punishing people for their status as poor or homeless. The Law Center has published numerous national reports on the criminalization of homelessness, brought litigation challenging laws that criminalize homelessness, and successfully worked with

communities around the country to implement constructive alternatives to criminalization.

INTRODUCTION AND SUMMARY

In *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981), the Court wrote that its "precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and [it] thus dr[e]w from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27. As the Court in *Lassiter* observed when discussing that rule in the context of a proceeding to terminate parental rights, the right to appointed counsel stems from "due process" generally, rather than the Sixth Amendment's right to the assistance of counsel in criminal cases. *Id.* at 25. *Lassiter* and the precedents it surveyed thus direct that when incarceration is at stake, the right to appointed counsel is not limited to only criminal cases, but applies equally in civil cases.

In line with this precedent, an indigent defendant facing incarceration as a contemnor has a due process right to appointed counsel regardless of whether the contempt proceeding is classified as civil or criminal. Because the consequence of losing such a case is the loss of unconditional physical liberty, it makes no practical difference—or any difference in the due process analysis—that the purpose of the confinement is to coerce compliance with a court order, rather than to deter or punish crime. Cf. *In re Gault*, 387 U.S. 1, 15-16, 35-36 (1967) (right to counsel applies to confinement of a juvenile offender even though purpose of confinement is meant to be "'clinical' rather than punitive"). Civil contemnors

are confined in the same jail facilities as persons convicted of crimes, obey the same rules, eat the same food, and experience the same separation from work, family, and society.

Contrary to the view of all of the federal circuits and the majority of the state courts of last resort that have considered the issue, the South Carolina Supreme Court held that no appointed counsel is required in civil contempt proceedings—even when incarceration is at stake—because the civil contemnor purportedly retains the ability to purge the sanction by compliance. Pet. App. 3a-5a. This rule is unsound both in theory and in practice. Because a defendant's inability to comply with the court order is a defense to civil contempt, the defendant's ability to purge the sanction often is itself the very issue that counsel is needed to help address.

As a practical matter, a significant number of low-income parents genuinely are unable to make the child support payments required of them, often for reasons that merit sympathy rather than scorn. Many such parents suffer from deficits in education and life skills that impede not only their ability to earn income and pay child support, but also their ability to explain to the court the reasons they are unable to make payments. Chronic physical ailments and low-level mental illness are also frequently factors that infect these proceedings. To be sure, some parents who fail to pay child support have no compelling excuse. Some may be entirely unsympathetic. But without counsel, there is a high risk of error; courts are less able to distinguish the poor from the recalcitrant, and injustice is done by incarcerating a debtor to coerce a payment that he is not able to make.

Amicus Legal Aid has experience representing both custodial and non-custodial parents in child support actions, and other *amici* have studied the issues confronting indigent persons before the courts. They have all found that most indigent persons accused of civil contempt need the assistance of a lawyer to present a defense, including a defense based upon an inability to pay—just as they need such counsel in criminal proceedings. Appointing counsel will generally make child support enforcement proceedings more efficient and improve the long-term prospects for compliance with child support orders.

Incarcerating people to coerce them to pay money they do not have is not only unjust, but also counterproductive. Improper civil incarceration imposes costs on parents and children that can ultimately hinder the enforcement of child support orders and be contrary to the interests of the child. An incarcerated parent normally cannot remain employed, look for work, enter many training programs, or maintain a relationship with his child. And a person's jailhouse residence will certainly taint, if not destroy, his relationship with prospective employers.

Based on the experience of *amici* with the child support system, the benefits of the appointment of counsel would not come at the expense of creating imbalance between custodial and non-custodial parents. At issue here is the right to appointed counsel in the limited context of civil contempt proceedings in which incarceration is threatened, not in child support proceedings more broadly. Moreover, the reality of civil contempt for the nonpayment of child support is that the government is deeply involved in the proceedings, in such roles as initiator, prosecutor, and even assignee of the right to child

support payments. Even when a private party pursues the action, the very nature of contempt—a means of vindicating the authority of the court and imposing deprivation of physical liberty—ensures that the court itself has a significant interest in ensuring that no imbalance arises.

Although the appointment of counsel requires resources, budgetary constraints should not limit this access to justice. The interest at stake—freedom from actual incarceration—is significant in itself, and the fact that many States already provide counsel in these circumstances is compelling evidence that the costs are manageable. Because the assistance of counsel should help individuals avoid inappropriate incarceration, guaranteeing counsel will save governments the costs of unnecessarily incarcerating such individuals. Indeed, in the course of representing these individuals, counsel can often provide significant ancillary guidance that will help to address underlying issues by suggesting modifications of the enforcement obligation, locating education and job training, finding referrals to address any physical or mental illnesses, providing information about possible disability or other support payments, ensuring that the obligor receives credit for any child's benefits that derive from his disability benefits, and otherwise counseling the individual in a way that the courts rarely have the ability or the time to do. All of these services will advance the interests of justice and the best interests of the child at issue, while avoiding the senseless expense of running what could otherwise be, in effect, a debtor's prison.

ARGUMENT

I. THERE IS A HIGH RISK OF ERROR WHEN INDIGENT PARENTS ARE HELD IN CIVIL CONTEMPT AND INCARCERATED FOR FAILURE TO PAY CHILD SUPPORT.

Lassiter made clear that "[t]he preeminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." 452 U.S. at 25. The South Carolina Supreme Court, however, held that this right does not apply when the loss of liberty is for civil contempt, on the theory that "[a] contemnor imprisoned for civil contempt . . . hold[s] the keys to his cell." Pet. App. 3a. But that is no reason for denying counsel; whether the defendant truly holds the keys—or will be unable to comply no matter how long he is incarcerated—often is the very issue that he needs counsel to help him argue. See Pet. Br. 7, 35-37 & n.21 (civil contempt sanction cannot be imposed where defendant lacks ability to comply with the order at issue).

Among those individuals facing civil contempt sanctions for nonpayment of child support, there is a significant risk that courts will make erroneous determinations regarding their ability to pay when counsel is not present. As explained below, far from being a theoretical concern, observational data and the experience of *amici* indicate that a sizable portion of the parents who fail to pay child support genuinely are unable to do so, and furthermore, that they are incapable of mounting an effective inability-to-pay defense to a contempt charge without the assistance of counsel.

A. Individuals Who Fail To Make Child Support Payments Often Lack The Resources And Skills Necessary To Make Required Payments.

The unfortunate economic reality is that many non-custodial parents are, in fact, indigent and unable to meet their existing child support obligations. The federal Office of Child Support Enforcement reported that 70% of the over $70 billion in child support arrears nationwide were owed by non-custodial parents who had either *no* quarterly earnings (42%) or annual earnings of less than $10,000 (28%); only 4% of arrears were owed by non-custodial parents who had annual earnings of over $40,000.[2] Similarly, an Urban Institute study in California found that 80% of arrears were owed by parents with less than $15,000 net income, over half of arrears were owed by debtors with less than $10,000 in net income but more than $20,000 in debt, and only 1% of child support debtors had net incomes over $50,000.[3] Many of these low-income debtors lack sufficient

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[2] *See* U.S. Dep't of Health & Human Servs., Admin. for Children and Families, Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State* ("HHS Report") 4, 5 (2004), *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2004/dcl-04-28a.pdf.

[3] *See* Elaine Sorensen et al., The Urban Inst., *Examining Child Support Arrears in California: The Collectibility Study* ("California Collectibility Study") at Executive Summary-10-11, 3-5 (2003), *available at* http://www.childsup.ca.gov/Portals/0/resources/docs/reports/2003/collectibility2003-05.pdf. *See also* Vicki Turetsky, Ctr. for L. & Soc. Pol'y, *Staying in Jobs and Out of the Underground: Child Support Policies that Encourage Legitimate Work* 3 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0349.pdf (summarizing findings in California Collectibility Study).

funds to meet their child support obligations. The Urban Institute calculated that 64% of parents who owed child support debt in California were subject to orders that were too high relative to their ability to pay, whereas only 36% of parents who accrued arrears had the ability to pay but did not. See California Collectibility Study at 5-4.

Within a low-income population, non-custodial parents who fail to make child support payments are "more likely to be 'dead-broke' than deadbeat."[4] Such poverty renders significant portions of child support debt effectively uncollectible. For example, in the District of Columbia, where 70% of the child support caseload consists of current or former welfare recipients, recent collection efforts brought in *only four percent of arrears*. DC Appleseed Report at 47, 111.

The high rate of indigence among child support debtors is due in large part to the inability of many non-custodial parents to obtain and retain employment. In the District of Columbia, an "overwhelming majority of absent parents . . . are low-income, undereducated, and tenuously connected to the workforce." *Id.* at 17. Many are part of an unstructured labor market, sometimes in grey-market industries. Even before the current economic downturn, fewer than one in five non-custodial fathers were employed year round. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*,

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[4] *See* DC Appleseed Ctr. for Law and Justice, Crowell & Moring LLP, and Kilpatrick Stockton LLP, *Taking Care of the District's Children: The Need to Reform DC's Child Support System* ("DC Appleseed Report") 51 (2007), *available at* http://www.dcappleseed.org/library/DC%20Appleseed%20Report-Rev6-1.pdf.

18 Cornell J.L. & Pub. Pol'y 95, 106 (2008). Another study showed that low-income non-custodial fathers were, on average, employed for only about 30 weeks per year. Today, a sustained period of high unemployment rates has exacerbated the problem, particularly for less-skilled workers.[5]

Unemployment or marginal employment cannot be disregarded as simply voluntary. To the contrary, a parent might be unable to find and hold on to work because he lacks a formal education or marketable skills, suffers from an addiction or other mental health problems, or has a criminal record that makes employers reluctant to hire him.[6] See, *e.g.*, Patterson, *supra*, at 105-06. Furthermore, many of the governmental welfare benefits that might help an individual overcome such obstacles are available only to custodial parents. See *id.*

In many cases, however, the amount of the child support obligation does not accurately reflect the obligor's actual economic circumstances. First, a child support order can reflect economic realities only to the extent that the official determining the level of support has accurate and complete information about the non-custodial parent's financial circumstances. See, *e.g.*, D.C. Code § 16-916.01(d)(11) (2001) (gross

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[5] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS14000000 (last visited Jan. 10, 2011).

[6] "Employers are much less likely to hire people with a criminal record than other groups of comparably skilled workers." Kirsten D. Levingston and Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 Clearinghouse Rev. J. Poverty L. & Pol'y 187, 191 (2007), *available at* http://www.clasp.org/admin/site/publications/files/0394.pdf.

income to be based on evidentiary record). But parents of limited means, and particularly those with limited education and practical skills, often have difficulty understanding and participating in the proceedings at which the initial child support obligation is set. In the experience of *amici*, many such parents do not fully appreciate the obligations being imposed and often are so deferential that they fail to object even when payment levels seem too high. See DC Appleseed Report at 121-22. As a result, some child support orders are, at the outset, set higher than the non-custodial parent can afford to pay.

Moreover, when information is unavailable, support may instead be calculated based on an imputed income, as happened in this case. See, *e.g.*, Pet. Br. 8-9 & n.5 (explaining process by which Petitioner was found to be unemployed but nonetheless had imputed to him a gross monthly income of $1,386). Certain legal presumptions can also pose obstacles. In the District of Columbia, for example, the support calculation guidelines apply presumptively, and any departure from them must be justified in writing. D.C. Code § 16-916.01(p) (2001). And, when the calculating officer determines that a low-income individual is able to make some level of payment, the guidelines set a presumptive minimum. See *id.* § 16-916.01(g)(3).

These sorts of imputation procedures and presumptions tend to affect disproportionately those parents who are least skilled and most unable to make child support payments at a significant level. See Rebecca May & Marguerite Roulet, Ctr. for Fam. Pol'y & Practice, *A Look at Arrests of Low-Income Fathers for Child Support Nonpayment: Enforcement, Court and Program Practices* 39-40 (2005),

available at http://www.cffpp.org/publications /pdfs/noncompliance.pdf. These parents may be the least able to present detailed financial records, and thus are the most likely to have imputed incomes or, in some jurisdictions, default child support orders that overestimate their true earning capacity. These parents are also the least likely to be able to afford legal representation. See *id.* at 39.

Second, many of the same socioeconomic challenges that present barriers to employment also make it difficult for individuals to seek modifications to their child support orders when their financial circumstances change, or even to know that they can seek modification of an order when circumstances change. Without the aid of counsel, these individuals often do not understand the standards and procedures for modification, leaving them subject to enforcement of outdated payment standards. For example, an observational study in the District of Columbia found that "it is sometimes unclear if [non-custodial parents who agree to payment plans] are agreeing to appear compliant, because they do not know they have the right to object, because they do not understand, or because they fully agree that they should, and will, pay the required amount." DC Appleseed Report at 121. Even those parents who are able to present legitimate requests for downward modifications are at a disadvantage; some observers have found that the District of Columbia's Child Support Services Division "routinely challenges any request for downward modification no matter how reasonable" and "claims that it files oppositions to downward modification motions in order to preserve the government's right to a hearing and to ensure that the non-custodial parent provides appropriate evidence." *Id.* at 113 (citing Letter from Linda

Singer, DC Attorney General to Judy Berman, DC Appleseed Senior Program Associate (May 15, 2007)).

Third, even when a parent can afford to pay the current monthly obligation, an accumulation of past arrears can make full compliance impossible. Often, those arrears accumulate during times when the parent is not able to pay them. In this case, Petitioner's initial child support order was made retroactive to the date of the first negotiation conference, and his arrears continued to accumulate even while he was hospitalized and incarcerated. See Pet. Br. 8-10. Modifications may be available for hospitalized or incarcerated parents, but the arrears have already accumulated "[b]y the time most incarcerated parents become aware that they should have taken steps to request modification." Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 Geo. J. Poverty L. & Pol'y 313, 328-29 (2006). Child support obligations are rarely modified for incarcerated parents in the District of Columbia. See DC Appleseed Report at 95.

B. Indigent Parents Are Often Unable To Present A Cogent Defense In Civil Contempt Proceedings Without The Assistance Of Counsel.

Based on any combination of the circumstances outlined above, the facts in a given case may show that a child support debtor lacks the present ability to pay the required support.[7] But possessing helpful

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[7] Consistent with constitutional requirements, South Carolina does not hold an individual in contempt for failure to meet a child support obligation if the court determines that the

facts is not enough; the defendant must also identify, document, and marshal those facts to present a convincing argument. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), long ago observed the "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. For an indigent child support debtor, who may lack even the basic skills necessary to hold a job, let alone mount a legal defense, the obstacles may be insurmountable.

Civil contempt proceedings can be extremely complex and often require skills and expertise beyond the capacity of those too poor to retain counsel. "Even the simplest inability to pay argument requires articulating the defense, gathering and presenting documentary and other evidence, and responding to legally significant questions from the bench—tasks which are probably awesome and perhaps insuperable undertakings to the uninitiated layperson." Patterson, *supra*, at 117 (internal quotation marks omitted). As the DC Appleseed report found, "[g]iven the high levels of illiteracy in DC, particularly among the low-income population that the child support system needs to reach, complex materials combined with a lack of legal representation are a near guarantee for non-custodial parents to feel overwhelmed and uninformed." DC Appleseed Report at 72.

Without counsel, there is a high risk that the defendant will be imprisoned despite actually being unable to pay child support. See, *e.g.*, *Pasqua* v. *Council*, 892 A.2d 663, 673 (N.J. 2006) ("When an indigent litigant is forced to proceed at [a civil

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individual is unable to pay. *Moseley* v. *Mosier*, 306 S.E.2d 624, 626 (S.C. 1983).

contempt] hearing without counsel, there is a high risk of an erroneous determination and wrongful incarceration."). The experience in North Carolina has been instructive. Although its courts are required in a civil contempt proceeding to make a specific determination regarding the defendant's ability to pay, before its highest court required appointment of counsel, it was "not altogether infrequent" for a trial court to "order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay the amount of child support owed." *McBride* v. *McBride*, 431 S.E.2d 14, 19 & n.4 (N.C. 1993) (citing cases). As the North Carolina Supreme Court correctly noted in recognizing a right to appointed counsel, "[a]n attorney would raise such issues on behalf of an indigent defendant, thereby preventing an unjustified deprivation of the defendant's physical liberty and increasing the accuracy of the proceeding." *Id.* at 19.

That a defendant must show his indigence in order to obtain appointed counsel in no way demonstrates that he is capable of making the separate showing that he is unable to pay his child support obligations without the assistance of counsel. Cf. Rogers Opp. 35-36. To the contrary, establishing indigence to qualify for appointed counsel is much more straightforward than establishing an inability-to-pay defense in a civil contempt proceeding. In the District of Columbia, for example, the relevant question for appointment of counsel in criminal cases and certain civil matters involving loss of liberty is simply whether a defendant "is financially unable to obtain counsel." D.C. Code § 11-2602 (2001); see also *id.* § 16-2304(a) (same standard for appointment in child abuse and neglect proceedings). Those

determinations are typically made not in a courtroom, but by administrative personnel reviewing form financial affidavits.[8] In contrast, a parent's inability to comply with a child support order is litigated in a courtroom, and "the trial court considers all the circumstances of the case, including whether the defendant's asserted inability to pay is due to involuntary financial straits or a voluntary decision to reduce his or her income." *Smith* v. *Smith*, 427 A.2d 928, 932 (D.C. 1981) (citing *Freeman* v. *Freeman*, 397 A.2d 554, 556 (D.C. 1979)).[9] In South Carolina, the contrast between the two showings is particularly stark. Whereas a criminal defendant is presumed to be entitled to court-appointed counsel if his net income is equal to or below federal poverty guidelines,[10] South Carolina Supreme Court Rule 608 (b)(4), the burden of showing inability to pay in child support cases falls squarely on the defendant. See *Brasington* v. *Shannon*, 341 S.E.2d 130, 131 (S.C. 1986) (once the moving party has established the existence of the order and the fact of noncompliance, the burden shifts to the defendant to establish his inability to comply with the order); accord *Hicks* v. *Feiock*, 485 U.S. 624, 645-46 (1988) (burdens of production and persuasion may rest on defendant in a civil contempt proceeding).

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[8] See D.C. Joint Comm. On Judicial Admin., *Plan for Furnishing Representation to Indigents under the District of Columbia Criminal Justice Act* § II(B) (effective Mar. 1, 2009), *available at* http://www.dccourts.gov/dccourts/docs/cja_plan.pdf.

[9] Other jurisdictions also require the obligor to make detailed financial showings or to demonstrate the involuntariness of the circumstances. *See* Pet. Br. 35-37 & nn.20, 21.

[10] The 2010 poverty guideline for an individual in South Carolina is $10,830. 75 Fed. Reg. 45,628, 45,629 (Aug. 3, 2010).

Given the large percentage of civil contemnors in South Carolina who are indigent, there is a significant risk that South Carolina courts are not adequately assessing an individual's ability to pay in contempt proceedings, and improperly incarcerating these individuals in violation of South Carolina law.[11] Without providing counsel to civil contemnors to guard against this risk, there is a real danger that "assembly-line justice"—indeed, assembly-line injustice—is being meted out. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 34-36 (1972).

II. PROVIDING COUNSEL IN CIVIL CONTEMPT PROCEEDINGS ENHANCES THE FAIRNESS AND EFFICIENCY OF CHILD SUPPORT ENFORCEMENT.

A. Guaranteeing Counsel In Civil Contempt Proceedings Benefits All Participants In The Child Support System.

Providing counsel to individuals facing the threat of incarceration for civil contempt has system-wide benefits that inure not only to non-custodial parents, but also to custodial parents and the children whose welfare is central to the child support system. By helping alleged contemnors articulate relevant, focused arguments—such as present inability to pay a child support debt—counsel can help prevent a variety of harms that follow from the incarceration of individuals who genuinely lack the present ability to make child support payments.

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[11] *See* HHS Report at 6 (30% of all arrears in South Carolina held by debtors with income under $10,000, and 42% held by debtors with no wage record).

First, and most fundamentally, it is both pointless and unjust to incarcerate an individual for failure to pay a debt that the individual lacks the present ability to pay. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 757 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action."); *Bearden* v. *Georgia*, 461 U.S. 660, 669 & n.10 (1983) ("[B]asic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine."). An incorrect determination regarding an alleged contemnor's ability to pay child support can result in the incarceration of a person for his poverty and the use of scarce penal resources in a fruitless attempt to coerce a payment that cannot be made. Such an outcome—in effect, a modern-day debtor's prison—is in no one's interest.[12]

Second, incarcerating parents who are unable to pay their child support obligations actually *decreases* the likelihood that those parents will pay child support obligations in the future or contribute in other meaningful ways to their children's lives. Although incarceration can induce compliance with a court order when the party has the ability to comply, it also carries significant and long-term negative side effects for the child, the custodial parent, and the noncustodial parent. The risk of those side effects—which are felt by custodial parents and children as much as anyone—makes it all the more important for there to be procedural safeguards (like the assistance of counsel) to ensure the accuracy of the determinations that lead to incarceration.

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[12] *See generally* American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* http://www.aclu.org/files/assets/InForAPenny_web.pdf.

Incarceration creates obstacles for parents who are trying to make child support payments. Perhaps most obviously, a parent who is behind bars is not in a position to earn the wages that are necessary to pay child support. Moreover, for those parents who were earning income before the finding of contempt, imprisonment can lead to the loss of the job that parent held, making it that much more difficult for the parent to resume work upon release. See, *e.g.*, *Argersinger*, 407 U.S. at 37 n.6 (noting that even short periods of incarceration "will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family") (internal quotation marks omitted).[13]

Social science research indicates that incarceration has a significant negative impact on a parent's *future* employability and wage level. Numerous studies have shown that, even after controlling for variables such as age, race, residence, education level, drug use, and other behavioral traits, individuals who have been incarcerated are still more likely to face difficulty in finding work, as well as lower wages once they do.[14] The effect is cumulative: Incarceration

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[13] *See also* Rebecca May, Ctr. for Fam. Pol'y and Practice, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents: When You Need a Safety Net, but There's Only a Dragnet* (2004), http://www.cffpp.org/publications/effect_child.html (last visited Jan. 10, 2011) ("Some of the participants in our focus groups and interviews lost employment that was only recently obtained because they were put in jail for nonpayment of child support"); Patterson, *supra*, 126-27.

[14] *See, e.g.*, The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* ("Pew Study") 11-12 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf; Amanda Geller, Irwin Garfinkel & Bruce

diminishes a person's earnings through age 48 by approximately half, and it significantly decreases upward economic mobility. Pew Study at 12, 16-17.

Research also shows that incarceration, taken alone, has adverse employment consequences separate and apart from those attributable to the difficulties associated with having a criminal history. *Id.* at 10. For example, individuals who have been incarcerated experience significantly greater negative employment effects than do individuals who received sentences of probation, indicating that incarceration, separate from the fact of criminal conviction, reduces a person's employability.[15] This is unsurprising because incarceration withdraws an individual from society, interrupts efforts to gain work experience, defines the person for himself and society as a "prisoner," exposes him or her to a peer group that is highly criminally active, and often leads to a build-up of child support arrearages that further diminishes incentives to work. See Pew Study at 10.

Incarceration also has detrimental effects on families and, in particular, children. Incarcerating a parent often impairs the parent-child relationship,[16]

Western, *The Effects of Incarceration on Employment and Wages: An Analysis of the Fragile Families Survey* 8-15, 22-25 (Princeton Univ. Ctr. for Research on Child Wellbeing, Working Paper #2006-01-FF, rev. Aug. 2006), *available at* http://crcw.princeton.edu/workingpapers/WP06-01-FF.pdf.

[15] See Richard Freeman, *Crime and the Employment of Disadvantaged Youth*, 11, 30 (Nat'l Bureau of Econ. Research, Working Paper #3875, 1991), *available at* http://www.nber.org/papers/w3875.pdf.

[16] *See, e.g.*, Jeremy Travis, Elizabeth Cincotta McBride & Amy L. Solomon, Urban Inst. Justice Pol'y Ctr., *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 2-4 (rev. 2005),

an adverse consequence that is particularly damaging in the context of child support enforcement because research indicates that fathers who are uninvolved in their children's lives are less likely to pay child support.[17] In addition, "[r]esearch that controls for other variables suggests that paternal incarceration, in itself, is associated with more aggressive behavior among boys and an increased likelihood of being expelled or suspended from school." Pew Study at 21 (citing studies). One study found that children whose fathers have spent time in jail are nearly six times more likely to be expelled or suspended from school than children whose fathers have not. *Id.*[18] The effects of an inaccurate decision can thus echo down through the generations.

For these reasons, incarcerating civil contemnors can work at cross-purposes with the goals of child support enforcement. Indeed, it has been the experience of *amici* that many custodial parents often oppose coercive incarceration because they understand that it may actually reduce the support and parental attention that their children receive. The same principle has also led some governmental agencies to use arrears forgiveness as a tool to

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available at http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf (summarizing social science research).

[17] *See* Joy Moses, Jacquelyn Boggess & Jill Groblewski, Ctr. for Fam. Pol'y and Practice, *"Sisters Are Doin' It for Themselves," But Could Use Some Help: Fatherhood Policy and the Well-Being of Low-Income Mothers and Children* 18 (2010), *available at* http://www.cffpp.org/publications/pdfs/fatherhood_report.pdf (citing studies).

[18] These effects may be felt not only by the families to whom support payments are owed, but also other family members, including children from other marriages who may be in the custody of the parent owing child support arrears. *See, e.g.*, May, *supra*.

encourage prospective compliance. DC Appleseed Report at 112 (citing Sherri Heller, Address at National Child Support Association Mid-Year Policy Forum, Washington D.C. (Jan. 2004)). For example, the District of Columbia has instituted the Fresh Start debt forgiveness program, which allows for a portion of government-owed arrears to be forgiven for eligible non-custodial parents who are successfully paying their obligations.[19] Quite simply, for those individuals who lack the present ability to pay child support, incarceration offers no coercive benefit while imposing considerable risks.

Third, appointing counsel in civil contempt proceedings alleviates the burden on courts to handle tasks that defense counsel otherwise would be expected to perform. In a *pro se* contempt proceeding, the risk is significant that the defendant "lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). See also *supra* 14-18 (describing common obstacles to presenting a strong defense in civil contempt proceedings). When confronted with an alleged contemnor who is both unskilled and unrepresented, a court considering incarceration must either assume the burden of guiding the defendant through the process—which might involve exploring possible defenses and reviewing undigested financial documents presented in the first instance—or else risk ordering the defendant's incarceration without legal justification. Counsel are well equipped to focus the arguments on the relevant issues.

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[19] *See* Office of the D.C. Att'y General, Brochure, Fresh Start (Debt Forgiveness Program), *available at* http://csed.dc.gov/csed/frames.asp?doc=/csed/lib/csed/pdf/brochures/fresh_start.pdf.

Fourth, in addition to helping defendants present arguments that they are unable to pay, counsel also can help negotiate alternatives to incarceration that may ultimately provide more workable solutions for everyone involved. For example, South Carolina's child support laws provide that a court may, as an alternative to incarcerating a parent for civil contempt, direct the parent "to participate in an employment training program or public service employment," S.C. Code Ann. § 63-17-490 (2009), or place the parent "on probation under such conditions as the court may determine," *id.* § 63-17-500. Likewise, it may be more helpful to require addiction or other mental health treatment rather than relying upon the prison system to address issues for which it is often poorly equipped. An unrepresented defendant may not know to seek such alternatives, or how to do so effectively. In many circumstances, however, such alternatives may offer a better chance at inducing future child support payments than incarceration. Appointed counsel can play an important role in providing the court the arguments and evidence necessary to make a fair assessment of the alternatives.

Finally, even in cases where the defendant has engaged in willful contempt, the appointment of counsel can have salutary effects in light of the advisory role of legal counsel. The role of a lawyer is not limited to presenting arguments in court, but also can involve providing candid advice, including practical advice about a parent's legal and ethical obligations to support his child. Accordingly, a lawyer rendering advice "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." ABA Model Rule of Prof'l

Conduct 2.1.[20] Indeed, because "[p]urely technical legal advice . . . can sometimes be inadequate," it is "proper for a lawyer to refer to relevant moral and ethical considerations," such as "effects on other people." *Id.* cmt. 2. And, if a lawyer determines that the client would benefit from seeking the help of a professional in another field, such as social work or mental health, "the lawyer should make such a recommendation." *Id.* cmt. 3. In some instances, advice of this nature may be the most effective form of intervention that counsel can provide.

B. Providing Counsel To Alleged Civil Contemnors Will Not Prejudice Unrepresented Custodial Parents.

Importantly, the benefits of guaranteeing counsel for alleged contemnors do not come at the expense of fairness for custodial parents. Many custodial parents are themselves unrepresented by counsel, and it would be troubling indeed if providing counsel to noncustodial parents were to create unfair advantages in proceedings against custodial parents appearing *pro se*. Fortunately, the concern is not warranted, both because the contempt proceedings at issue are not, in fact, mere private disputes, and because non-custodial parents face structural disadvantages that custodial parents—even those appearing *pro se*—do not.

To be clear, the issue in this case is not whether a non-custodial parent has a right to appointed counsel in any and all child support proceedings. Rather, the

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[20] South Carolina, like the District of Columbia, has adopted ABA Model Rule 2.1 and its comments in full. *See* S.C. R. of Prof'l Conduct 2.1 and comments; D.C. R. of Prof'l Conduct 2.1 and comments.

question here is about a far narrower right: whether a non-custodial parent has a right to appointed counsel *in civil contempt proceedings in which the noncustodial parent risks incarceration*. The difference is significant both because incarceration is a power exercisable only by the government, and because the contempt process itself is the mechanism by which a State exercises its significant interest in "vindicat[ing] the regular operation of its judicial system." *Juidice* v. *Vail*, 430 U.S. 327, 335 (1977). Quite simply, when a court must decide whether the government should incarcerate a party as a sanction for contempt of court, the proceeding has ceased to be merely a private dispute.

Concerns regarding imbalance are also unfounded because the government typically occupies a position adverse to the non-custodial parent throughout the contempt proceedings. In the District of Columbia, it is the Child Support Services Division ("CSSD") that is responsible for identifying cases of non-payment and filing motions for contempt. DC Appleseed Report at 56 (citing DC Code Ann. § 46-225.02). Similarly, it was South Carolina that initiated contempt proceedings in this case, through a series of automated judicial procedures.[21] See Pet. Br. 6-7, 10-11. In addition, the federal Temporary Assistance for Needy Families ("TANF") program requires States to assign themselves all child support benefits as a condition of receiving federal welfare dollars, see

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[21] South Carolina's family court rules require the court clerk to review a child-support obligor's payments on a monthly basis and, if the account is in arrears, to issue, *sua sponte*, a rule to show cause why the obligor should not be held in contempt, as well as an affidavit establishing the arrearage, which can be used as proof in a contempt proceeding. *See* S.C. Fam. Ct. R. 24; Pet. Br. 6.

42 U.S.C. § 608(a)(3) (2009), thus ensuring that local governments maintain an interest in child support collections. See D.C. Code § 46-203(a) (2001) (subrogating to the District the right "to prosecute or maintain any support action," as well as the right "to receive past, present, and future payments under an order or decree"); S.C. Code Ann. § 43-5-65(a)(1) (2009).

The mandatory assignment of child support rights also provides a mechanism by which the government obtains reimbursement for welfare benefits that it has paid to the custodial parent. Typically, only a portion of the payments collected will be directed to the custodial parent; the government will retain the remaining portion as reimbursement. See, *e.g.*, *id.* § 43-5-222. In some jurisdictions, the government will retain *the entire support payment* when necessary to cover the reimbursable amount.[22] The upshot of these reimbursement policies is that, as of 2003, approximately half of all child support arrears nationwide were owed to governments, not custodial parents; in some States, the amount owed to the government was as high as 75% of all arrears. See HHS Report at 5-6. Accordingly, the government has a strong interest in enforcing child support orders,

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[22] *See* Michelle Vinson and Vicki Turetsky, Ctr. for L. & Soc. Pol'y, *State Child Support Pass-Through Policies* (2009), *available at* http://s242739747.onlinehome.us/publications/passthroughfinal061209.pdf (listing policies by state). Although many States and the District of Columbia now guarantee that some amount of the payments received will be directed to the custodial parent, a significant number do not. Many States also reduce the benefits paid to a custodial parent when child support payments are made, which limits or eliminates the economic benefit that a custodial parent receives from child support payments. *See id.*

even when the custodial parent and the child will see little of the amount collected.

In the District of Columbia, the government's commitment to assisting custodial parents is significant enough that the court "has been observed referring to custodial parents as the 'client' of the 'government'" and making extra effort to ensure that "non-custodial parents know all the options, possibilities, and consequences of the actions being taken since they 'don't have an attorney.'" DC Appleseed Report at 122-23 & n.393 (citing government-provided materials and 2007 interview with District of Columbia court personnel). Although the District of Columbia Office of the Attorney General ("OAG") currently represents only the District in child support cases, until October 2000, OAG directly represented custodial parents in child support cases, which made the custodial parent quite literally the "client" of the government.[23] In practice, this change in representation has had "little practical effect, especially because the interests of the custodial parent often align closely with CSSD, *i.e.*, requiring the non-custodial parent to pay child support." *Id.*

III. RESOURCE CONSTRAINTS DO NOT JUSTIFY DENYING THE RIGHT TO COUNSEL.

Providing counsel requires resources, and some may question whether resources are too scarce to guarantee counsel to individuals before incarcerating them for civil contempt. Although it is difficult to predict the precise budgetary impact of recognizing

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[23] *See id.* at 57 (citing Memorandum from Talia Sassoon Cohen, Policy Counsel, OCC/CSED Policy Counsel Memo to All Child Support Staff, Revised New Representation Policy (Jan. 4, 2001)).

this right, this is not a case in which procedural protections must fall victim to budgetary concerns.

As an initial matter, the cost of appointing counsel enters the equation only as part of a due process balancing analysis that weighs the government's pecuniary interests against, *inter alia*, the defendant's liberty interest and the likelihood that the procedures followed in the contempt proceeding will yield an accurate decision.[24] See *Lassiter*, 452 U.S. at 27-28; *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). Under this balancing test, the budgetary and administrative burdens on the government would have to be extraordinary to justify withholding counsel in cases of actual incarceration, when the need for that procedural protection is at its peak. See, *e.g.*, *Lassiter*, 452 U.S. at 26; cf. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1079-80 (1976) ("If the obligation [of ensuring access to counsel] is one of justice, it is an obligation of society as a whole.").

Every indication, however, is that the costs at issue are far from prohibitive. Perhaps the best evidence that governments can afford to ensure access to counsel in cases like this is that many States already do so. Cf. *Alabama* v. *Shelton*, 535 U.S. 654, 670 (2002) (explaining that concern regarding the practical impact of providing counsel in cases of suspended sentences was unjustified in light of many States' existing practice of doing so). As Petitioner has noted, the courts of last resort in fifteen States have recognized the right at issue here, as have the

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[24] The government also has an interest in the welfare of supported children which, as explained *supra*, is advanced by the appointment of counsel.

intermediate appellate courts in eight additional States. See Pet. 16-17 & n.9 (citing cases).

For example, in *Mead* v. *Batchlor*, 460 N.W.2d 493 (Mich. 1990), the Michigan Supreme Court ruled that any budgetary considerations were outweighed in the *Eldridge* balancing analysis by the other interests at stake. *Id.* at 503-05 & n.29. In reaching this conclusion, the court solicited input from both the State Attorney General—who took the position that "counsel should be appointed for indigents facing incarceration for child nonsupport regardless of cost," *id.* at 504 n.29—and the Association for Michigan Counties—which argued only that there would be significant costs involved in "providing counsel in *all* child support proceedings," as opposed to the subset of proceedings in which incarceration is at stake, *id.* at 504-05.

Similarly, New Jersey recognizes a right to appointed counsel in a wide variety of situations that include, but go far beyond, civil contempt proceedings involving possible incarceration, thus putting to rest the notion that recognizing the right at issue here is prohibitively expensive. See *Pasqua*, 892 A.2d at 675-76.[25]

Any consideration of resources would be incomplete if it did not also account for the resources that governments *save* by providing counsel to indigent defendants. The appointment of counsel will help to reduce instances of improper incarceration and thereby reduce the government's incarceration costs.

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[25] New Jersey provides counsel not only to civil contemnors facing incarceration, but also to individuals facing the loss of motor vehicle privileges in drunk driving cases, heavy fines in municipal court proceedings, the termination of parental rights, and sex offender classification. *See id.*

See, *e.g.*, *Mead*, 460 N.W.2d at 505 ("Considering also that the appointment of attorneys in some cases will save the government jail housing costs, the record and briefs made available in this case leave one to speculate whether a cost increase or a cost saving will be the ultimate result."). These cost savings can be significant. For example, the State of South Carolina spent $14,545 per inmate on incarceration costs in 2009 alone. See S.C. Dep't of Corrections, *Cost Per Inmate, Fiscal Years 1988-2009* (Nov. 19, 2009), http://www.doc.sc.gov/research/BudgetAndExpenditures/PerInmateCost1988-2009.pdf (last visited Jan. 11, 2011). By way of comparison, South Carolina currently compensates court-appointed counsel at a rate of $40 an hour for time spent out of court and $60 an hour for time spent in court, with total compensation capped at $1,000 per case for misdemeanors and $3,500 per case for felonies. See S.C. Code Ann. § 17-3-50(A) (2009).

Even if it is difficult to predict the precise costs and savings associated with providing counsel in these cases, comfort can be found in the fact that concerns expressed in the past about the administrative costs of far broader expansions of the right to counsel proved to be unwarranted. When, for example, this Court held in *Gideon* that appointed counsel was constitutionally required in a state felony case, it rejected arguments that "this requirement would impose an enormous burden on members of the Bar who might be called upon to defend such charges" and "[t]he entire undertaking would result in unnecessary expense to tax payers." Resp. Br. at 47, *Gideon*, 372 U.S. 335 (filed Jan. 2, 1963) (No. 155). Likewise, when this Court extended the right to include misdemeanor proceedings resulting in incarceration, some Justices worried that "[t]he

holding of the Court today may well add large new burdens on a profession already overtaxed," *Argersinger*, 407 U.S. at 44 (Burger, C.J., concurring), or that the holding would present "a practical impossibility for many small town courts" such that "[t]he community could simply not enforce its own laws," *id.* at 61 (Powell, J., concurring). Experience, however, has demonstrated that even "the requirements of *Argersinger* have not proved to be unduly burdensome." *Scott* v. *Illinois*, 440 U.S. 367, 374 n. 5 (1979).

Moreover, the same scarcity of resources that animates concerns regarding the administrative costs of appointing counsel also serves to highlight the need for doing so. Although the country's current economic conditions may have taken their toll on governmental budgets, they have also led to the most prolonged period of high unemployment in over twenty-five years. See Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey. High long-term unemployment rates are likely both to increase the number of parents who legitimately cannot pay child support, cf. *supra* 10-11, and to increase the difficulty that recently-incarcerated parents face in looking for work, cf. *supra* 11 & n.6.

Similarly, any concern regarding the volume of contempt proceedings that might be affected by a ruling in this case is more than offset by the risk that the same volume "may create an obsession for speedy dispositions, regardless of the fairness of the result." *Argersinger*, 407 U.S. at 34. In the context of misdemeanor trials, this Court has recognized that the appointment of counsel can help prevent the devolution of efficiency into "assembly-line justice." *Id.* at 36 (internal quotation marks omitted).

These same protections are needed for individuals facing incarceration for civil contempt; the hearing at issue in this case illustrates the point perfectly. After providing each parent with a short opportunity to speak, the court provided no substantive response to anything said, made no statement or inquiry regarding Petitioner's ability to pay child support, and proceeded to impose twelve months of incarceration without providing any statement of reasons. Pet. App. 17a-18a. When Petitioner asked why work credits and good time credits were not available to him, the court responded simply, "Because that's my ruling." Pet. App. 18a. Had counsel been present, Petitioner would have been better able to present the court with arguments that it was too hurried to consider on its own.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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