Cause No.: 16-41192

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ASHLEY B. WOMACK,	)	Civil appeal from the United
	)	States District Court for the
Plaintiff-Appellee,	)	Eastern District of Texas,
	)	Sherman Division
v.	)	
	)	USDC No. 4:15-CV-601
RUSTIN P. WRIGHT,	)	
	)	Chief Judge Ron Clark, presiding
Defendant-Appellant.	)	Magistrate Don Bush, assigned

AMICUS CURIAE BRIEF OF FAMILIES CIVIL LIBERTIES UNION URGING REVERSAL IN SUPPORT OF APPELLANT RUSTIN WRIGHT

Gregory T. Roberts, Founder & President
Families Civil Liberties Union
One Liberty Plaza, 22nd Floor
165 Broadway, New York, NY 10006
groberts@fclu.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed Amicus Curiae Families Civil Liberties Union certifies that it is a not-for-profit corporation that has no outstanding stock, and consequently, that no parent corporation or publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES AND CONSTITUTION PROVISIONS

.....

INTERESTS OF AMICUS CURIAE

The Families Civil Liberties Union (hereafter, "FCLU") respectfully submits this amicus brief in support of Appellant, an individual parent who (i) is a fit, capable and loving parent, and (ii) has suffered loss of parental rights and been relegated to visitor in his child's life for no valid reason. The purpose of this brief is to provide the Court with an independent perspective demonstrating appropriateness of Federal intervention and of the substantial import of Appellant's pleas.

The FCLU is a professional, politically neutral, national activist organization headquartered in New York City. We work towards equalized gender rights and a system of fairness that benefits families by ensuring a fair, unbiased, competent and responsible judicial system. We seek to omit the need for bitter, costly and unnecessary court litigation by establishing Family Court reform to assure basic rights for all parents that allows them to focus on what is of critical important in our society, our children.

Our mission is to promote nationwide equal-gender rights through education and encouraging standardized practices in relation to Family and Domestic Relations Laws. We believe no child should be without either parent, except in rare cases of abuse, and the laws and practices of Family Courts need to reflect that belief. We believe matrimonial attorneys and the judicial system enforcing Family and

Domestic Relations Laws should be held accountable to providing a system that is fair, unbiased and benefits the family as a whole.

The practice of matrimonial law is an extremely lucrative business and attorneys openly refuse to raise arguments of the nature presented by Appellant even though his arguments have merit. We believe the reluctance of attorneys is more-so to avoid marginalizing their business or impacting association with established practitioners of matrimonial law. Hence nationwide, parents like Appellant who seek justice must take the arduous task of proceeding pro se. FCLU is dedicated to the cause of supporting all parents and prays this Court will grant leniency afforded pro se litigants to construe his petition liberally and expansively. "Pro se pleadings are always to be construed liberally and expansively, affording them all opportunity in obtaining substance of justice, over technicality of form." *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

In the attached Motion for Leave to File, FCLU separately seeks authority to file this amicus brief.

STATEMENT OF AMICUS CURIAE

FCLU counsel did not author this brief in whole nor in part. No person — other than the amicus curiae— or any party or party's counsel contributed money that was intended to fund preparation or submission of this amicus curiae brief.

SUMMARY OF ARGUMENT

Federal Court intervention will not disturb Federal-State government comity. State tribunals are compromised by Act of Congress, leaving no State tribunal untouched. Impartial State tribunal is lacking and remand is not supported by US Supreme Court precedent.

Administration for Children and Families grants of Federal Incentives is largely determined by the support paid by responsible Obligator parents. Parents who had never abandoned their child, nor found to be unfit are casually presumed noncustodial parent and ordered to pay the Family Court designated Custodian Obligee to care for their child. Here as is typical, the Appellant is a parent who has provided life-long support and care, has a loving relationship with his child, is a capable parents wanting to care for his child directly and has never been absent, in any manner, from his child's live.

Disenfranchised Obligator parents, now considered presumptively as noncustodial parents, require active engagement from Federal Courts to exercise their authority in recognition that Congress overstepped its authority. In requiring the State to permit its State Agency to establish cooperative financial agreements with "appropriate courts" under 42 U.S.C. § 654(7) raises considerable Federal constitutional concerns. These agreements enable State Agencies to administer Federal Incentive payments to complicit State Courts and even possibly Federal

District Courts. These incentive payments severely undermine Appellant's right of access to impartial tribunals.

Title IV-D Federal Incentive grants requires the existence of a "noncustodial parent". While there are no current Federal guidelines for applying this statutory classification, it impacts fundamental personal rights. Federal courts recognize noncustodial parents must have diminished parental rights else the classification will have no meaning. A Federal-classification of "noncustodial parent" is therefore an invidious classification and requires clear and convincing evidence given the right infringed is of fundamental import. Such a classification may be appropriate when a parent is found guilty of abandoning, neglecting or abusing their child. Mere absence, especially when imposed by an order of government, is insufficient.

FCLU believe the provision of 42 U.S.C. § 654(7) exceeds the Congress's authority and thus cannot be a valid requirement for State participation in the Federal Social Security Title IV Grants. FCLU encourages this Federal Court to recognize the Federal incentive program has undermined the impartiality of State Courts and resulted in a violation of Appellant's due process rights. Only a Federal Court can make such a finding relative to a Federal Statute and effect suitable remedial action.

ARGUMENT

I. FEDERAL COURT INTERVENTION WILL NOT DISTURB FEDERAL-STATE GOVERNMENT COMITY. STATE TRIBUNALS ARE COMPROMISED BY ACT OF CONGRESS, IMPARTIAL STATE TRIBUNAL IS LACKING AND REMAND NOT SUPPORTED BY US SUPREME PRECEDENT

In cases such as this, respect for comity between Federal and State governments typically present concerns for Federal Courts. Here, that concern reduced to a question of whether Congress has breached it limits and has compromised the impartiality of State Family Courts. FCLU believes Congress has indeed disturbed the necessary balance of governance and in so doing caused an unconstitutional probability of bias within Family Courts by establishing an incentive scheme that gives them a substantial, direct pecuniary interest in the outcome of the cases they adjudicate. We believe these Courts have been rendered improper venues for adjudicating the very class of cases they were established to adjudicate or, at best, have been rendered legislative forums.

A. CONGRESS ENABLED COOPERATIVE FINANCIAL AGREEMENTS

Under financial agreements with Family Courts, State Child Support Enforcement agencies ("State Agencies" such as DFSS in Texas) are permitted under authority of Federal Law to inappropriately steer Federal Incentive grants to Family Courts with intention to bias support arrangement they decree. Congress

intended to ensure absent parents contributed to their child's financial wellbeing and thereby avoid unnecessary welfare expenditure. An unintended consequence has been to create a loop-hole for State Agencies to secure lucrative Federal grants by simply promoting a common custodial arrangement profitable to said agencies and Family Courts. It results in one parent ("Obligor") being burdened with support obligations payable to a caretaker designated by the Family Court ("Custodial Obligee"). Support payments made pursuant are accepted without scrutiny to be "support obligations owed by noncustodial parents" and used by the State Agency to claim Federal Incentive grants it then shares with complicit Family Courts. Under authority of 42 U.S.C. § 654(7), *State plan for child and spousal support*, for a State to participate in the Title IV programs, it must:

> (7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials …
> (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and
> (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan.
> (Emphasis added.)

FCLU believes the Federal Incentive grants give State Agencies excessive influence over State Courts, compromises the impartiality of these courts and encourages unnecessarily divisive custodial arrangements, all so they can secure grants from the Social Security Welfare programs, 42 U.S.C. §§ 601-679 (hereafter,

"Title IV").

B. FEDERAL INCENTIVES TO STATE AGENCIES AND COURTS

For the lucrative Federal program to be utilized, per the purpose of Part D of Title IV (hereafter, "Title IV-D"), 42 U.S.C. § 651 et seq., a support obligation must be established on one parent asserted to be the "noncustodial parent," payable to a recipient "custodial parent" per 42 U.S.C. § 654(4)(B). This seemingly simple requirement radically alters the life of each parent when such a custodial arrangement is decreed. Here, as typical, the custodial parent enjoys day-to-day association with their child free from government oversight while the Appellant is limited to blocks of time with their child, is burdened with payments to the custodial parent and must dutifully perform under threat of incarceration. Given these classifications were utilized for a Federal program, FCLU believes Federal criteria must be utilized to classify parents for purposes of Title IV. However, Title IV, and specifically Title IV-D, fails to proscribe classification criteria or guidelines for State Courts to utilize.

The Federal "Incentive Payment to a State" provided under Title IV-D is derived by a complex algorithm established by 42 U.S.C. § 658a. These Incentive Payments are determined mostly by the "State Collections Base" and the "Establishment of child support orders %". Simply increasing the "State Collections Base" (the total sum of Support Orders) and "Establishment of child support orders %" (percentage of cases with Support Orders) will increase the Federal Incentive

granted the State. Proceeds are then shared, under federally enabled cooperative financial arrangements, with State Courts that administer these profitable custodial arrangements and support obligations. State Courts can greatly influence its incentive bonus simply by its choice of custodial parent and support provisions it decrees.

The "State Collections Base" is not limited to Child Support and includes all "order[s] of an administrative process established under State law, for support and maintenance of a minor child which is owed to or on behalf of such child, or for support and maintenance of the noncustodial parent's spouse (or former spouse) with whom the child is living." See 42 U.S.C. § 666 (e).

To secure Federal Incentive grants from the Administration for Children and Families (hereafter, "ACF"), State Agencies simply submit claims to ACF using support payments from marginalized Obligator parents as presumptive "support obligations owed by noncustodial parents." Parents who had never been adjudicated to be "noncustodial parent", are simply presumed to be noncustodial parent perhaps because they were not designated a custodial. FCLU believes adjudication against clear criteria is necessary to be classified a "noncustodial parent" to fulfill the purpose of the Federal Incentive grants program which is specifically to enforce "support obligations owed by noncustodial parents" per 42 U.S.C. § 652. Instead support paid by Obligator parents are used, without scrutiny, as "support obligations

owed by noncustodial parents" to secure Federal Incentive grants payments under Title IV-D.

C. IMPARTIAL STATE TRIBUNALS LACKING OR ARE IN FACT LEGISLATIVE FORUMS

All considered, comity concerns reduce to a core question that only a Federal Court can address. It is whether Congress has breached it limits and has compromised the impartiality of Family Courts. If Congress has indeed created an unconstitutional probability of bias within Family Courts, then they are rendered improper venues for adjudicating custody concerns. Given the pervasiveness and supremacy of Federal Law, FCLU believes there is no State Court venue left untouched and thus remand is improper as there are no available impartial venues:

> "Under § 1443 (1), the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966), citing *Georgia v. Rachel*, ante; *Strauder v. West Virginia*, 100 U. S. 303.

If instead, Congress' actions has rendered Family Courts to be legislative forums, a similar conclusion is reached. In the case of *Prentis,* the Court distinguished a legislative forum as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be

> applied thereafter to all or some part of those subject to its power." *New Orleans Pub. Serv., Inc., v. Council of City of New Orleans*, 491 U.S. 350, 370-71, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

In *Prentis* the establishment of a rate was determined to be the making of a rule for the future, and thus rendered a legislative and not a judicial act. Likewise in typical Family Court settings as here, the court simply decreed the rules it decided were suitable to govern the future of the fragmented family.

Furthermore, as in *Prentis* the nature of the proceeding is not determined by its form and the fact that the hearing was performed by a judicial in a Family Court does not, without more, render the decree a judicial act:

> "[The proper characterization of an … action] depends not upon the character of the body but upon the character of the proceedings. . . . And it does not matter what inquiries may have been made as a preliminary to the … act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . . The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370-371 (1989), (hereafter, "*NOPSI*"), citing *Prentis*.

It thus follows that in the case at hand, the Family Court decree completed a legislative act. From this perspective, the Appellant challenges a completed

legislative action and, as in *NOPSI,* his desired Federal Court engagement represents neither the interference with ongoing judicial proceedings against which *Younger* was directed, nor the interference with an ongoing legislative process against which *Prentis* was directed. It is, insofar as policies of federal comity are concerned, no different in substance from a challenge to an allegedly unconstitutional statute or zoning ordinance — which assuredly need not be limited to state courts. See *NOPSI at* 370-371, citing *Wooley v. Maynard,* 430 U. S. 705, 711 (1977).

It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes pre-empt, a future — or, as in the present circumstances, even a pending — state-court action. But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts. Viewed, as it should be, as no more than a challenge to completed legislative action, the Appellant's case at hand comes within none of the exceptions that *Younger* and later cases have established. See *NOPSI at* 371-373.

As such, FCLU believes Federal Court intervention does not disturb Federal-State comity, is entirely appropriate and is actually prudent. Disenfranchised Obligator parents, now considered presumptively as noncustodial parents, require active engagement and exercise of Federal authority in recognition that Congress has overstepped its authority. Congress' requirement for the State to permit its State Agency to establish cooperative financial agreements with "appropriate courts,"

under 42 U.S.C. § 654(7), raises considerable Federal constitutional concerns. These agreements enable State Agencies to administer Federal Incentive payments to complicit State Courts and even possibly Federal District Courts. These incentive scheme has severely undermined Appellant's right of access to impartial tribunals.

II. APPELLANT'S RIGHT OF PARENT-CHILD ASSOCIATION ARE FUNDAMENTAL, TITLE IV CLASSIFICATIONS ARE INVIDEOUS AND FEDERAL INTERVENTION IS IMPERATIVE

A. APPELLANT HAS FUNDAMENTAL RIGHT OF ASSOCIATION WITH HIS CHILD AND EQUAL RIGHTS DEMAND STRICK SCRUTINY WHEN FUNDAMENTAL RIGHT IS INFRINGED.

While the Appellant's decree does not terminate his legal right as a parent, his interest in parent-child association, a fundamental right, is severely infringed. The US Supreme Court assured the …

> "freedom of association receives protection as a fundamental element of personal liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

Both the freedom of "expressive association" and of "intimate association" are protected for such relationships required to raise and educate his child. This Circuit agrees and counselled:

> "Of course, as is also true for expressive associational rights, the constitutional right of private association is not protected absolutely against infringement by the state. As stated in *Rotary Club*, the protection is "against unjustified government interference". 481 U.S. at 544, 107 S.Ct. at 1945. As a fundamental right, however, any such infringement is subject to strict scrutiny. *McCabe v. Sharrett*, 12 F.3d 1558, 1566 (11th Cir.1994). Strict

> scrutiny analysis requires the government to demonstrate that (1) the state action serves a compelling state interest which (2) cannot be achieved through means significantly less restrictive of one's associational freedom." *Louisiana Deb. and Lit. Ass'n v. City of New Orleans*, 42 F.3d 1483, 1489-1490 (5th Cir.), cert. denied, 515 U.S. 1145 (1995).

Classification of parents as "Custodial" and "Noncustodial" affords preferential treatment to one parent and discrimination against the other. This bias triggers equal protection concerns. Equal protection requires that all persons similarly situated be treated alike and is aimed at securing equality of treatment by prohibiting hostile discrimination. Under the equal protection clause, the appropriate level of scrutiny depends on the right involved.

The aforementioned classification, with incumbent, highly-unequal parent-child association clearly infringes the Appellant's fundamental right as …

> "equal protection analysis requires strict scrutiny of a legislative classification … when the classification … interferes with the exercise of a fundamental right" *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

For government to infringe a parent's fundamental right, justification must clear strict scrutiny to assure equal protection of the parents' interests. Scrutiny is not reduced by the parties' presumed equivalency but is enhanced given the right is fundamental. Only when a child is substantially more dependent on one of her parents, or a child's well-being is at stake, or possibly when there is demonstrated risk of a child becoming dependent on public welfare, is there a compelling State interest to justify preferentially treatment of one parent. The cause at hand is not

such a case.

FCLU believes focusing solely on Appellant's legal right of guardianship without consideration of his right of parent-child association would effectively reduce his child to chattel. The Appellant, as most parents, is interested in his relationship with his child and it is the unburdened time spent together that is relevant. This truly treasured aspect of his parental rights was casually parsed by the Family Court likely biased by Federal financial incentives administered by the State Agency.

As noted by the US Supreme Court, a parent's right to custody derive from their active engagement and commitment to care and provide for his child. "[T]he rights of the parents are a counterpart of the responsibilities they have assumed. … The relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258 (1983). It should not be doubted that Appellant has demonstrate substantial parental responsibilities and longs to be more engaged.

B. APPELLANT RIGHT OF ASSOCIATION VIOLATED BY FAMILY COURT.

Whether a Family Court acts under the State's parens patriae or police power, the purpose of classification required by Title IV-D must focus on the child's well-being and must strongly relate to that compelling State purpose.

> "In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose". *Trimble v. Gordon*, 430 U.S. 762, 769, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

Here, as in most cases however, his child is not substantially more dependent on either parent. Discriminating between the parents as the Family Court did in affording Appellant substantially inferior parenting time clearly violated his fundamental right of association. Furthermore, the invidious classification required for State Agencies to seek Title IV Incentive grants cannot validly be used unless his child's well-being is at stake.

> "[A] statutory classification … must rest upon some ground of difference having a … substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Caban v. Mohammed*, 441 U.S. 380, 391, 60 L.Ed.2d 297, 99 S.Ct. 1760 (1979).

Here, the State's goal is to ensure his child is adequately cared for and the only relevant attribute is that of being a fit parent. FCLU believes that only if one parent is unfit or has abandoned his parental duty does the Constitution permit the Court to treat the parents differently. Here, as in most cases, no explicit finding of fitness or unfitness was made.

A designation of Custodial and Noncustodial parent while seemingly innocuous, is invidious under *Murgia* and in situations such as this, "[the US Supreme] Court has mandated … clear and convincing evidence when the individual interests at stake in a state proceeding are … particularly important." *Santosky v.*

Kramer, 455 U.S. 745, 756 (1982). Meaning the substantial inequity in parenting time afforded the Appellant required, but lacked, clear and convincing evidence of substantially higher dependency on the designated Custodial. Such discriminatory classification … "may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Lehr*, 463 U.S. at 267.

Given what has been said, Federal intervention is imperative to ensure equal protection of the rights of both parents. Unless the Family Court had established a specific finding of unfitness, both parents must be considered similarly situated with regard to their relationship with their child. Equal protection of parent's fundamental right of association must prevail. Given the Family Court has substantial direct pecuniary interest in the outcome and the resulting unconstitutional probability of bias, Appellant's fundamental right to an impartial tribunal makes it improper for the Federal District Court to remand this cause to the State Court as …

> "judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. … [W]hen the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

C. OVERVIEW OF SOCIAL SECURITY SUBCHAPTER IV (TITLE IV) AND THE IMPLICIT FEDERAL MEANING OF NONCUSTODIAL PARENT

The *Social Security Act* of 1935 established what has become Title IV of Social Security. A brief review of its history is needed to decipher the programs implicit requirements. Title IV singled out for welfare assistance the "dependent child," who was defined in § 406 of the Act, 42 U.S.C. § 606 (a) (1964 ed., Supp. II), as an age-qualified "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any one of several listed relatives.

As late as 1995, 42 U.S.C. § 602, *State plans for aid and services to needy families with children*, required: "A State plan for aid … to families with dependent children with respect to a child who has been deserted or abandoned by a parent." (Emphasis added.)

Title IV was reformulated in 1996 by the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996* (or "*Welfare Reform Act of 1996*"). It now requires states to certify they operate a child support enforcement program that conforms to the Act, else the State loses all Title IV Welfare grants. See *Champion v. Sec'y of State,* 761 N.W.2d 747, 751 (Mich.Ct . App. 2008).

Congressional findings introducing the *Welfare Reform Act of 1996* assure the original purpose of Title IV to support families in need, was not disturbed with the reformulation. Congressional Findings Pub. L. 104–193, title I, § 101, Aug. 22, 1996, 110 Stat. 2110, presented "The Congress makes the following findings:

> (1) Marriage is the foundation of a successful society.
> (2) Marriage is an essential institution of a successful society which promotes the interests of children.
> (3) Promotion of responsible designated noncustodial parenthood and custodial parenthood is integral to successful child rearing and the well-being of children.
> …
> (9) … While many parents find themselves, through divorce or tragic circumstances beyond their control, facing the difficult task of raising children alone, nevertheless, the negative consequences of raising children in singleparent homes are well documented as follows:
> …
> (H) The absence of a designated noncustodial parent in the life of a child has a negative effect on school performance and peer adjustment.
> …
> (K) children from single-parent homes are almost 4 times more likely to be expelled or suspended from school."

The *Child Support Performance and Incentive Act of 1998* (H.R.3130) made additional changes to Part D of Title IV. The 1998 Act referenced on the ACF website, makes clear:

> "An Act: To provide for an alternative penalty procedure for States that fail to meet Federal child support data processing requirements, to reform Federal incentive payments for effective child support performance, to provide for a more flexible penalty procedure for States that violate interjurisdictional adoption requirements, and for other purposes." (Emphasis added.)

The 1996 Act introduced the phrase “noncustodial parent” to replace the earlier reference to “absent parent” and it is now used throughout parts A and D of Title IV. *Child Support and Establishment of Paternity*, 42 U.S.C. § 651, *Authorization of Appropriations*, sets out the purpose of part D of the Title IV Welfare program as:

> For the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for assistance under a State program funded under part A of this subchapter) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.
> (Emphasis added.)

While “support obligations owed by noncustodial parents” is central to its operation, Title IV-D fails to provide clear definition for “noncustodial parent” except to establish a key purpose of “locating noncustodial parents.” The Acts did not suggest there was an intended change in the prior meaning of “absent parent.” However, the House Report emphasized that with the implementation of 42 U.S.C. § 666 "enforcement [will be] significantly strengthened to ensure that absent noncustodial parents provide financial support for their children." H. Rep. No. 104-651 at 5 (1996), 1996 U.S.C.C.A.N. 2183, 2186. Furthermore, the Act seeks to establish "uniform state tracking procedures ... established to catch deadbeat parents …." H. Rep. No. 104-651 at 5 (1996), 1996 U.S.C.C.A.N. at 2186; See *Greidinger*

v. Almand, 30 F. Supp.3d 413, 423 (D. MD. 2014). (Emphasis added.) Taken together, these suggest the classification of “noncustodial parent” verges on a criminal class of parent who would willfully abandon her parental duty as evident from the prior, then current, 42 U.S.C. § 602.

Consistent with this interpretation, in the Federal realm it is broadly recognized that noncustodial parents have a reduced liberty interest in the companionship, care, custody, and management of their children. Federal Circuits hold that the interest of noncustodial parent, in the words of one Circuit, “is unambiguously lesser in magnitude than that of a parent with full legal custody." *Burke v. County of Alameda*, 586 F.3d 725, 733 (9th Cir.2009). In contrast, custodial parents are entitled to autonomy (see *Egle v. Egle*, 715 F.2d 999, 1011 n. 15 (5th Cir. 1983)) and "constitutional interpretation has consistently recognized that the [custodial] parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U. S. 629, 639 (1968). Obviously, the classification of “noncustodial” carries a heavy burden in the Federal realm. FCLU does not challenge the Federal interpretation but instead emphasizes the significant import of that classification.

D. FEDERAL AUTHORITY REQUIRED TO ESTABLISH THE MEANING OF AND CRITERIA TO ASSIGN TITLE IV CLASSIFICATION.

It is also evident from extensive Federal precedent that classifications such as "noncustodial parent" that carry inherent infringement of rights, especially when those rights are broadly recognized as fundamental, cannot be casually assigned and the Federal definition of a "noncustodial parent" must have a clear, logical purpose. So much so, when statutory classifications approach sensitive and fundamental personal rights, Federal courts exercise stricter scrutiny. See *Weber v. Aetna Casualty & Surety Co.*, 406 US 164, 172 (1972). Without this clarity, State Agencies will readily and improperly designate and stigmatize loving, responsible parents as "noncustodial parents" resulting in them being treated like parolees, though wrongfully presumed guilty of committing a crime that actually never occurred. From all that has been said, here again Appellant cannot be classified as a noncustodial parent so as to justify the infringement of his right of parent-child association.

Just as Congress explicitly defined what are clearly State established classifications such as "Wife" (under 42 U.S.C. § 416(b)), to assure consistent application throughout the Title IV Welfare programs, a clear definition of the "noncustodial parent" classification and strict requirements for its application are desperately needed. Federal authority is required here to clarify the meaning of

"noncustodial parent" intended by Title IV. Principles for statutory interpretation hold that the prior meaning was not abrogated because Congress did not overtly declare a purposeful change except to imply noncustodial is a subset of absent parents who have abandoned her child.

Federal statutes stand supreme if and when there is conflict between Federal and State rules. The relative importance to the State of its own law is not material when there is a conflict with a valid Federal Law. Even laws governing the economic aspects of domestic relations, must give way to clearly conflicting Federal enactments. See *Ridgway* at 54-55. Here Federal authority is needed to assure the proper application of Federal Law and to ensure Appellant's support payments are not inappropriately used by State Agencies to solicit Federal Incentives.

III. FEDERAL COURT INTERVENTION IS REQUIRED TO DETERMINE IF CONGRESS HAS OVERSTEPPED ITS LIMITS

A. CONGRESS IS LIMITED BY ARTICLE III

The Compensation Clause of Article III imposes limitations that may not be transgressed and are essential to safeguard an independent Judiciary. By restricting the ability of the other branches to tamper with judicial compensation and rewards, the Constitution aims to ensure that each judicial decision is rendered, not with an eye toward currying favor with the Legislature or Executive, but rather with the clear

minds and integrity deemed essential to good judges. The importance of protecting judicial compensation has long been recognized by the highest of Courts because, "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." See *US v. Will*, 449 U.S. 200, 214 (1980) and *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011).

However as previously noted, per 42 U.S.C. § 654(7), *State plan for child and spousal support*, for the State to participate in the comprehensive Title IV programs, it must provide for entering into cooperative financial arrangements with appropriate courts. FCLU believes this federally imposed incentive, or bribe, administered by the State Agencies establish excessive leverage over lower courts. Clearly, this Federal requirement violates Article III and effectively sets-aside all State courts as all are obviously "appropriate courts." It may also set-aside Federal District courts, as they too may adjudicate Title IV cases under 42 U.S.C. § 652, and thus could have cooperative financial arrangements.

Actions of State Agencies that directly or indirectly incent State Courts makes it impossible for parents like Appellant to secure an impartial State tribunal. Rather, an unconstitutional probability of bias is plainly present. If remanded, Appellant will be deprived of his right to impartial tribunals as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208 (2009).

Given apparent conflict of interest, Appellant cannot pursue this matter in any appropriate State court for the lack of required impartial tribunal. See *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971).

B. ONLY FEDERAL COURT CAN DETERMINE CONGRESS OVERSTEPPED LIMITS OF ARTICLE III

FCLU believe the provision of 42 U.S.C. § 654(7) exceeds the Congress's authority and thus cannot be a valid requirement for State participation in the Federal Social Security Title IV Grants. As such, all agreements established pursuant to this allegedly unconstitutional provision must be deemed null and void.

Case Law suggests Congressional authority for Title IV-D is derived some in part from the Commerce Clause, Compact Clause, Spending Clause and possibly the enforcement Clause of the Fourteenth Amendment. However, regardless of the source of Congressional authority, their authority is limited and enactments of Congress cannot directly conflict the Constitution nor require others to act in conflict with the Constitution. Most relevant here, restrictions on the Congress' exercise of power under the Spending Clause requires there be no independent constitutional bar to the conditions placed on grants. Meaning, Congress may not induce the states, through offer of Federal grants, to engage in unconstitutional activities as done here in establishing an ambiguous and questionable congressional provision that

encourages financial agreements with appropriate courts. See *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir.2000).

Federal Regulations established by the ACF show apparent concern for the anticipated abuse of the ambiguous and questionable congressional provision that encourages financial agreements with "appropriate courts". For example, 45 CFR § 304.21(2)(b)(2) & (5) prohibits use of grants for "Costs of compensation (salary and fringe benefits) of judges" and "administrative and support staffs." However, ACF does not police State Agencies and rely on self-reported performance.

In addition, these Federal Regulations failed to provide adequate oversight to detect and deter misappropriations. It is elementarily for example that the State Courts, by simply appropriating Federal Incentive grants to non-prohibited expenses, is then free to increase its allocation of general funds to increase its compensation for judges. Doing so, for example coincident with the first receipt of Title IV-D Federal Incentive grants makes it virtually impossible to prove such mischief but renders the State Courts dependent on continued Incentive grants to cover costs.

The ACF possibly realized Congress would have overstepped its authority if it intended to allow State Agencies to bias courts using financially incentives and so it instituted what prudent restrictions it could. However, given sufficient motivation, most any financial regulation can be circumvented with creative accounting

practices. A share of the $500 million in Federal Incentive grants annually allocated to Title IV-D is believed sufficiently enticing for State Agencies. Federal Court intervention is required to either clarify or set-aside this questionable congressional provision that has and will continue to undermine Appellants right of access to impartial tribunals.

> "There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, … the courts must obey the Constitution rather than the law-making department of government, and must, *upon their own responsibility*, determine whether, in any particular case, these limits have been passed." *Mugler v. Kansas*, 123 U. S. 623, 661 (1887). [Emphasis added.]

While the ACF Secretary's effort to limit abuse is commendable, it does not sufficiently address the unconstitutional probability of bias. As wisely noted: "The country should never be allowed to think that the Constitution can, in any case, be evaded or amended by mere … interpretation, or that its behests may be nullified by an ingenious construction of its provisions." See *Ex Parte Young*, 209 U.S. 123, 183, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

FCLU encourages this Federal Court to recognize the Federal incentive program has undermined the impartiality of State Courts and resulted in a violation of Appellant's due process rights. Only a Federal Court can make such a finding relative to a Federal Statute and effect suitable remedial action.

CONCLUSION

This Court should accept review and reverse the District Court's remand.

Respectfully submitted November 21, 2016.

Gregory T. Roberts, Founder & President
Families Civil Liberties Union
One Liberty Plaza, 22nd Floor
165 Broadway, New York, NY 10006
groberts@fclu.org

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6135 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

Dated November 21, 2016.

Gregory T. Roberts, Founder & President
Families Civil Liberties Union
One Liberty Plaza, 22nd Floor
165 Broadway, New York, NY 10006
groberts@fclu.org

CERTIFICATE OF SERVICE

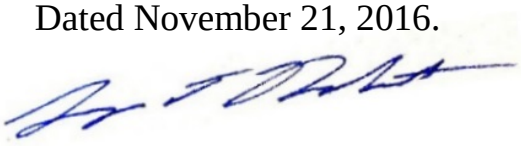
I hereby certify that, on this 21st day of November, 2016, a true and complete copy of the foregoing *AMICUS CURIAE BRIEF OF FAMILIES CIVIL LIBERTIES UNION URGING REVERSAL IN SUPPORT OF APPELLANT RUSTIN WRIGHT* by depositing same via first-class United States mail, postage prepaid, has been duly served on:

(last-known counsel for Appellee)
Jennifer M. Gibo, #24032343
Law Office of Jennifer Gibo
109 1st Street SE
Paris, TX 75460

and, that I further certify that, on this same 21st day of November, 2016, the requisite number of true and complete copies of the foregoing *AMICUS CURIAE BRIEF OF FAMILIES CIVIL LIBERTIES UNION URGING REVERSAL IN SUPPORT OF APPELLANT RUSTIN WRIGHT* by depositing said copies via "overnight" or similar express and tracked first-class United States mail or equivalent carrier, postage prepaid, has been duly served on:

Lyle W. Cayce, Clerk
Fifth Circuit Court of Appeals
600 S. Maestri Place
New Orleans, LA 70130

Dated November 21, 2016.



Gregory T. Roberts, Founder & President
Families Civil Liberties Union
One Liberty Plaza, 22nd Floor
165 Broadway, New York, NY 10006
groberts@fclu.org