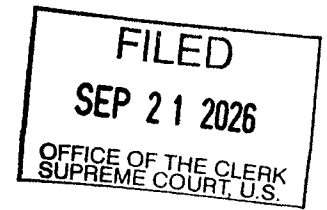


26-5867
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER J. TOSSING, Petitioner,

v.

SARAH M. MORGAN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF WISCONSIN, DISTRICT IV

PETITION FOR A WRIT OF CERTIORARI

Christopher J. Tossing, #652502
New Lisbon Correctional Institution
P.O. Box 2000, New Lisbon, WI 53950
Petitioner, pro se

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment permits a State to keep in force, against a parent confined for more than a decade who earns a few dollars a month, a child-support order calculated on earnings he cannot have while confined, on the ground that his incarceration was the foreseeable result of his own crime, where the order can only generate arrears that no one expects to be paid during the children's minority and that will follow him for the rest of his life.
2. Whether due process requires a court that declines to modify such an order to make an express finding on the obligor's actual present and prospective ability to pay, as Turner requires before a court may act on an assumption that a parent can pay.
3. Whether a state court may treat a parent's incarceration as voluntary unemployment in refusing to modify a support order when 45 C.F.R. § 302.56(c)(3), a binding condition of the State's federally funded child-support program, provides that incarceration "may not be treated as voluntary unemployment in establishing or modifying support orders," and the federal agency that wrote the rule expressly refused to except parents incarcerated for offenses against the supported child.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioner Christopher J. Tossing was the respondent-appellant-petitioner below. Respondent Sarah M. Morgan was the petitioner-respondent below. The State of Wisconsin, through the Dane County Child Support Agency, appeared by counsel in the circuit court in support of the existing order. (App. SC44, R130:1; App. SC16, R138:4).

Related Proceedings

- In re the Marriage of Morgan v. Tossing, No. 2016FA13, Waukesha County (Wis.) Circuit Court. Judgment of divorce entered August 3, 2017; venue transferred to Dane County January 31, 2023.
- In re the Marriage of Morgan v. Tossing, No. 2023FA203, Dane County (Wis.) Circuit Court. Order denying motion to modify child support entered October 11, 2023.
- In re the Marriage of Morgan v. Tossing, No. 2023AP2203, Wisconsin Court of Appeals, District IV. Opinion entered July 10, 2025; reconsideration denied and errata issued August 7, 2025.
- Morgan v. Tossing, No. 2023AP2203, Supreme Court of Wisconsin. Petition for review denied April 22, 2026.
- Tossing v. Morgan, No. 26A70, Supreme Court of the United States. Application to extend the time to file this petition granted July 16, 2026.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	2
PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS.....	3
TABLE OF CONTENTS.....	4
TABLE OF AUTHORITIES.....	5
OPINIONS BELOW.....	7
JURISDICTION.....	7
PROVISIONS INVOLVED.....	7
STATEMENT OF THE CASE.....	8
RAISING AND DISPOSITION OF THE FEDERAL QUESTIONS.....	12
REASONS FOR GRANTING THE PETITION.....	15
CONCLUSION.....	25
INDEX TO APPENDICES.....	26

APPENDIX (separately paginated SC1 to SC103):

Opinion: Wis. Ct. App. (July 10, 2025), with errata (Aug. 7, 2025).....	App. SC1-12
Transcript: hearing de novo, Dane Cnty. Cir. Ct. (Oct. 10, 2023).....	App. SC13-43
Order: Dane Cnty. Cir. Ct., denying modification (Oct. 11, 2023).....	App. SC44-45
Order: Wis. Sup. Ct., denying review (Apr. 22, 2026), with remittitur.....	App. SC46-48
Order: Wis. Ct. App., denying reconsideration (Aug. 7, 2025).....	App. SC49
Brief of Appellant: Wis. Ct. App. (Aug. 12, 2024).....	App. SC50-71
Motion for Reconsideration: Wis. Ct. App. (Aug. 4, 2025).....	App. SC72-76
Petition for Review: Wis. Sup. Ct. (Sept. 9, 2025).....	App. SC77-89
Provisions involved, set out verbatim.....	App. SC90-98
Debt-to-Payment Projection Scenario.....	App. SC99-100
Summary Chart of Projection Scenarios.....	App. SC101-102
Child Support Online Services balance statement (Sept. 11, 2026).....	App. SC103

NOTE ON APP. SC 50-SC 76: Petitioner is incarcerated, and the institution required these documents to reach him through its mail vendor. In the vendor's reproduction, the text on these pages did not print. Petitioner received the packet on September 21, 2026, the last day to file, and had no earlier opportunity to inspect it. Replacement copies of SC 50-SC 70 and SC 73-SC 75 are supplied from petitioner's personal papers but are unfortunately printed 2-Up instead of full page. SC 71, SC 72, and ~~SC 76~~ SC 76 are omitted; petitioner has no copies of those pages. None of the three are cited in the petition for any proposition: SC 71 and SC 76 are certificates of mailing, and SC 72 is the court's motion form. Full page, better copies will be provided on request.

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 520 U.S. 83 (1997) (per curiam).....	14
Adkins v. Adkins, 656 S.E.2d 47 (W. Va. 2007).....	21
In re Marriage of Barker, 600 N.W.2d 321 (Iowa 1999).....	21
Bearden v. Georgia, 461 U.S. 660 (1983).....	19
Bendixen v. Bendixen, 962 P.2d 170 (Alaska 1998).....	21
Blessing v. Freestone, 520 U.S. 329 (1997).....	19
Clark v. Clark, 902 N.E.2d 813 (Ind. 2009).....	21
Gisi v. Gisi, 2007 SD 39, 731 N.W.2d 223.....	21
Illinois v. Gates, 462 U.S. 213 (1983).....	14
Lambert v. Lambert, 861 N.E.2d 1176 (Ind. 2007).....	20
In re State of N.H. & Lounder, 166 N.H. 353 (2014).....	21
M.L.B. v. S.L.J., 519 U.S. 102 (1996).....	20
Mathews v. Eldridge, 424 U.S. 319 (1976).....	20
Michigan v. Long, 463 U.S. 1032 (1983).....	24
Nash v. Herbster, 932 A.2d 183 (Pa. Super. Ct. 2007).....	21
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).....	14
Noddin v. Noddin, 455 A.2d 1051 (N.H. 1983).....	22
Nunley v. Nunley, 955 N.E.2d 824 (Ind. Ct. App. 2011).....	24
P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 64 N.E.3d 940 (2016).....	21
Rottschait v. Dumler, 2003 WI 62, 262 Wis. 2d 292, 664 N.W.2d 525.....	10
Staffon v. Staffon, 277 Ga. 179, 587 S.E.2d 630 (2003).....	21
Tate v. Short, 401 U.S. 395 (1971).....	19
Turner v. Rogers, 564 U.S. 431 (2011).....	17
Williams v. Illinois, 399 U.S. 235 (1970).....	19
Wills v. Jones, 667 A.2d 331 (Md. 1995).....	21
Yerkes v. Yerkes, 573 Pa. 294, 824 A.2d 1169 (2003).....	21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1.....	7
----------------------------------	---

STATUTES

11 U.S.C. §§ 101(14A), 523(a)(5), 1328(a)(2).....	12
28 U.S.C. § 1257(a).....	7
42 U.S.C. § 666(a)(10).....	8
42 U.S.C. § 667.....	8
Mich. Comp. Laws § 552.517f.....	22
Ga. Code Ann. § 19-6-15(f)(4).....	21
S.D. Codified Laws §§ 25-7-6.4, 25-7-6.26.....	22
Va. Code Ann. § 20-108.1(B)(3).....	22
Wis. Stat. § 767.59.....	8
Wis. Stat. § 809.62.....	13

REGULATIONS AND ADMINISTRATIVE MATERIALS

45 C.F.R. § 302.56(c)(3).....	2
45 C.F.R. § 303.8.....	8
81 Fed. Reg. 93492 (Dec. 20, 2016).....	15
85 Fed. Reg. 58029 (Sept. 17, 2020).....	16
86 Fed. Reg. 62502 (Nov. 10, 2021).....	16
Wis. Admin. Code § DCF 150.03(3).....	8
Wis. Dep't of Children & Families, Child Support Bulletin No. 17-14 (Dec. 14, 2017).....	18
Wis. Dep't of Children & Families, Child Support Guidelines Review Advisory Committee Report (Sept. 2021).....	18
Wis. Dep't of Children & Families, 2025 Child Support Guidelines Review.....	18
Wis. Admin. Code § DCF 150.03 (History) (CR 16-075, eff. July 1, 2018).....	17
2019 Wis. A.B. 94 (failed to pass, Apr. 1, 2020).....	18

RULES

Pa. R. Civ. P. 1910.19(f).....	21
Sup. Ct. R. 13.....	7
Sup. Ct. R. 14.1.....	8
Sup. Ct. R. 29.2.....	7

OPINIONS BELOW

The opinion of the Wisconsin Court of Appeals, District IV (App. SC1-12), is unpublished. See Wis. Stat. Rule 809.23(1)(b)5. The order of that court denying reconsideration (App. SC49) and the errata sheet correcting two factual statements in the opinion (bound with App. SC1-12) are unreported. The written order of the Circuit Court for Dane County denying modification (App. SC44-45) is unreported; the circuit court's oral findings and decision appear in the transcript of the October 10, 2023 hearing (App. SC13-43). The order of the Supreme Court of Wisconsin denying review (App. SC46-48) is unreported.

JURISDICTION

The Wisconsin Court of Appeals, District IV, issued its decision on July 10, 2025 (App. SC1-12), and denied reconsideration on August 7, 2025 (App. SC49). The Supreme Court of Wisconsin denied a timely petition for review on April 22, 2026 (App. SC46-48). On July 16, 2026, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including September 19, 2026, in Application No. 26A70. This petition is filed within that extended period. Sup. Ct. R. 13.1, 13.3, 13.5, 30.1. Petitioner is an inmate confined in a state institution and is not represented by counsel; the petition is deposited in the institution's internal mail system with the declaration required by Sup. Ct. R. 29.2. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

45 C.F.R. § 302.56(c)(3) provides that a State's child-support guidelines "must . . . [p]rovide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders."

The following provisions are also involved and, being lengthy, are set out in the appendix at App. SC90-98. Sup. Ct. R. 14.1(f); 42 U.S.C. § 666(a)(10) (state plan must provide procedures for review and adjustment of support orders); 42 U.S.C. § 667 (state guidelines for child-support awards); 45 C.F.R. § 303.8 (review and adjustment of orders, including the incarceration provisions of subsections (b)(2), (b)(7)(ii) and (c)); Wis. Stat. § 767.59 (revision of child support upon a substantial change in circumstances); and Wis. Admin. Code § DCF 150.03(3) (effective January 1, 2024) ("A parent's incarceration may not be treated as voluntary unemployment for purposes of establishing or modifying a child support order.").

STATEMENT OF THE CASE

A. The support order.

¶ 1 Petitioner and respondent married in 2008 and have two children. They divorced in 2017. The judgment of divorce ordered petitioner to pay \$2,430 in child support each month, calculated on an annual income of \$120,000 to \$128,000. (App. SC2, ¶2; App. SC44, R130:1). That income was not the income of the marriage, during which petitioner's earnings never exceeded \$81,000 a year; it was the income of a single software-engineering contract. (App. SC23, 31-32, R138:11, 19-20). And it was earned in an unusual custodial status: when the order was set, petitioner was serving a county jail sentence with work-release privileges, and, in his words, "I was able to work 60 hours a week, and I made a lot of money; so support was set at" that level because "all I could do was work." (App. SC32, R138:20). The State agreed: "Support was set while he was incarcerated. He just testified to that. . . . He had Huber release, and the court set an appropriate amount." (App. SC35, R138:23; see App. SC44, R130:1 ("Mr. Tossing was incarcerated when the child support order was set.")). The order has never been recalculated against what petitioner is able to earn in the confinement he is in now.

B. Petitioner was current on support when he was confined.

¶ 2 On June 20, 2022, petitioner was sentenced on a no-contest plea to one count of child enticement with sexual contact. The victim was one of the two children covered by the support order. (App. SC2, ¶3; App. SC44, R130:1; App. SC21, R138:9). He received ten years and two

months of initial confinement, to be followed by seven years and ten months of extended supervision. (App. SC2, ¶3). On the day he was sentenced he was current on his support obligation, with no arrears. (App. SC26, R138:14). The courts below treated the nature of the offense as the decisive consideration, and petitioner does not ask this Court to look past it. He asks whether it can lawfully answer the question the courts were asked, which was whether he can pay.

C. The modification motion and the hearing.

¶3 Petitioner moved to modify support on January 3, 2023, on the ground of his incarceration. (App. SC45, R130:2). A court commissioner denied the motion on June 29, 2023. Petitioner requested a hearing de novo, which was scheduled for August 28, 2023, and rescheduled to October 10, 2023. (App. SC45, R130:2; App. SC36-38, R138:24-26). The de novo hearing was held by videoconference. Both parties appeared pro se, petitioner from the correctional institution, and the State of Wisconsin, through the Dane County Child Support Agency, appeared by counsel in opposition to any modification. (App. SC44, R130:1; App. SC16, R138:4). Petitioner objected "for the record . . . to this hearing proceeding as I was not given ample opportunity to prepare." (App. SC24, R138:12). The court found he "has had sufficient time to prepare." (App. SC45, R130:2; App. SC40, R138:28).

¶4 The court examined petitioner under oath. He testified that he earns prison wages of \$8.67 per month (App. SC3-4, ¶6); that work release "is not a possibility" and "I will never have work release before I am released to supervision," (App. SC28, R138:16); that his field requires "access to the internet," which he expects to be barred from using as a condition of supervision, so that "my career is over," (App. SC25, 32, R138:13, 20); that he has no college degree and would re-enter the labor market at fifty competing for entry-level work (App. SC27, R138:15); that the family residence carries a mortgage and prior judgment liens that leave "no equity" and "no money in the house," (App. SC26-27, R138:14-15); and that his remaining assets are a small retirement account and checking balance that are "a drop in the bucket" against the debt at issue (App. SC27, R138:15). He testified that, although he was current at sentencing, he was already

"almost \$30,000 in arrears because of how high the support amount was set at." (App. SC26, R138:14).

¶ 5 He then put the arithmetic of the unmodified order into the record through two exhibits the court received. (App. SC42, R138:30 (Exs. C1-18 received)). If the \$2,430 order stands through his confinement, support alone will total \$245,852.80 by his release; interest will have accrued on top of it; and if he were somehow able to resume paying \$2,430 a month on release, support and interest together would come to \$538,065.84 before the debt was retired in 2051, when he would be sixty-nine. (App. SC28-29, R138:16-17; App. SC99-100, R107:1-2 (Ex. C2); App. SC101-102, R125:1-2 (Ex. C17)). He added that the younger child will be nineteen when he is released, so that none of the accruing sum will support either child during childhood. (App. SC31, R138:19).

¶ 6 The State did not dispute any of this. Its counsel told the court: "I think everyone can agree that he is not going to be able to pay that support now if that obligation remains intact, but he will owe it to his children." (App. SC34, R138:22). Counsel argued that petitioner "is essentially trying to argue that the accumulation of child support is somehow a punishment to him; it is not," (App. SC33, R138:21), and asked the court to "consider the nature of the crime," (App. SC36, R138:24).

D. The circuit court's decision.

¶ 7 The court asked petitioner: "Mr. Tossing, do you also accept responsibility for the fact that every single thing that you have stated here today is a result of your own intentional conduct toward your daughter? Because that's also something that I consider." (App. SC29, R138:17). When petitioner answered that "[t]his was not shirking. This was not an intentional act to try to avoid paying support," the court read aloud from *Rottscheit v. Dumler*, 2003 WI 62, 262 Wis. 2d 292, 664 N.W.2d 525, the passage quoting a decision of another State that "[i]ncarceration was a foreseeable result of his criminal conduct and is thus deemed a voluntary act in and of itself." (App. SC30, R138:18 (quoting *Rottscheit* ¶27)). Asked whether that factor alone precluded

relief, the court said it did not, "because that is not the law. It is something that I can consider among the other things." (App. SC30, R138:18).

¶ 8 The court denied the motion from the bench (App. SC39-42, R138:27-30), and by written order the next day. (App. SC44-45, R130:1-2). The written order recites that "[t]he Respondent admits that his loss of employment and his incarceration is a direct result of the crimes he committed against his child," that he "could reasonably anticipate his conduct, particularly the nature of his crime, would result in incarceration which would interfere with his ability to pay support," and that "[a]ccumulation of support is not a punishment, but instead leaves intact a responsibility taken on by the parent in having children." (App. SC45, R130:2). The court "acknowledge[d] the financial effects of incarceration and underst[ood] Mr. Tossing will be in a difficult financial situation," but held that "the fact of incarceration alone is insufficient for a Court to modify a child support order." *Id.* It made no finding that petitioner has, or on release will have, the ability to pay \$2,430 a month or any other sum. (*Id.*; App. SC39-42, R138:27-30).

E. The decisions of the appellate courts.

¶ 9 The Court of Appeals affirmed in an unpublished per curiam opinion. (App. SC1-12). It reviewed only for an erroneous exercise of discretion under *Rottscheit* (App. SC2-3, ¶4), and held that the circuit court "appears to have determined that the nature of Tossing's criminal conduct and the needs of the children outweighed any other factors that may have supported modifying child support," (App. SC4-5, ¶7; see App. SC7-8, ¶11). It acknowledged *Rottscheit*'s own statement that "a longer period of incarceration may well tip the balance in favor of modification and make the refusal to modify payments an erroneous exercise of discretion," and that the *Rottscheit* obligor "did not face a period of incarceration of ten, or even five, years," (App. SC6-7, ¶10 (quoting *Rottscheit* ¶46 n.12)), but held that a ten-year sentence "is but one factor" that the circuit court was free to outweigh with "the nature of Tossing's criminal conduct." (App. SC7-8, ¶11). The court did not address whether petitioner can pay the order; it did not mention 45 C.F.R. § 302.56(c)(3) or Wis. Admin. Code § DCF 150.03(3), which had taken effect eighteen months before its decision; and it did not mention the Fourteenth

Amendment. Reconsideration was denied on August 7, 2025, with an errata sheet correcting two factual statements. (App. SC49 (order); App. SC10-12 (errata)).

¶ 10 The Supreme Court of Wisconsin denied review without opinion on April 22, 2026. (App. SC46-48).

F. The order since.

¶ 11 The \$2,430 order remains in force. The State's own account statement, as of September 11, 2026, records \$120,036.07 in principal arrears and \$14,552.58 in accrued interest, \$134,588.65 in all, accumulated in the four years since petitioner was sentenced current. (App. SC103). That figure is not part of the record below and petitioner cites it only to show that the trajectory he placed in the record has been borne out. The arrears are not dischargeable in bankruptcy. 11 U.S.C. §§ 101(14A), 523(a)(5), 1328(a)(2).

RAISING AND DISPOSITION OF THE FEDERAL QUESTIONS (RULE 14.1(G)(I))

¶ 12 Petitioner was without counsel at every stage below. Rule 14.1(g)(i) requires him to say where the federal questions were raised and how they were passed on, and he states the record as it is.

Circuit court (hearing October 10, 2023; written order October 11, 2023).

¶ 13 Petitioner did not cite the Fourteenth Amendment or 45 C.F.R. § 302.56(c)(3) by name. He pressed the substance of the first two questions presented directly: that the order rests on earnings he never typically had and cannot have while confined (App. SC23-25, 32, R138:11-13, 20); that he was current at sentencing and \$30,000 had accrued since (App. SC26, R138:14); that he has no assets and no realistic prospect of resuming his career (App. SC25-27, R138:13-15); that the unmodified order would generate a debt of \$538,000 that "is not realistic" for him to pay (App. SC28-29, R138:16-17); that the purpose of support "is not satisfied by indebting me, to enslaving me, basically, until I die to pay an amount that is based off of an income that I never had" (App. SC31, R138:19); and that his incarceration "was not shirking," not "an intentional act to try to avoid paying support" (App. SC30, R138:18). The State answered that argument on its own terms, telling the court that the accumulating debt is not "a punishment to him; it is not."

(App. SC33, R138:21). The court passed on the question by holding that petitioner's incarceration was the foreseeable result of his own conduct, that "[a]ccumulation of support is not a punishment," and that the fact of incarceration "alone is insufficient" to modify the order. (App. SC45, R130:2; App. SC30, 39-42, R138:18, 27-30).

Court of Appeals (decision July 10, 2025; reconsideration denied August 7, 2025).

¶ 14 Petitioner's brief argued that the circuit court had misapplied Rottschait by treating the nature of his offense as dispositive when nothing in the record connected it to his "ability and attitude toward paying child support," (App. SC62-64, Br. of Appellant 13-15 (Aug. 12, 2024)); by disregarding the length of his sentence (App. SC61, id. at 12), and his inability to earn his prior income on release (App. SC54, 66-67, id. at 5, 17-18); and by failing to make findings on employability and on the arrears that would accumulate, which he quantified at \$538,065.84 and called "excessive and patently unreasonable," (App. SC67-68, id. at 18-19). The brief argued the case under Wisconsin law and did not cite federal authority. His motion for reconsideration pressed the same points: that the Rottschait offense factor turns on a "pattern of offenses" bearing on payment and not on the type of crime (App. SC73, Mot. for Reconsideration 2 (Aug. 4, 2025)); that keeping in force an order that produces "irreversible financial ruin strips away any incentive for future payment," (App. SC74, id. at 3); that no court had assessed his employability and that, unlike the Rottschait obligor, he cannot return for modification later because his children will be adults before he is released, id.; and that reciting the factors is not evaluating them (App. SC74-75, id. at 3-4). The Court of Appeals passed on the ability-to-pay question by holding that the nature of the offense could be "weighed more heavily against modification" than every factor favoring it, including a ten-year sentence. (App. SC4-5, 7-8 (¶¶7, 11)).

Supreme Court of Wisconsin (petition for review dated September 8 and filed September 9, 2025; denied April 22, 2026).

¶ 15 The petition for review, the first paper petitioner filed after the Court of Appeals' decision, presented the federal questions expressly. It asked the court to grant review under Wis. Stat. § 809.62(1r)(a) and (b) because "[c]onstitutional considerations (due process and equal

protection) arise when orders ignore actual ability to pay," (App. SC81, Pet. for Review 5); argued that civil enforcement that disregards capacity produces "outcomes akin to an unconstitutional debtors' prison," (App. SC85, id. at 9), and that this "remains true even where the custodial parent and child are also crime victims," because "any punitive response belongs in the criminal sentence or a separate civil action, not in child-support arithmetic," (App. SC86, id. at 10); argued in a separately headed section that "[s]tate guidelines must reflect actual ability to pay and may not treat incarceration as voluntary unemployment for establishing or modifying support. 45 C.F.R. § 302.56(c)(3)," and that the denial below, "grounded in intentionality and offense type, functions like imputing pre-incarceration earnings and refusing adjustment," (App. SC87, id. at 11); and concluded that the resulting patchwork "implicates equal protection (similarly situated parents should be treated similarly) and due process (civil enforcement must reflect capacity)," (App. SC88, id. at 12). The court denied review without opinion. (App. SC46-48).

¶ 16 Petitioner recognizes that this Court ordinarily requires a federal question to have been "either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam); see *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983). He submits that the requirement is met here, for three reasons. First, "no particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The claim that an order a man cannot pay is being kept in force to punish him, and the ground for it, were put to the circuit court by petitioner, answered by the State, and decided against him in terms. Second, the Court of Appeals necessarily passed on the same question when it held that the nature of the offense could outweigh every ability-to-pay consideration in the record. Third, the federal questions were presented by name to the State's highest court, which had full power to reach them and declined. If the Court concludes that the federal label came too late, petitioner

asks that it say so, because the same questions can be presented again in the circuit court under § DCF 150.03(3), now in force, and the answer will govern how they return.

REASONS FOR GRANTING THE PETITION

¶ 17 This petition asks whether a State may keep a child-support order in force against a parent who cannot pay it, for a decade, on the ground that he brought his inability on himself. The order is \$2,430 a month. Petitioner earns \$8.67 a month, roughly one 280th of it. The State told the court that "everyone can agree that he is not going to be able to pay that support now." (App. SC34, R138:22). The circuit court agreed he is "in a difficult financial situation" and denied relief anyway, because the incarceration was foreseeable and because accumulating a debt he cannot pay "is not a punishment." (App. SC45, R130:2). The Court of Appeals affirmed on the ground that the nature of his offense could outweigh everything else. (App. SC7-8, ¶11). No court found that he can pay. The result is a support order that supports no one, a debt that will exceed \$245,000 when the children are grown and \$538,000 if it is ever paid, and a rule of decision, incarceration as a voluntary act, that federal law forbids the State to apply.

I. THE DECISION BELOW RESTS ON A RULE THAT FEDERAL LAW FORBIDS: THAT INCARCERATION IS VOLUNTARY UNEMPLOYMENT.

A. The federal rule and how it came to be.

¶ 18 Every State that accepts federal child-support funds must maintain guidelines for support awards and procedures for reviewing and adjusting orders. 42 U.S.C. §§ 666(a)(10), 667. In 2016 the Department of Health and Human Services, after notice and comment, amended the guideline regulation to provide that state guidelines "must . . . [p]rovide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders." 45 C.F.R. § 302.56(c)(3); Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93492, 93562 (Dec. 20, 2016). The agency explained that the rule "prohibits the treatment of incarceration as 'voluntary unemployment' when establishing or modifying support orders because State policies that treat incarceration as voluntary unemployment effectively block application of the Federal review and adjustment law in section

466(a)(10) of the Act." Id. at 93495. The companion regulation requires the State to notify both parents of the right to seek review within fifteen business days of learning that a parent will be incarcerated for more than 180 days, and provides that the State's standard for adjustment "must not exclude incarceration as a basis" for review. 45 C.F.R. § 303.8(b)(7)(ii), (c).

¶ 19 The rule has no exception, and that is not an oversight. Four commenters asked the agency to except parents incarcerated for a crime against the supported child or the custodial parent. The agency refused: "We agree with the overwhelming majority of commenters, and do not make changes in response to the four commenters' suggestion for an exception based on the nature of the crime." 81 Fed. Reg. at 93526. Others argued that reducing the obligations of incarcerated parents "was rewarding bad behavior"; the agency answered that "[t]he child support system is not meant to serve a punitive purpose." Id. at 93527. In the imputation provision, answering a commenter who asked that a parent who had abused the other parent or the child be held to imputed income, the agency wrote that "[i]ncarcerated parents have been sentenced for the crime they committed and are repaying their debt to society," and that "[i]mputing income based upon the nature of the crime is considered an adverse collateral consequence of incarceration that imposes additional civil sanctions beyond the criminal sentence." Id. at 93524. More than six hundred commenters supported the prohibition; four asked for the exception. Id. at 93526. Others asked that parents incarcerated for "a crime committed against any child, or a crime committed against a party in the child support case" be excluded from the incarceration review provisions; the agency's answer was "We do not agree." Id. at 93538. In 2020 the agency proposed to let States adopt exactly those two exceptions, 85 Fed. Reg. 58029 (Sept. 17, 2020), and then withdrew the proposal, 86 Fed. Reg. 62502 (Nov. 10, 2021), reaffirming that "[s]etting and modifying realistic child support obligations for incarcerated parents can improve their ability to provide consistent support for their children upon release from prison." The prohibition stands today as written in 2016: categorical, and offense-blind by design.

¶ 20 The agency also explained where the rule came from. It "updates the program to reflect the recent Supreme Court decision in *Turner v. Rogers*." 81 Fed. Reg. at 93493. The regulation is the administrative implementation, at the order-setting and modification stage, of the principle this Court announced at the enforcement stage: that a support obligation must answer to the obligor's actual ability to pay.

B. Wisconsin has adopted the rule, and the decision below applies the rule it replaced.

¶ 21 Wisconsin's guidelines now say the same thing. Effective January 1, 2024, Wis. Admin. Code § DCF 150.03(3) provides: "A parent's incarceration may not be treated as voluntary unemployment for purposes of establishing or modifying a child support order." The State adopted that sentence to conform its guidelines to the federal rule. The Court of Appeals decided this case eighteen months later and affirmed an order that rests on the opposite premise. The circuit court read into the record, as the ground for its decision, the proposition that "[i]ncarceration was a foreseeable result of his criminal conduct and is thus deemed a voluntary act in and of itself," (App. SC30, R138:18), and wrote that petitioner "could reasonably anticipate his conduct . . . would result in incarceration which would interfere with his ability to pay support," (App. SC45, R130:2). That is treating incarceration as voluntary unemployment. It is the rule the federal agency identified as blocking the review-and-adjustment system, the rule it declined to soften for offenses against the child when asked to in the imputation, incarceration, and review-and-adjustment provisions of the same rulemaking, and the rule Wisconsin itself has since renounced. The Court of Appeals affirmed it without mentioning either regulation. (App. SC1-12).

¶ 22 The 2024 amendment was not prompt. The federal rule gave each State one year from the completion of its next quadrennial guidelines review to conform its guidelines. 45 C.F.R. § 302.56(a), (e). Wisconsin revised the same subsection in 2018, with the federal rule eighteen months old, and added no incarceration language. Wis. Admin. Code § DCF 150.03 (History) (CR 16-075, eff. July 1, 2018). Its next review was completed in September 2021, and its advisory committee recommended the incarceration language then, in terms: "Modify the

guidelines to include language that states that incarceration is not to be treated as voluntary unemployment for the purposes of establishing or modifying child support orders." Wis. Dep't of Children & Families, Child Support Guidelines Review Advisory Committee Report 10 (Sept. 2021). The Department's own current report states the rule and the dates: "States had one year after their next review commencing after 2016 to fulfill the expanded federal requirements," Wisconsin "requested and received" the one-year pandemic extension the federal government allowed, its review was completed "in September 2021," and "[t]he most recent changes took effect on January 1, 2024." Wis. Dep't of Children & Families, 2025 Child Support Guidelines Review 1. On any reading of those dates the deadline had passed before the circuit court denied petitioner's motion on October 11, 2023. The State's courts applied, to a parent sentenced in June 2022, a rule the State was already obliged not to apply, and then adopted the federal sentence ten weeks after the denial.

¶ 23 Wisconsin renounced the rule early, and in terms. Before the federal rule, the State's child support agency had instructed county agencies that a case could not be reviewed for adjustment "if the payer is incarcerated for a crime committed against any child." Wis. Dep't of Children & Families, Child Support Bulletin No. 17-14 (Dec. 14, 2017) (describing the prior policy under Bulletin No. 13-04). Within a year of the federal rule the agency withdrew that instruction: "Under the new rule there are no exceptions to the required review process," and "[w]ith the publication of this Child Support Bulletin, CSB 13-04 is obsolete." *Id.* The Legislature was then asked to write the same exception into statute, for any parent "incarcerated for a crime against a child," and declined. 2019 Wis. A.B. 94 (failed to pass, Apr. 1, 2020). By the time petitioner's motion was heard in October 2023, the exception the circuit court applied had been abandoned by the State's agency for six years, refused by its Legislature for three, and refused twice by the federal agency whose rule the State had bound itself to follow.

¶ 24 The State cannot answer that the courts merely "considered" the offense as one factor. The federal rule does not forbid courts to consider the nature of an offense for what it shows about a parent's attitude toward support. It forbids the specific inference the courts below drew:

that because the parent chose the crime, his resulting inability to earn is his own doing and the order may be left where it was. Wisconsin's own guideline draws that line: the same subsection that forbids treating incarceration as voluntary unemployment lists "[t]he parent's criminal history and history of incarceration" among the factors bearing on what he can actually earn. Wis. Admin. Code § DCF 150.03(3)(h). The courts below did not ask what petitioner can earn in light of his record. They held that his crime made his inability to earn his own choice. The Court of Appeals described the holding below in exactly those terms (App. SC4-5, 7-8 (¶¶7, 11)), and the circuit court said so in writing (App. SC45, R130:2). Nor can the State answer that Title IV-D creates no private right of action. See *Blessing v. Freestone*, 520 U.S. 329 (1997). Petitioner does not sue to enforce the regulation. He asks this Court, on review of a state judgment under 28 U.S.C. § 1257(a), whether the State's courts may apply a rule of decision that the State, as a condition of federal funds, has bound itself not to apply, in a proceeding in which the State's own child-support agency appeared to urge it.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ABILITY-TO-PAY DECISIONS, AND WISCONSIN NOW STANDS ALONE AMONG THE STATE COURTS OF LAST RESORT THAT HAVE ADDRESSED THE QUESTION.

A. Bearden and Turner.

¶ 25 This Court has repeatedly held that the State may not treat inability to pay as though it were refusal to pay. In *Bearden v. Georgia*, 461 U.S. 660, 672-673 (1983), the Court held that a State may not revoke probation for failure to pay a fine without first inquiring into the reasons for nonpayment, because to deprive a person of his liberty "simply because, through no fault of his own, he cannot pay the fine" "would be contrary to the fundamental fairness required by the Fourteenth Amendment." See *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). In *Turner v. Rogers*, 564 U.S. 431, 445-449 (2011), the Court carried that principle into civil child-support enforcement, holding that a parent's ability to pay is "the critical question" and that due process requires procedures adequate to answer it, including "an express finding by the court that the defendant has the ability to pay." *Id.* at 448. *Turner* applied the

framework of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and it did so in a family-law proceeding in which the parties were unrepresented, as they were here.

¶ 26 The decision below inverts that command. Turner's premise is that the State may not visit the consequences of nonpayment on a parent without first finding that he can pay. Here the State conceded he cannot, no court found that he can, and the order was kept in force for the stated reason that his inability was foreseeable. The circuit court's answer to the *Bearden* problem was that accumulating an unpayable debt "is not a punishment." (App. SC45, R130:2). But a support order that the State agrees cannot be paid, that will support neither child during childhood, that grows by interest for a decade, and that survives bankruptcy, 11 U.S.C. §§ 101(14A), 523(a)(5), 1328(a)(2), does nothing except attach a permanent, growing liability to a person because he is poor and in prison. Whether that is "support" or "punishment" is the federal question, and it is not answered by a label. As the Supreme Court of Indiana put it, "imposing impossibly high support payments on incarcerated parents acts like a punitive measure, and does an injustice to the best interests of the child." *Lambert v. Lambert*, 861 N.E.2d 1176, 1180 (Ind. 2007).

¶ 27 The family setting raises the stakes rather than lowering them. This Court has recognized that due process and equal protection concerns converge where the State adjudicates family status and the obligations that come with it, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117, 120-124 (1996), and it has refused to let a State condition a parent's access to review of a family-status judgment on her ability to pay for it. *Id.* at 107, 124. The same concern is present when a State builds, through a decade of accruals, a lien on a parent's future earnings that is measured by an income he never had rather than by any income he can have.

B. Wisconsin is an outlier.

¶ 28 The Supreme Court of Wisconsin wrote in 2003 that "[s]tate courts are significantly divided over the effect of incarceration upon a person's child support obligations," and collected the cases on both sides. *Rottscheit v. Dumler*, 2003 WI 62, ¶¶24-29. That division has since resolved, and it resolved in one direction. The high courts that have taken up the question most recently hold that support during incarceration must be set on the parent's actual earnings and

assets, not on pre-incarceration income and not on the theory that the parent chose his unemployment by choosing his crime. *Lambert*, 861 N.E.2d at 1177 ("courts should not impute potential income to an imprisoned parent based on pre-incarceration wages"); *Clark v. Clark*, 902 N.E.2d 813, 817 (Ind. 2009) (extending *Lambert* to motions to modify: "a support obligation should be set based on the obligated parent's actual earnings while incarcerated"); *Adkins v. Adkins*, 656 S.E.2d 47, Syl. Pt. 6 (W. Va. 2007) (same rule, adopted on a petition to modify that the family court had summarily denied); *In re State of N.H. & Louder*, 166 N.H. 353, 357 (2014) (incarceration that causes loss of employment does not render a parent voluntarily unemployed for purposes of modification); see also *Bendixen v. Bendixen*, 962 P.2d 170, 173 (Alaska 1998); *In re Marriage of Barker*, 600 N.W.2d 321 (Iowa 1999); *Wills v. Jones*, 667 A.2d 331 (Md. 1995). The intermediate courts have followed. *P.F. v. Department of Revenue*, 90 Mass. App. Ct. 707, 711, 64 N.E.3d 940, 943-944 (2016), reversed a trial court that had refused relief because the father's unemployment was the foreseeable result of an offense against the very child he supported: "the relevant inquiry . . . is not whether the payor's unemployment was 'foreseeable'; it is whether the payor is presently able to obtain employment through 'reasonable efforts.'"

¶ 29. The decisions on the other side of Rottscheit's divide have not survived, and the pattern of their abandonment is itself the answer to the question presented. Three courts of last resort applied the voluntary-unemployment theory to a motion to modify after *Rottscheit* was decided: *Staffon v. Staffon*, 277 Ga. 179, 587 S.E.2d 630 (Ga. 2003); *Yerkes v. Yerkes*, 573 Pa. 294, 824 A.2d 1169 (Pa. 2003); and *Gisi v. Gisi*, 2007 SD 39, 731 N.W.2d 223. Every one of those three States has since abandoned it. Pennsylvania did so within three years by rule: Pa. R. Civ. P. 1910.19(f), effective May 19, 2006, permits modification or suspension where the obligor has no verifiable income or assets whatever the reason for the incarceration, and *Nash v. Herbster*, 932 A.2d 183 (Pa. Super. 2007), vacated a *Yerkes*-based denial under it. Georgia did so by statute in 2018: O.C.G.A. § 19-6-15(f)(4)(D) now provides that "[a] determination of willful or voluntary unemployment or underemployment shall not be made when an individual's incarceration

prevents employment," and § 19-6-15(f)(4)(A) forbids assuming earning capacity from pre-incarceration wages. South Dakota did so in 2022, striking the words "including while incarcerated" from S.D. Codified Laws § 25-7-6.4 and providing that "[n]o income may be imputed to a parent who has been sentenced to serve a term of incarceration or confinement of more than one hundred eighty days," § 25-7-6.26. The older decisions have fared no better. New Hampshire's high court, which had held in 1983 that an incarcerated parent's "reduced financial ability was due to his own fault," *Rottscheit* ¶26 (describing *Noddin v. Noddin*, 455 A.2d 1051 (N.H. 1983)), held the opposite in *Lounder* in 2014. Legislatures have done the same by statute. Virginia, whose courts had treated incarceration as voluntary unemployment, amended its guidelines in 2022 to provide that "a party's current incarceration . . . for 180 or more consecutive days shall not be deemed voluntary unemployment or voluntary underemployment" and "shall be a material change in circumstances upon which a modification of child support may be based," with no exception for the nature of the offense. Va. Code Ann. § 20-108.1(B)(3) (as amended by 2022 Va. Acts ch. 527). Michigan abates support by operation of law on incarceration of 180 days or more. Mich. Comp. Laws § 552.517f. When the federal agency adopted the 2016 rule, it observed that "[t]hree-quarters of States have eliminated treatment of incarceration as voluntary unemployment in recent years." 81 Fed. Reg. at 93526. Wisconsin's own agency has since joined them by regulation. Its courts have not.

¶ 30 That is the sense in which the county-by-county disparity petitioner raised below matters. (App. SC83, 85, 88, Pet. for Review 7, 9, 12). Under *Rottscheit*, whether an incarcerated parent's order is set to what he can pay or left at what he once earned depends on how a particular judge weighs the "nature of the offense" against everything else, and similarly situated parents receive systematically different treatment on a question federal law has removed from the balance. The Court need not decide whether that disparity independently violates the Equal Protection Clause to see that it is the predictable product of a rule that no other court of last resort still applies.

III. THE QUESTION IS IMPORTANT AND RECURRING.

¶ 31 The federal government funds and regulates every State's child-support program, and it has told the States why orders untethered from ability to pay fail the children they are meant to serve: "Where child support orders are not based upon the noncustodial parent's actual ability to pay, children are less likely to receive support." Office of Child Support Enforcement, Information Memorandum IM-12-01, Alternatives to Incarceration (June 18, 2012), <https://acf.gov/archive/css/policy-guidance/alternatives-incarceration>. The 2016 rule was adopted on the same finding, and its withdrawal of the 2020 exceptions rested on the same finding. 81 Fed. Reg. at 93495; 86 Fed. Reg. at 62502. Incarceration of a support obligor is not a rare event. Every State has a review-and-adjustment system that must, under 45 C.F.R. § 303.8, treat incarceration of more than 180 days as a ground for review, and every one of those reviews will present the question whether the reviewing court may answer as the courts did here.

¶ 32 This Court has not addressed whether the Due Process Clause places any floor under a support order imposed on a person with no ability to pay it, as distinct from the enforcement of such an order by contempt. Turner answered the enforcement question. The order-setting question is antecedent: a parent who is protected at the contempt stage by Turner's ability-to-pay safeguards is not protected at all if the State may set and maintain the underlying obligation at any level it likes regardless of ability, let it accrue with interest, and collect it for the rest of his life. The federal agency has treated the two stages as one principle since 2012. The state courts have not, and this case shows what the gap costs.

IV. THIS CASE IS AN IDEAL VEHICLE.

¶ 33 The facts are undisputed. Petitioner was current when confined; he earns a few dollars a month; the State conceded he cannot pay; the sentence is a decade; the arithmetic of the unmodified order is in the record through exhibits the court received; and the courts below stated their reason for denying relief in terms. The offense is the hardest fact in the case, and petitioner has stated it. It is also the fact that makes this case an ideal vehicle rather than a poor one: the federal rule was written with exactly this case in mind. Commenters asked the agency to except

parents incarcerated for a crime against the supported child or the custodial parent. It refused, declining to "make changes in response to the four commenters' suggestion for an exception based on the nature of the crime." 81 Fed. Reg. at 93526; see id. at 93524, 93527, 93538. Four years later the agency proposed to let States adopt that very exception, for "[i]ncarceration for any offense of which the individual's dependent child or the child support recipient was a victim," 85 Fed. Reg. 58029 (Sept. 17, 2020), and then withdrew the proposal without adopting it, 86 Fed. Reg. 62502 (Nov. 10, 2021). If the rule does not reach this case, it does not reach the cases its authors were asked about. Indiana's courts, applying their own actual-earnings rule, have likewise declined to carve out offenses against the supported child, holding that "the logic of those cases applied regardless of the crime that led to the obligor's incarceration" and that any exception is for the State's highest court to create. *Nunley v. Nunley*, 955 N.E.2d 824 (Ind. Ct. App. 2011). No factual dispute stands between this Court and the legal question.

¶ 34 Nor is there any question of mootness or of an intervening change that would deprive a decision of effect. The order is in force, the arrears are accruing, and petitioner will be confined for six more years.

V. THE STATE-LAW GROUND IS NEITHER INDEPENDENT NOR ADEQUATE TO BAR REVIEW.

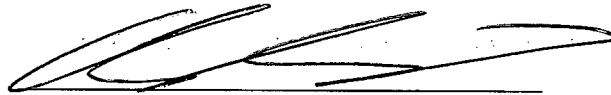
¶ 35 The Court of Appeals decided the case under the Rottschelt standard, and the State may argue that its judgment rests on an adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983), answers that argument. First, the state ground is not independent of federal law. Rottschelt gives circuit courts discretion; the federal questions here are whether that discretion may be exercised by treating incarceration as voluntary unemployment, which federal law forbids, and whether it may be exercised to keep an unpayable order in force without a finding of ability to pay, which the Fourteenth Amendment forbids. A state discretionary standard cannot be "independent" of the federal floor that bounds it. Second, the state courts did not say they were resting on state law alone; they did not mention federal law at all. Where a state decision "fairly appears to rest primarily on federal law, or to be interwoven

with the federal law," and the adequacy and independence of the state ground is not clear from the face of the opinion, this Court will assume jurisdiction. Id. at 1040-1041. Third, the Wisconsin courts' silence on 45 C.F.R. § 302.56(c)(3) and § DCF 150.03(3) is not a holding that state law is independent of them; it is a failure to apply them.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment, and remand for consideration in light of 45 C.F.R. § 302.56(c)(3) and Wis. Admin. Code § DCF 150.03(3), neither of which the courts below addressed.

Respectfully submitted,



Christopher J. Tossing, Petitioner, pro se

New Lisbon Correctional Institution

P.O. Box 2000, New Lisbon, WI 53950

Dated: 9/21, 2026

September 21st, 2026

INDEX TO APPENDICES

Opinion: Wis. Ct. App. (July 10, 2025), with errata (Aug. 7, 2025).....	App. SC1-12
Transcript: hearing de novo, Dane Cnty. Cir. Ct. (Oct. 10, 2023).....	App. SC13-43
Order: Dane Cnty. Cir. Ct., denying modification (Oct. 11, 2023).....	App. SC44-45
Order: Wis. Sup. Ct., denying review (Apr. 22, 2026), with remittitur.....	App. SC46-48
Order: Wis. Ct. App., denying reconsideration (Aug. 7, 2025).....	App. SC49
Brief of Appellant: Wis. Ct. App. (Aug. 12, 2024).....	App. SC50-71
Motion for Reconsideration: Wis. Ct. App. (Aug. 4, 2025).....	App. SC72-76
Petition for Review: Wis. Sup. Ct. (Sept. 9, 2025).....	App. SC77-89
Provisions involved, set out verbatim.....	App. SC90-98
Debt-to-Payment Projection Scenario.....	App. SC99-100
Summary Chart of Projection Scenarios.....	App. SC101-102
Child Support Online Services balance statement (Sept. 11, 2026).....	App. SC103

NOTE ON APP. SC50-SC76: please see full explanation text
on page 4 of this petition ~~TABLE OF CONTENTS~~ (Table of Contents page
at the bottom)