

SOJOURNER A., on her own behalf and as guardian ad litem for her infant Y.A.; and ANGELA B., on her own behalf and as guardian ad litem for her infant W.B., on behalf of themselves and all others similarly situated,

Plaintiffs – Appellants,

v.

THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants – Respondents.

**SUPREME COURT OF NEW JERSEY**

Docket No. 52,981  
Appeal No. A-160-01

App. Div. Docket No.:  
A-2787-OOT5  
(Before Judges King, Wecker & Winkelstein)

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**AMICI CURIAE BRIEF FOR THE CENTER FOR ECONOMIC AND SOCIAL RIGHTS, THE INTERNATIONAL WOMEN’S HUMAN RIGHTS LAW CLINIC, AND THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICI.....1

INTRODUCTION.....1

PROCEDURAL HISTORY AND STATEMENT OF  
FACTS.....3

ARGUMENT.....3

I. THE LAWS OF THE UNITED STATES SHOULD BE CONSTRUED  
TO BE CONSISTENT WITH INTERNATIONAL LAW.....3

II. HUMAN RIGHTS LAW IS RELEVANT TO  
STATE CONSTITUTIONAL LAW.....5

III. THE CHILD EXCLUSION VIOLATES US  
HUMAN RIGHTS OBLIGATIONS.....10

A. THE CHILD EXCLUSION CONSTITUTES A PROHIBITED  
DISCRIMINATION BASED ON BIRTH STATUS.....10

B. THE CHILD EXCLUSION VIOLATES THE CUSTOMARY  
NORMS PROHIBITING PENALIZING OR DISCRIMINATING  
AGAINST CHILDREN FOR PARENTAL CHOICES AND  
REQUIRING LEGISLATION TO FURTHER THE  
BEST INTEREST OF THE CHILD.....14

C. THE CHILD EXCLUSION VIOLATES THE RIGHT TO PRIVACY AND  
PROTECTION OF FAMILY UNDER THE ICCPR.....15

D. THE CHILD EXCLUSION VIOLATES THE RIGHT TO MAKE  
RELIGIOUS CHOICES UNDER THE ICCPR.....16

E. THE CHILD EXCLUSION CONSTITUTES A PROHIBITED  
RACE DISCRIMINATION UNDER THE ICCPR AND CERD.....17

CONCLUSION.....20

TABLE OF AUTHORITIES

CASE LAW

Alvarez-Machain v. United States, 266 F.3d 1045 (9<sup>th</sup> Cir. 2001).....7

American National Ins. Co. v. Fair Employment & Housing Com.,  
651 P.2d 1151 (Cal. 1982) .....8

Batista v. Batista, 1992 WL 156171 (Conn. Super. Ct. 1992).....8

Beharry v. Reno, 183 F.Supp.2d 584 (E.D.N.Y. 2002)..... 4,7,13

Bixby v. Pierno, 481 P.2d 242 (Cal. 1971).....9

Boehm v. Superior Court, 223 Cal. Rptr. 716 (Cal. App. 5<sup>th</sup> Dist. 1986).....8

City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980).....9

Commonwealth v. Edward Sadler, 3 Phila. Co. Rptr. 316 (Pa. Com. Pl. 1979).....8

Cramer v. Tyars, 588 P.2d 793 (Cal. 1979).....9

Danning v. the Netherlands, Communication No. 180/1984 (9April 1987),  
U.N. Doc. Supp. No. 40 (A/42/40)(1987).....13

In Re Julie Anne, 2002 WL 2022117 (Ohio Ct. C.P. 2002) .....8

In Re White, 158 Cal. Rptr. 562, (Cal. App. 1979).....9

Moore v. Ganim, 660 A.2d 742 (1995).....8

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)..... 4,11

The Nereide, 13 U.S. 388 (1815).....4

New Hampshire v. Robert H., 393 A.2d 1387 (N.H. 1978) .....8

The Paquete Habana, 175 U.S. (1900).....3

Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).....8

People v. Barnes, 2002 WL 53230 (Cal. Ct. App. 2002).....9

<u>Sadeghi v. I.N.S.</u> , 40 F.3d 1139 (10 <sup>th</sup> Cir. 1994).....	4
<u>Sterling v. Cupp</u> , 625 P.2d 123 (Or. 1981).....	8
<u>Talbot v. Seeman</u> , 5 U.S. (1 Cranch) 1, (1801).....	4
<u>Thompson v. Oklahoma</u> , 487 U.S. 815 (1988).....	5
<u>Velasquez Rodriguez Case</u> , Inter-Am. Ct. H.R. 35, Ser. C, No. 4, OAS/Ser.L/V/III.19, doc. 13 (1988).....	16
<u>Vos v. The Netherlands</u> , Communications No. 218/1986 (19 March 1989), U.N. Doc. Supp. No. 40 (A/44/40) (1989) .....	12
<u>Wilson v. Hacker</u> , 101 N.Y.S.2d 461 (N.Y. Sup. 1950).....	9
<u>Wynn v. State</u> , 804 So.2d 1122 (Ala. Crim. App. 2000).....	9
<u>X &amp; Y v. The Netherlands</u> , Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986).....	16

#### INTERNATIONAL INSTRUMENTS

American Convention on Human Rights, entered into force July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. L/V/II.23 Document Revision 2, 1144 U.N.T.S. 123 .....	15
American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), <i>reprinted in</i> Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/II.82 doc.6 rev.1 at 17 (1992).....	2,3
Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered in force November 20, 1994.....	2
Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S.195 (1966).....	<i>passim</i>
Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989 <i>entry into force</i> September 2, 1990, in accordance with Article 9.....	<i>passim</i>
European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force September 3, 1953, 213 U.N.T.S. 222.....	16

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 .....	5
International Covenant on Civil and Political Rights ratified by U.S. June 8, 1992, 999 U.N.T.S. 171 (1966).....	<i>passim</i>
International Covenant on Economic, Social, and Cultural Rights <i>entered into force</i> , January 3, 1976, 993 U.N.T.S. 3, (1967).....	2,3,12
Universal Declaration of Human Rights, Adopted and proclaimed by UN General Assembly Resolution 217A (III), December 10, 1948.....	2,3,12
Vienna Convention on the Law of Treaties, entered into force January 27, 1980, U.N. Doc. A/Conf. 39/27 (1969), 1155 U.N.T.S. 331 .....	13

ARTICLES

Martha F. Davis, <i>International Human Rights and United States Law: Predictions of a Courtwatcher</i> , 64 Alb. L. Rev. 417, 421-28 (2000).....	4
LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER, HANS SMIT, INTERNATIONAL LAW 416 (2nd ed. 1987).....	13
Claire L’Heureux-Dube, <i>The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court</i> , 34 Tulsa L.J. 15 (1998).....	4
Sandra Day O’Connor, <i>Federalism of Free Nations</i> , <i>reprinted in International Law Decisions in National Courts</i> 13 (Thomas M., Franck & Gregory H. Fox eds., 1996).....	4
Comment, <i>Rogue States Within American Borders: Remedying State Noncompliance with the International Covenant on Civil and Political Rights</i> , 90 Cal. L. Rev. 165, 173 (2002).....	6

MISCELLANEOUS

Committee on the Elimination of Racial Discrimination, CERD General Recommendation XIV, Forty-second session, 1993.....	18
Concluding Observations of the Human Rights Committee: United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40,paras.266-304.....	6

Human Rights Committee, CCPR General Comment 17, Thirty-fifth session, 1989.....	10
Human Rights Committee, CCPR General Comment 18, Thirty-seventh session, 1989.....	11,17
Initial reports of States parties due in 1993: United States of America. 24/08/94. CCPR/C/81/Add.4, (State Party Report) .....	6
Summary Record of 967 <sup>th</sup> CERD Committee Meeting, CERD/C/SR.967, March 11, 1993.....	18
U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., October 27, 1990).....	6
U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).....	6,11
U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994) .....	6

## ***INTEREST OF AMICI***

The Center for Economic and Social Rights (CESR) is an international human rights organization dedicated to using human rights to attain social justice for all the world's people. Through its projects in the US and abroad, CESR combines advocacy and research to support struggles to guarantee the rights to housing, education, work, social security, food and health.

The International Women's Human Rights Clinic (IWHR) at City University of New York Law School combines education, advocacy and scholarship to advance international women's human rights. IWHR works both in international contexts as well as on building international human rights jurisprudence and culture in the United States.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the US Constitution and the Universal Declaration of Human Rights. Founded in 1966, CCR has had a long history of litigating civil rights and international human rights cases.

## **INTRODUCTION**

International human rights treaty and customary law norms are an important source of persuasive and sometimes binding authority relevant to state court interpretations of their constitutions. As a general principle, absent direct and unavoidable conflict, a state court should construe its domestic law so as to be consistent with and maximize the fulfillment of, this country's international obligations. The Child Exclusion provision in New Jersey's welfare program, at issue in this case, is in clear violation of international human rights norms. Accordingly, the *amici curiae* submit that this Court should construe and apply the New Jersey

Constitution in a manner consistent with these norms and invalidate the Child Exclusion provision.

While *amici* respect and join the arguments of appellants that N.J. State Constitutional law, standing alone, requires invalidation of this provision, we offer this discussion of the relevance of international law to provide the Court with additional authority for its important ruling in this case. This Court has been a leader in recognizing and implementing the positive obligations of government toward the protection of the civil rights of the poor even in the face of contrary federal precedent. Here, we urge as well that this Court join those courts which have taken leadership by explicitly relying on international law in their decisions, given the importance of demonstrating, at every level of government, this Nation's commitment to the implementation of international human rights here.

Although the United States played a key role historically in developing international human rights standards,<sup>1</sup> as a result of the Cold War, the US retreated from the human rights system and failed to ratify any of the principal human rights treaties until 1992. In the last decade, however, the United States has ratified three of the six major human rights treaties.<sup>2</sup> Consequently, the particular role human rights standards play in domestic law has received increasing attention at all levels.

The human rights system protects civil, political, economic, social and cultural rights. Our national Constitution, however, limits itself to civil and political rights, and also limits Congress from addressing large areas affecting economic and social human rights. Moreover,

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<sup>1</sup> Eleanor Roosevelt, as the U.S. representative and President of the Commission on Human Rights, was one of the principal architects of the Universal Declaration of Human Rights. The Universal Declaration was strongly influenced by President Franklin D. Roosevelt's "economic bill of rights" and his doctrine of the "four freedoms"—freedom of expression, freedom of religion, freedom from want, and freedom from fear.

<sup>2</sup> The United States has ratified the International Covenant on Civil and Political Rights [hereinafter ICCPR], the Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Racial Discrimination [hereinafter CERD].

even where Congressional action is constitutionally appropriate pursuant to the Spending Clause, the current trend is to provide more flexibility to the States in the social and economic fields.

Thus, the nature of our federal system places both the authority and responsibility for enforcement of economic and social human rights in a non-discriminatory manner squarely on the individual States. In light of this, the US government has consistently assured the international community that States will implement US human rights obligations – in particular those that are not addressed by the US Constitution or federal legislation. *See Infra* at II.

Consequently, State judiciaries and Constitutions play a fundamental role in protecting internationally recognized economic and social human rights, making the relationship between human rights law and State Constitutional jurisprudence very important. This applies to the particular right at issue in the case at bar -- the right to social security, which is protected by the US welfare system, as well as a broad range of international instruments.<sup>3</sup>

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

*Amici curiae* adopt the procedural history and statement of facts set forth in Plaintiffs-Appellants' brief.

## ARGUMENT

### I. THE LAWS OF THE UNITED STATES SHOULD BE CONSTRUED TO BE CONSISTENT WITH INTERNATIONAL LAW

Customary international law has always been part of the laws of the United States. The Paquete Habana, 175 U.S. 677, 700-701 (1900) (“the law of nations ...is a part of the law of the

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<sup>3</sup> A broad range of international human rights documents protect the right to social security in the event of sickness, disability, widowhood, retirement, unemployment or other lack of livelihood in circumstances beyond an individual's control. See Universal Declaration of Human Rights Article 25, Convention on the Rights of the Child Article 26, Convention on the Elimination of All Forms of Racial Discrimination Article 5(e)(iv), International Convention on Economic, Social, and Cultural Rights Article 9, and the American Declaration on the Rights and Duties of Man Article XVI.

land." ).<sup>4</sup> Consequently, federal courts have long recognized that domestic law should be construed consistently with international customary law. *See, e.g., Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *Talbot v Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *Beharry v. Reno*, 183 F.Supp.2d 584, 599 (E.D.N.Y. 2002) (“The need to harmonize domestic and international law is well recognized.”);<sup>5</sup> Similarly, where the US has ratified an international treaty, and thus affirmatively incorporated obligations contained therein into federal law, this principal applies with equal, if not, greater force.

Throughout their history, US Courts have served as a model for countries around the world, and the United States government has been an international leader in proclaiming the importance of international law and the promotion of human rights. *See Claire L’Heureux-Dube, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *Tulsa L.J.* 15, 16-17, 21(1998) (acknowledging United States’s past judicial influence “[i]n the fields of human rights and constitutional principles); *see also* Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 *Alb. L. Rev.* 417, 421-28 (2000) (arguing that in the 21st century, courts must acknowledge the international context of decisions in order to maintain stature). In particular, this country’s constitutional rights jurisprudence has been a major aspect of its international influence. In order to ensure the continued intellectual leadership of the United States in issues involving human rights, and to maintain international respect for our courts in an era of globalization, it is imperative that

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<sup>4</sup> Indeed, absent a declaration by Congress to the contrary, customary international law has is binding on U.S. courts. *The Nereide*, 13 U.S. 388, 423 (1815).

<sup>5</sup> *See also*, Sandra Day O’Connor, *Federalism of Free Nations, reprinted in International Law Decisions in National Courts* 13, 15-16 (Thomas M., Franck & Gregory H. Fox eds., 1996) (discussing *Charming Betsy’s* “acknowledge[ment] that the law of nations is an integral part of [our] jurisprudence”); *Sadeghi v. I.N.S.*, 40 F.3d 1139 (10<sup>th</sup> Cir. 1994) (refusing in deportation hearing to recognize Iranian law that would conflict with Convention on the Rights of the Child).

courts in the US consider the international context of their decisions. In recent years, American jurists have moved further in that direction and signaled an increased willingness to turn to international law for guidance when addressing key Constitutional questions. *See e.g., Thompson v. Oklahoma*, 487 U.S. 815, 851 (1988) (O'Connor, J., concurring) (invoking United States' ratification of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), and its signature of two other international agreements that had not been ratified, as relevant expressions of international practice to consider when evaluating application of the death penalty to a 15-year-old defendant).

## II. HUMAN RIGHTS LAW IS RELEVANT TO STATE CONSTITUTIONAL LAW

Due to the nature of our federal system, the reach of international human rights standards must extend beyond the federal judiciary and become part of state jurisprudence as well. First, as noted above, *see* Introduction, in a federal context state, not national, governments primarily regulate the economic and social fields. Second, the federal government – through the treaty ratification process and other representations on the international stage – has committed the individual States to meeting US human rights obligations.

For example, each time the Senate has given its advice and consent to ratify a major human rights treaties, it has done so with the following understanding:

That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that

the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.<sup>6</sup>

Additionally, when the US issued its first report in 1994 to the United Nations Human Rights Committee regarding its compliance with the International Covenant on Civil and Political rights, the federal government stated that, it was:

a government of limited authority and responsibility.... [and that] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and exercise of the ordinary police power... Some areas covered by the Covenant fall into this category.<sup>7</sup>

The report then explained that the US had, through its ratification process, put other governments on notice that the:

United States will implement its obligations under the Covenant by appropriate legislative, executive and **judicial** means, federal **or state**, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.<sup>8</sup> (emphasis added)

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<sup>6</sup> U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992); *see also*, U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990); U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

<sup>7</sup> Initial reports of States parties due in 1993: United States of America. 24/08/94. CCPR/C/81/Add.4, (State Party Report).

<sup>8</sup> *Id.* The treaty obligations, however, still remain in effect upon the federal government. The US acknowledged this before the Human Rights Committee, and the Committee noted “with satisfaction the assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States.” Concluding Observations of the Human Rights Committee : United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40, paras.266-304. (Concluding Observations/Comments). As some commentators have noted, the Senate’s approach to human rights treaties “merely displaces the primary implementation burden from the national government to each of the states... Such local implementation of the treaty’s baseline standards and procedures encourages unique enforcement solutions tailored to each state’s specific situation.” Comment, *Rogue States Within American BorderS: Remediating State Noncompliance with the International Covenant on Civil and Political Rights*, 90 Cal. L. Rev. 165, 173 (2002).

Moreover, human rights treaties specifically require the availability of judicial remedies for violations.<sup>9</sup> Therefore, unless there is State court participation in the implementation of human rights standards, the US will fall short of meeting its human rights obligations and maintaining credibility on the international stage.

These considerations also apply with regards to international customary human rights law. US courts have recognized that certain human rights norms have attained the status of customary law, in particular the norms contained in the Convention on the Rights of the Child [hereinafter CRC]. *See Alvarez-Machain v. United States*, 266 F.3d 1045, 1051 (9<sup>th</sup> Cir. 2001) (finding international human rights instruments to be “evidence of customary international law”), *en banc rehearing ordered*, 284 F.3d 1039 (9<sup>th</sup> Cir. 2002); *Beharry v. Reno*, 183 F.Supp.2d 584, 600-601 (E.D.N.Y. 2002) (finding that the CRC has “overwhelming acceptance” internationally, with only the U.S. and Somalia having failed to ratify it, and Congress’s failure to ratify the CRC “is not a sufficiently clear statement to constitute repudiation of the customary international law principles contained in and underlying”). As in the case of treaties, many of these customary law norms apply to the economic and social fields primarily regulated by the States. Without State implementation, the US would also fall short of meeting this set of obligations.

Moreover, State courts are no strangers to the use of customary human rights law. There are numerous examples of State court decisions that have relied upon or cited these standards to

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<sup>9</sup> *See*, ICCPR Art. 2 “Each State party to the present Covenant undertakes: a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent **judicial**, administrative or legislative authorities ... and to develop the possibilities of judicial remedy;” CERD Art. 6: “State parties shall assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals ... against any acts of racial discrimination which violate [her] human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

interpret domestic law. *See e.g.*, New Hampshire v. Robert H., 393 A.2d 1387 (N.H. 1978) (citing ICCPR and International Covenant on Economic, Social and Cultural Rights to support notion that parental rights are natural and inherent under State Constitution in action to terminate parental rights); Pauley v. Kelly, 255 S.E.2d 859, 864, n.5 (W.Va. 1979) (court interprets State Constitution more broadly than the federal Constitution on the right to education and cites the Universal Declaration of Human Rights for the proposition that education is a fundamental right); In re Julie Anne, 2002 WL 2022117, at \*5 (Ohio Ct. C.P. 2002) (noting that the CRC requires the “best interests of the child” to be a primary consideration); Batista v. Batista, 1992 WL 156171 at \*6-\*7 (Conn. Super. Ct. 1992) (finding it an “embarrassment” that the U.S. at that time had not signed the CRC, and holding in accordance with the CRC that the child’s wishes should be taken into account in a custody proceeding); Commonwealth v. Edward Sadler, 3 Phila. Co. Rptr. 316, 330 (Pa. Com. Pl. 1979) (citing the Universal Declaration of Human Rights to support the holding that the state had an obligation to educate juveniles in custody); Boehm v. Superior Court, 223 Cal. Rptr. 716 (Cal. App. 5<sup>th</sup> Dist. 1986) (citing the Universal Declaration of Human Rights for the proposition that it was inhumane for California to exempt allowances for clothing, transportation or medical care from its calculation of payment rates for General Relief); Moore v. Ganim, 660 A.2d 742 (1995) (Berdon, J., dissenting), (citing the Universal Declaration of Human Rights to support the proposition that the State constitution included a right to welfare); *See also*, American National Ins. Co. v. Fair Employment & Housing Com., 651 P.2d 1151, n.4 (Cal. 1982) (noting the Universal Declaration of Human Rights’ relevance to a discrimination claim based on disability); Sterling v. Cupp, 625 P.2d 123 (Or. 1981) (citing, *inter alia*, the Universal Declaration of Human Rights as persuasive authority supporting a prohibition on female correctional officers from performing searches or pat-downs of male

inmates' genital regions except under circumstances of necessity); City of Santa Barbara v. Adamson, 610 P.2d 436, n.2 (Cal. 1980) (citing language from the Universal Declaration of Human Rights in discussion of California's constitutional amendment recognizing a right to privacy in one's family as well as in one's home); Bixby v. Pierno, 481 P.2d 242, n.9 (Cal. 1971) (citing the Universal Declaration of Human Rights in support of the obligation to protect the fundamental right to practice one's trade); In Re White, 158 Cal. Rptr. 562, 567, n. 149 (Cal. App. 1979) (in striking down a term of probation prohibiting a former prostitute from entering certain neighborhoods, the court cited, *inter alia*, the Universal Declaration of Human Rights' provision on freedom of movement within a state); Wilson v. Hacker, 101 N.Y.S.2d 461 (N.Y. Sup. 1950), (citing the Universal Declaration of Human Rights for the principal of non-discrimination based on sex); Cramer v. Tyars, 588 P.2d 793 (Cal. 1979) (Newman, J. dissenting) (citing the Universal Declaration of Human Rights to support his conclusion that the questioning of a mentally retarded person by the prosecution in a hearing regarding his committal was "cruel and degrading").<sup>10</sup>

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<sup>10</sup> But see, People v. Barnes, 2002 WL 53230 at \*7 (Cal. Ct. App. 2002) (refusing to follow CRC provision banning life imprisonment or execution of minors); People v. Brazile, 2001 WL 1423739 at \*26-\*27 (Cal. Ct. App. 2001) (same), Wynn v. State, 804 So.2d 1122, 1145-1148 (Ala. Crim. App. 2000) (declining to overturn death penalty finding for minor). These cases are distinguishable, however, as the US specifically placed a reservation on the juvenile death penalty provision in the ICCPR. Under international law, when a Nation-State is a "persistent objector" on a particular norm, it is exempt from that norm unless that norm is considered a *jus cogens* and therefore non-derogable.

### III. THE CHILD EXCLUSION VIOLATES US HUMAN RIGHTS OBLIGATIONS

#### A. THE CHILD EXCLUSION CONSTITUTES A PROHIBITED DISCRIMINATION BASED ON BIRTH STATUS

The United States ratified the International Covenant on Civil and Political Rights in 1992.<sup>11</sup> Article 24 of the ICCPR states that:

Every child shall have, without any discrimination as to ....social origin ... or birth, the right to such measures of protection as are required by his status as minor, on the part of ... the State.

As the Human Rights Committee<sup>12</sup> notes in its General Comment 17, article 24 of the ICCPR does not specify which “measures” must be taken and “it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction.” Human Rights Committee General Comment 17 at par. 3 [hereinafter HRC Gen. Com. at \_\_\_]. TANF benefits for children, however, clearly fall within the ambit of article 24. As the Committee notes “such measures, although intended primarily to ensure that children fully enjoy the [civil and political] rights enunciated in the Covenant, may also be economic, social and cultural.” *Id.* General Comment 17 provides examples of such measures including those taken to “eradicate malnutrition among children.”

As article 24 of the ICCPR states plainly on its face measures of protection for children must be provided without discrimination as to birth status or social origin. The Child Exclusion in New Jersey welfare law clearly constitutes such a discrimination, as a child is denied benefits based exclusively on the status of the family in which he or she happens to be born.

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<sup>11</sup> International Covenant on Civil and Political Rights, ratified by U.S. June 8, 1992, 999 U.N.T.S. 171 (1966).

<sup>12</sup> The Human Rights Committee is a UN treaty-based body created by Article 28 of the ICCPR. Article 40 of the ICCPR empowers the Human Rights Committee to “transmit ... such general comments as it may consider appropriate to the State Parties.”

The ICCPR addresses the question of discrimination as to birth status or social origin in article 26 as well. Specifically, article 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as .. social origin, ... birth or other status.

The Human Rights Committee further elaborates on the definition of discrimination in General Comment 18. Specifically, the Committee has found that:

The term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as ... birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

HRC Gen. Com. 18 at par. 7.<sup>13</sup> The Child Exclusion in New Jersey's welfare law constitutes a distinction, restriction and an exclusion based on birth status. If a child is born into a "welfare family" he/she is automatically excluded from receiving benefits. The law thus distinguishes between children based on the status of the families into which they are born, and excludes those from benefits who are born into "welfare families."

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<sup>13</sup> During the ratification process, the US Senate conditioned advice and consent to the ICCPR on the understanding:

That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

This understanding can be read consistent with international law, i.e. the Human Rights Committee's jurisprudence, when it is considered in the context of the federalism understanding which recognizes the different roles the federal and state governments play implementing this particular treaty. *See supra* Sect. II. In that context, the understanding regarding article 26 appears to be limited to federal implementation, and in fact it only refers to federal law and the US Constitution. To read it more broadly would put domestic law unnecessarily at odds with international law, and create blatantly contradictory treaty interpretations. This approach is inconsistent with US jurisprudence. *See supra* at Sect. I; *See also*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) at 119 (holding that the "extraordinary intent" of Congress to violate the law of nations must be "plainly expressed" to be given effect by the courts).

Additionally, the Child Exclusion impairs the enjoyment and exercise of a wide range of internationally protected rights by excluded children born into welfare families. As amply demonstrated by the Appellant's brief, the exclusion impairs equal enjoyment of the right to food, housing, clothing and an adequate standard of living – all rights protected under international instruments such as the Universal Declaration of Human Rights, article 25, the International Covenant on Economic, Social and Cultural Rights, *see e.g.* article 9 & 11, and the Convention on the Rights of the Child, *see infra*. It also impairs enjoyment of the right to social security by excluded children, which is also widely protected. *See supra* at n.3. In fact, a welfare program is one of the most common vehicles State Parties adopt to protect social security.

That these rights are not specifically mentioned in the ICCPR is not relevant for purposes of article 26. As in the case of article 24, the Human Rights Committee makes clear that article 26:

prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

Id. at par. 12. The TANF program (and thus the Child Exclusion) in New Jersey clearly constitutes legislation in a “field regulated and protected by public authorities,” and therefore falls under the ambit of article 26. Moreover, the Human Rights Committee, in at least two cases brought under the ICCPR against the Netherlands, has explicitly found that article 26 applies to State schemes to protect social security in the case of unemployment or disability. *See Vos v. The Netherlands*, Communications No. 218/1986 (19 March 1989), U.N. Doc. Supp. No. 40

(A/44/40) at 232 (1989); Danning v. the Netherlands, Communication No. 180/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 151 (1987).

The CRC also contains relevant provisions regarding obligations of non-discrimination on birth status. As noted above, the CRC constitutes customary international law. *See supra* at II.<sup>14</sup> Every country in the world, except the United States and Somalia – which has no functioning government – has ratified this treaty. In light of the “overwhelming acceptance” these norms have in the international arena, US courts have recognized their status as customary international law. Beharry v. Reno, 183 F.Supp.2d 584, 600 (E.D.N.Y. 2002) (finding CRC has “overwhelming acceptance” internationally, with only U.S. and Somalia having failed to ratify it).

Similar to the ICCPR, the CRC requires:

State Parties [to] respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child’s . . . birth or other status.

CRC Art. 2(1). The rights set forth in the CRC clearly encompass those protected by the New Jersey welfare program. Specifically, the CRC recognizes the right of the child to “benefit from social security”, article 26, and maintain a “standard of living adequate for the child’s physical, mental, spiritual, moral and social development,” article 27(1). Additionally, the CRC obligates State Parties to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities,” article 18 (2), and “in case of need provide material assistance with regard to nutrition, clothing and housing,” article 27 (3). Thus, for the reasons

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<sup>14</sup> Additionally, although the US has not ratified the CRC, it has signed the Covenant. Consequently, the US “is obliged to refrain from acts which would defeat the object and purpose” of the CRC. *See*, Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, at art. 18, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331, [hereinafter “Law of Treaties at \_\_\_\_”]. (“The Vienna Convention on the Law of Treaties, concluded in 1969, is the principle authoritative source of the law of treaties...”); LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER, HANS SMIT, INTERNATIONAL LAW 416 (2nd ed. 1987). (“The Department of State, in submitting the Convention to the Senate, stated that the Convention ‘is already recognized as the authoritative guide to current treaty law and practice.’” (citing S. EXEC. DOC. L. at 1 (1971)));

noted in the above discussion regarding the ICCPR, the Child Exclusion violates obligations to ensure non-discrimination under article 2 of the CRC as well.

**B. THE CHILD EXCLUSION VIOLATES THE CUSTOMARY NORMS  
PROHIBITING PENALIZING OR DISCRIMINATING AGAINST CHILDREN  
FOR PARENTAL CHOICES AND REQUIRING LEGISLATION TO FURTHER  
THE BEST INTEREST OF THE CHILD**

The Child Exclusion was enacted with the intention of dissuading poor women from having additional children. *See* Plaintiffs-Appellant’s Brief Statement of Facts, Sect. II. It was intended as an incentive for women on welfare to be “responsible” and not have additional children, and as a penalty on those who gave birth nonetheless. *See Id.* The CRC prohibits enacting legislation for this purpose under two different articles. Article 2 states that:

State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child’s parents, legal guardians, or family members.

The Child Exclusion constitutes a discrimination and penalty based on the activities of the child’s parents, i.e. having children while on welfare, and on the status of the child’s parents, i.e. welfare recipients. Moreover, in cases where a parent has religious beliefs that prevent her from controlling the timing of her children’s birth, the Child Exclusion also constitutes a discrimination and penalty against a child for his or her parent’s beliefs.

Article 3 of the CRC also requires that “the best interest of the child shall be a primary consideration” in any action “undertaken by ...legislative bodies ....” The legislative history of the Child Exclusion reflects a chilling dearth of concern for the children born into these families receiving welfare. Indeed, there appears to be no indication that the interest of the affected children was considered at all. Moreover, by its very nature a legislative act that excludes poor

children from receiving necessary assistance cannot be considered in the best interest of those children.

### C. THE CHILD EXCLUSION VIOLATES THE RIGHT TO PRIVACY AND PROTECTION OF FAMILY UNDER THE ICCPR

Article 17 of the ICCPR states that: “No one shall be subjected to arbitrary ... interference with [her] privacy [or] family ....” Article 23(1) of the ICCPR states that: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The Child Exclusion was designed specifically to interfere with one of the most intimate and important decisions regarding family – whether or not to bear a child. Moreover, the Child Exclusion in fact effectively interferes with this decision by causing women to choose abortion when they otherwise would have given birth. *See* Plaintiff-Appellant’s Brief Statement of Facts Sect. III.

Additionally, the Child Exclusion violates the obligation to provide protection for family by penalizing women for decisions regarding their family, i.e. childbirth decisions, and imposing severe hardship on their children. *See* Plaintiffs-Appellant’s Brief Statement of Facts Sect. III. Indeed, it strains the imagination as to how the State can justify this exclusion in light of its role as a guardian for the well-being of the families in the State of New Jersey. The State’s position that these families are no worse off than if they received no aid is not relevant to the obligations imposed by the ICCPR. Under the ICCPR, States must “ensure” the rights contained in the convention. *See* ICCPR, Article 1. This imposes positive obligations on a State, and requires States to take affirmative steps to protect the rights guaranteed under the Convention.<sup>15</sup>

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<sup>15</sup> The "ensure" language also appears in the American Convention on Human Rights, entered into force July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. L/V/II.23 Document

Legislative actions that demonstrably harm families such as the Child Exclusion, *see* Appellant's Brief at Statement of Facts Sect. III, clearly contravene this affirmative obligation to protect families.

#### D. THE CHILD EXCLUSION VIOLATES THE RIGHT TO MAKE RELIGIOUS CHOICES UNDER THE ICCPR

Article 18 of the ICCPR provides that:

1) Everyone shall have the right to freedom of ... conscience and religion. This right shall include freedom to ... manifest [her] religion or belief in . . . practice. . . . 3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

It is hardly controversial that childbearing decisions have strong religious implications for large segments of the population. For many, decisions around sexual intercourse, contraception, and abortion are all forms of manifesting religious beliefs and following religious practices.

Attempting to control the timing of the birth of children through a limitation on State aid constitutes an interference with the freedom to practice one's religion that cannot be justified as a measure "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

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Revision 2, 1144 U.N.T.S. 123, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 U.N.T.S. 222. In both systems, "ensure" has been similarly interpreted to require affirmative steps on the part of a State to protect rights. *See, Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. 35, Ser. C, No. 4, OAS/Ser.L/V/III.19, doc. 13 (1988); *X & Y v. The Netherlands*, Series A. No. 91, Application No. 8978/80 Eur. Ct. J. 8 EHRR 235 (1986) (State must afford remedies for private sexual assault of a mentally disabled person.).

## E. THE CHILD EXCLUSION CONSTITUTES A PROHIBITED RACE DISCRIMINATION UNDER THE ICCPR AND CERD

Both the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) have been ratified by the United States and prohibit discrimination on the basis of race. Article 26 of the ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as .. race ...

As noted above in Sect. III (A), the Human Rights Committee has issued a general comment further explaining article 26 and has stated that the term:

“discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race ...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

HRC Gen. Com. 18 at par. 7. The General Comment, as well as decisions by the Human Rights Committee on individual complaints, also make clear that article 26 applies to discrimination in the economic and social fields, including the rights affected by the Child Exclusion. *See supra* at Sect. III (A).

Article 1 of CERD defines:

the term “racial discrimination” [as] any distinction, exclusion, restriction or preference based on race, ... or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the ... economic, social . . . or any other field of public life.

In article 2 CERD obligates “State Parties [to] ... eliminating racial discrimination in all its forms . . . and, to this end ... take effective measures to .... rescind or nullify any laws ... which have the

effect of creating or perpetuating racial discrimination wherever it exists....” Finally, in article 5 CERD obligates State Parties to “prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race ... or ethnic origin, to equality before the law, notably in the enjoyment [*inter alia*] [of] [e]conomic, social and cultural rights, in particular ... [t]he right to ... social security and social services....” Thus, CERD, on its face, prohibits discrimination in the administration of New Jersey’s welfare program, and requires the nullification of any portion of the law that which has the purpose or effect of perpetuating racial or ethnic discrimination.

The United Nations Committee on the Elimination of Racial Discrimination (CERD Committee),<sup>16</sup> has issued a General Recommendation further clarifying what the treaty means by a discriminatory effect. Specifically, General Recommendation XIV on article 1, paragraph 1, of the CERD provides in pertinent part:

1. ... A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1(c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.
2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention [i.e. special measures]. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an *unjustifiable* disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin. (emphasis added)

The draft General Recommendation was introduced by CERD Committee Member, Mr. Wolfrum.<sup>17</sup> Mr. Wolfrum gave two specific examples of the kinds of situations that motivated

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<sup>16</sup> CERD is a body of experts created by the CERD treaty and charged with overseeing its implementation, *see* CERD at Part II, Arts. 8-16.

<sup>17</sup> Summary Record of 967<sup>th</sup> CERD Committee Meeting, CERD/C/SR.967, 11 March 1993.

the drafting of the recommendation. First, the United Kingdom had a law making the wearing of safety helmets compulsory for certain occupations, which had the effect of excluding Sikhs from those occupations because they could not wear helmets for religious reasons. The law had been struck down in court because of its discriminatory effect. Second, a central European State had a law that only permitted persons who had entered the country before a certain date to vote. The law effectively excluded a certain ethnic group, which constituted approximately one third of the population, from voting.<sup>18</sup> He had wanted to make clear that laws with discriminatory effects, such as these, also contravened the CERD.

The Child Exclusion creates a discriminatory effect based on race in analogous ways to Mr. Wolfrum's second example. In that example, the voting law affects all persons who entered the country after a particular date, thus the ethnic minority and others within that category are affected the same way. However, when comparing demographically those affected by the law to the population at large, it becomes clear that one ethnicity is disproportionately affected because they are overrepresented in the category of people arriving after the date the law specifies. Similarly here, the State-commissioned study by the Rutgers School of Social Work reflects that African-American families comprise approximately 50 % of the families in the welfare program. Yet, African-Americans represent only 14% of the State population. *See* DP-1. Profile of General Demographic Characteristics: 2000 Data Set: Census 2000 Summary File 1 (SF 1) 100-Percent Data Geographic Area: New Jersey. Conversely, according to the Rutgers' study White families comprise less than 20% of the families on welfare, although they represent 72% of the State population. *Id.* Thus, the Child Exclusion disproportionately impacts African-American families due to their overrepresentation in the program. In this light, it is worth comparing the

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<sup>18</sup> *Id.*

Child Exclusion to New Jersey's tax laws, which provide a monetary deduction per child, without limit. This tax benefit is provided to a population that is 72% White.

The second part of the analysis under the CERD Committee's jurisprudence requires assessing whether the disproportionate impact is "unjustifiable," particularly when "judged against the objectives and purposes of the Convention..." The overall purpose and objective of the Convention is to prohibit racial and ethnic discrimination and to protect the human rights of those subject to discrimination. The Child Exclusion, which disproportionately erodes the fundamental economic and social rights of a class of persons that has historically suffered from discrimination cannot be seen to be justifiable within the purpose and objectives of a human rights treaty. Thus, the Child Exclusion also violates the prohibition on race discrimination contained in the ICCPR and CERD.

## **CONCLUSION**

For the above-mentioned reasons, this Court should interpret its State Constitution consistent with international human rights norms and strike down the Child Exclusion as violative of the New Jersey Constitution.

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