

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)

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

Jennifer Brown, Esq.
Sherry Leiwant, Esq.
Spenta Cama, Esq.
NOW LEGAL DEFENSE AND
EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635

Edward Barocas, Esq.
AMERICAN CIVIL
LIBERTIES UNION OF
NEW JERSEY
FOUNDATION
35 Halsey Street, 4B
Newark, NJ 07102
(973) 642-2086

Lawrence S. Lustberg, Esq.
Jennifer Ching, Esq.
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4500

Lenora Lapidus, Esq.
Emily Martin, Esq.
WOMEN'S RIGHTS PROJECT
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10014
(212) 549-2668

ATTORNEYS FOR PLAINTIFFS

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PRELIMINARY STATEMENT

The question posed by this case is whether a statute that imposes severe financial penalties on poor women and the children they bear, with the purpose and effect of influencing poor women's decisions about whether and when to have children, violates the New Jersey constitutional guarantees of privacy and equal protection.

Plaintiffs challenge a single statutory provision, N.J.S.A. 44:10-61, known as the "Child Exclusion," which denies cash benefits to poor children conceived and born while their mothers were receiving public assistance. Equally poor children whose mothers were not receiving public assistance at the time of their conception and birth are provided full cash benefits.

The Child Exclusion is a single, discrete provision in Work First New Jersey, the state welfare law. This challenge has nothing to do with other welfare provisions that have come to be known as hallmarks of welfare reform—work requirements, time limits, and child support enforcement requirements. This lawsuit challenges the one and only provision of the New Jersey law aimed at controlling poor women's reproductive choices. In addition, although many of the provisions of New Jersey's welfare law are required by federal statute, the Child Exclusion is not so required. It is a creature of the New Jersey Legislature applicable only to poor women in New Jersey. Thus, this state constitutional challenge to a provision of state law

must be judged by the standards of the New Jersey Constitution, as interpreted by this Court.

This Court has consistently interpreted the right to privacy guaranteed by the New Jersey Constitution to grant the highest protection to a woman's right to make decisions about whether and when to bear a child. The majority of cases involving the right to privacy have dealt with the right of women to decide NOT to have a child. That right has been appropriately well protected by the decisions of this Court. The Court should grant no less protection to women who exercise their right to HAVE a child. Applying the standards articulated in Right to Choose v. Byrne, 91 N.J. 287 (1982) and Planned Parenthood v. Farmer, 165 N.J. 287 (2000), there can be no question that the Child Exclusion is an unconstitutional attempt to interfere with the childbearing decisions of poor women by severely penalizing their innocent children and their families.

The Appellate Division failed to apply the clear standards set forth by this Court for evaluating a statute that infringes the rights to privacy and equal protection. Sojourner A. v. New Jersey Dep't of Human Services, 350 N.J. Super. 152 (App. Div. 2002). The court below erred in (1) applying a lenient and toothless federal rational basis standard of review to Plaintiffs' privacy and equal protection claims, (2) failing to apply the standards that control in challenges to legislative classifications infringing the right to privacy under the New Jersey Constitution—specifically, failing to properly balance

the infringement on the right to privacy against the governmental interest served by it, and (3) in evaluating the governmental interest, failing to conduct the requisite searching inquiry into the alleged purpose of the provision at issue to determine if the government has demonstrated a nexus between its alleged interest and the provision. Further, the Appellate Division failed even to address Plaintiffs' argument that Child Exclusion unconstitutionally discriminates on the basis of birth status. The decision of the Appellate Division in this case must therefore be reversed, and the Child Exclusion struck down as unconstitutional.

PROCEDURAL HISTORY

On March 24, 1997, New Jersey enacted Work First New Jersey ("WFNJ") as a response to the repeal of the federal Aid to Families with Dependent Children ("AFDC") program and its replacement with a block grant to the states under the Temporary Assistance for Needy Families ("TANF") program. 42 U.S.C. §§ 601.-608. Included in WFNJ was a Child Exclusion provision. N.J.S.A. 44:10-61. It states: "The level of cash assistance benefits payable to an assistance unit with dependent children shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits." N.J.S.A. 44:10-61(a).¹

¹ Previously, in January 1992, the New Jersey Legislature amended the Family Development Program ("FDP"), which was the State's welfare program under the former federal AFDC program, to add a Child Exclusion provision. N.J.S.A. 44:10-3.5. The WFNJ Child Exclusion provision operates as it did under the FDP.

On September 5, 1997, Plaintiffs Sojourner A., Angela B., Rosa C., and Crystal D., filed the Complaint in this matter on behalf of themselves, their minor children, and a class of similarly situated individuals, seeking to enjoin the Child Exclusion provision on grounds that it violates the New Jersey Constitution. Pa1-22.² Plaintiffs alleged that: (1) the Child Exclusion violates state constitutional guarantees of the right to privacy, including the right to make procreative and childbearing decisions, by seeking to coerce those choices and by penalizing Plaintiffs for the exercise of their fundamental right to bear children; and (2) the Child Exclusion violates state constitutional guarantees of equal protection by treating otherwise similarly situated children differently based on their parents' reproductive choices and the timing of a child's conception and birth. Pa19. On July 17, 2000, the trial court granted Plaintiffs' Motion for Class Certification, certifying the following class of Plaintiffs:

all women who have conceived or will conceive a child while they or someone in their family received welfare benefits (or within a year of such receipt) under the former AFDC program or under the Work First program any time after October 1, 1992, and all children born to such women after August 1, 1993 who have been or will be subject to N.J.S.A. 44:10-61 and N.J.A.C. 10:90-2.18 or their predecessor statute and regulations,

² The Court granted Defendants' unopposed Motion to remove two of the original four Plaintiffs by Order dated August 26, 1999. Pa66(1). Citations to "Pa" refer to Plaintiffs' Appendix filed in support of their appeal in the Appellate Division.

N.J.S.A. 44:10-3.5 and N.J.A.C. 10:81-3.8
and 10:81-1.11.

Pa74-76.

On December 18, 2000, the Court entered an Order denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Cross-Motion for Summary Judgment. Pa79-81. On January 25, 2001, Plaintiffs filed their Notice of Appeal to the Appellate Division. Pa82-88.

In a decision dated April 5, 2002, the Appellate Division affirmed the trial court's decision, holding that the Child Exclusion does not violate the right to privacy or equal protection under the state constitution. Sojourner A., 350 N.J. Super at 156. In reaching its decision, the Appellate Division acknowledged that the right to privacy is fundamental under the New Jersey Constitution. Id. at 168. The court also found that the Child Exclusion creates hardship, conceding that "it cannot be denied that the less money a poor woman has available the more difficult it will be for her to house and feed her children." Id. at 174. It found, further, that the hardships imposed by the Child Exclusion influence the intimate procreative decisions protected by the right to privacy, stating that the provision "to some degree, affects a welfare recipient's decision whether to have another child." Id. at 171. However, citing federal equal protection cases and incorrectly applying a lenient federal standard of review rather than the demanding review required by the New Jersey Constitution, the Appellate Division held that the Child

Exclusion does not violate state constitutional guarantees of privacy and equal protection because it "has a rational basis," id. at 174, and does not "directly [a]ffect a woman's fundamental right to become pregnant." Id. at 173. Furthermore, in balancing the infringement of the privacy right against the government's need for the provision, the Appellate Division failed to determine whether, under the standards articulated in Planned Parenthood, 165 N.J. at 619-20, the state had "demonstrate[d] a real and significant relationship" between the alleged governmental purpose and the statutory provision at issue.

Plaintiffs filed their Notice of Petition for Certification on April 19, 2002, and this Court granted certification on July 13, 2002. On September 6, 2002, this Court granted Plaintiffs' motion for leave to file a supplemental brief.

STATEMENT OF FACTS

I. THE CHILD EXCLUSION AND WORK FIRST NEW JERSEY

Work First New Jersey ("WFNJ") exists to assist to those in desperate need; the benefits it provides are a last resort. Under WFNJ, "benefits shall be provided . . . when other means of support and maintenance are not present." N.J.S.A. 44:10-59(a) (emphasis supplied). The Child Exclusion is a discrete provision within New Jersey's welfare law that denies subsistence benefits to poor children based solely on the timing of their conception and birth. Without question, this denial of assistance provided to other equally needy children imposes an

extreme hardship on both the excluded child and her parent and siblings.

Generally, eligibility for cash benefits under WFNJ is determined under the need and benefit schedule set forth in regulations issued by the New Jersey Department of Human Services ("DHS"). N.J.A.C. 10:90-3.3, Schedules I and II. Under the regulations, eligibility is determined by comparing a family's income to the State's eligibility threshold. N.J.A.C. 10:90-3.1. The amount of benefits an eligible family receives is determined according to its size: for each child, the family's grant increases by an incremental amount. N.J.A.C. 10:69-10.2(a); 10:90-3.3, Schedule II.

The Child Exclusion is the exception to this scheme. The law provides that, with limited exceptions, each child born into a family in which any family member receiving welfare is excluded from receiving cash benefits. N.J.S.A. 44:10-61; N.J.A.C. 10:90-2.18.³ This is true if a child is born because of failed contraception or because the mother did not use birth control because she believed she had been sterilized. The Child Exclusion applies if anyone in the household is receiving welfare benefits, even if the mother of the child receives no benefits and is not considered part of "the assistance unit" by

³ A child is not excluded if he or she is born within ten months of the family's application for benefits, so that a child conceived before the family is on welfare should qualify for benefits. N.J.S.A. 44:10-61 (e); N.J.A.C. 10:90-2.18(a)(3). In addition, children are not excluded if their birth was the result of rape or incest. N.J.S.A. 44:10-61(f).

law.⁴ All children of a multiple birth (such as twins or triplets) will be excluded if they are born into a household receiving welfare benefits. N.J.A.C. 10:90-2.18. In addition, an excluded child will not receive benefits even if he or she is sent to live with another family as long as the original family was receiving welfare when the child was born. Id. A child is excluded even if she or he is born after the family has ceased to receive assistance if the birth of the baby occurs within a year of any family member's receipt of welfare and the family later re-applies for public assistance. N.J.A.C. 10:90-2.18(a)(8).

Under WFNJ, if a woman with two children who is not receiving benefits becomes pregnant and has a third child, she will receive a grant of \$488 for herself and all three of her children if she becomes destitute and applies for WFNJ. N.J.A.C. 10:90-3.1 to 10:90-3.3. However, by operation of the Child Exclusion, if a woman with two children who is receiving benefits becomes pregnant, she will receive cash assistance only for herself and her first two children—not the newborn—and the family grant will remain \$424. N.J.A.C. 10:69-10.2(a); 10:90-3.3, Schedule II. By denying additional benefits to support an additional child born into a family receiving welfare, the Child

⁴ Parents who receive Supplemental Security Income because, for example, they are disabled and unable to work, are ineligible for WFNJ benefits and are not considered part of the WFNJ assistance unit. N.J.S.A. 44:10-48(a)(2). Nevertheless, under the Child Exclusion provision, they may have children excluded from WFNJ benefits.

Exclusion harshly penalizes women who choose to bear children⁵ As discussed infra, this seemingly small reduction in benefits can mean the difference between having enough money to buy food at the end of the month, medicine if a child is sick, shoes and school clothing for one's children, or simply leaving these basic needs unfulfilled.

II. HISTORY AND PURPOSE OF THE CHILD EXCLUSION

The Child Exclusion was enacted by the New Jersey Legislature with the specific intention of influencing poor women's childbearing decisions; its sponsor introduced the bill as an amendment to New Jersey's welfare law by stating that it "is intended to discourage AFDC recipients from having additional children during the period of their welfare dependence." Pa872.

Because the Child Exclusion provision, when first enacted, violated federal AFDC law by denying benefits to otherwise eligible needy children, New Jersey applied for a waiver of federal requirements.⁶ Pa95-113. The Waiver Request further

⁵ Currently the State pays at most 45 percent of its defined need standard to families eligible for WFNJ, and even less if a child is born into a family while they are receiving benefits. See N.J.S.A. 44:10-42; N.J.A.C. 10:69-10.2(a); 10:90-3.3. For example, while New Jersey's standard of need recognizes that a family of three requires at least \$985 per month to meet its subsistence needs, that family will not receive more than \$424 in public assistance.

⁶ Waivers of federal requirements are permitted when a state runs an "experimental, pilot or demonstration project." 42 U.S.C. § 1315(a).

demonstrated the statute's purpose, describing the Child Exclusion as "harsh" but seeking to justify it by stating that its purpose was to "encourage" women to "be responsible" in their "decision to have another child while receiving welfare." Pa104-06 (describing the choice to have a child while on AFDC as "irresponsible and not socially desirable").

Despite objections to the Waiver Request, the federal government approved the waiver as a five-year research experiment.⁷ Pa114-34. Because the Child Exclusion was an experiment, the approval imposed a series of "Terms and Conditions" on the State. Specifically, New Jersey was required to evaluate the impact of the Child Exclusion on "marital status and birth rates," thereby measuring whether the statute succeeded in deterring births by AFDC recipients. Pa126. Again, the purpose of the statute was clear; according to the DHS project liaison, the "real behavioral point of interest" of the Child Exclusion experiment was "conception or avoidance of conception." Pa198.

⁷ This waiver for the Child Exclusion was challenged in C.K. v. Shalala, in which Plaintiffs raised federal claims involving the procedures by which the waiver was granted, as well as the operation of the Child Exclusion. On May 4, 1995, the United States District Court for the District of New Jersey granted the Defendants' motion for summary judgment and dismissed the complaint. C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995), aff'd sub nom, C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996). The state constitutional claims initially raised in that federal lawsuit were voluntarily dismissed. Stipulation of Dismissal (D.N.J. May 2, 1994). Thus, the state constitutional claims that are the basis for the present lawsuit have never been addressed or adjudicated in federal court.

Consistent with the evaluation requirement, DHS retained the Rutgers University School of Social Work to evaluate the effects of the Child Exclusion, particularly its impact on welfare recipients' childbearing decisions. Pa135-44. See also Pa188. Rutgers University submitted a "Plan for Securing Survey Data," stating that "[o]ne of the primary aims of the [Child Exclusion] . . . policy is to have an influence on the likelihood that AFDC recipients will continue to have children while receiving public cash benefits." Pa159. The Rutgers study sought to measure the success of the Child Exclusion in achieving this purpose by determining whether the FDP, including the Child Exclusion, had a marked effect on birth rates and abortion rates among women receiving welfare. Pa279. The DHS project liaison confirmed that DHS was not concerned with examining the effects of the Child Exclusion on the health, nutrition, or housing of the affected families.⁸ Pa183-84.

In 1997, WFNJ replaced the former FDP, changing many provisions of New Jersey's welfare program. However, the Child Exclusion was retained without alteration and has continued to operate as it did under the former program. N.J.S.A. 44:10-61; N.J.A.C. 10:90-2.18.

⁸ The Rutgers researchers had also intended to study child well-being and other "quality of life" issues, but were unable to conduct this portion of the study, as the State chose not to fund it. Pa279-83; Pa296-97.

III. EFFECT OF THE CHILD EXCLUSION

A. The Child Exclusion Affects Women's Childbearing Decisions, Resulting in More Poor Women Having Abortions.

The Child Exclusion has had the effect intended by the Legislature—it has caused more poor women who need welfare to have abortions. Plaintiffs Angela B. and Sojourner A. both considered abortions when they discovered they were pregnant. Pa543; Pa551-52. After having one child who was excluded from welfare benefits, Sojourner A. chose to terminate a subsequent pregnancy rather than give birth to a second child subject to the Child Exclusion. She had already faced hardships trying to support two children with benefits meant for one and knew that with an additional child and no additional support, her family would suffer. Pa552; Pa556-57.

Indeed, the study by the Rutgers School of Social Work shows that the denial of benefits to children born into families on welfare has resulted in an increased number of women who receive benefits obtaining abortions. Pa135-44. The Rutgers School of Social Work analyzed the Child Exclusion according to two different methodologies—an “experimental-control” design, and a “pre-post” analysis.⁹ The results of these analyses were

⁹ Under the experimental-control design, welfare recipients were randomly assigned into two groups: an experimental group, which was subject to all the provisions of the FDP, including the Child Exclusion, and a control group, which was not affected by the FDP and was provided full benefits. Pa232-33. The pre-post design consisted of an analysis of the entire welfare caseload over time from 1990 through 1996 to determine if there were changes in behavior that could be attributed to

submitted to DHS, Pa724-45; Pa746-58, and the findings were released to the public by then-Governor Christine Todd Whitman and DHS on November 2, 1998. Pa759-66.

Both methodologies—experimental-control and pre-post—showed that the birth rate among welfare recipients dropped in the period after implementation of the Child Exclusion, and that the abortion rate for this group increased, despite a decline in the abortion rate among the general population. Pa759-60. The final report, with the findings from the pre-post analysis, stated:

Between October 1992, the effective implementation of the FDP (and the family cap), and the end of 1996, we estimate that there were 14,057 fewer births among AFDC female payees of childbearing age than would have occurred in the absence of the FDP; [o]ver this same period, we estimate that there were 1,429 more abortions than would have occurred in the absence of the FDP.... Pa742.

The final report on the experimental-control analysis concluded that “[t]he Family Development Program and the family cap did have a statistically significant impact on the birth, abortion and family planning decisions of cases in our study sample.” Pa754. Specifically, with respect to ongoing cases, welfare recipients subject to the Child Exclusion had birth rates about 9% lower than those not subject to the provision, and for new cases, those subject to the Child Exclusion had

implementation of the FDP, including the Child Exclusion. Pa 276.

birth rates about 12% lower and abortion rates about 14% higher.
Id.

The Rutgers researchers' conclusions are all the more compelling because they were consistent using different methodologies. Based on the outcomes of these studies, the Rutgers researchers concluded that the FDP and the Child Exclusion had a definite impact on the reproductive decisions of women on welfare in New Jersey: pregnant women whose children would be subject to the Child Exclusion were more likely to terminate their pregnancies. Pa745. Although the estimated magnitude of this impact varied somewhat based on differences in methodology, the outcome remained the same. Pa205. The principal investigator of the Rutgers study expressed confidence in the reliability of these findings. Pa304.

So, too, did the DHS official coordinating the Rutgers study. He stated that it is both credible and logical to conclude that the similarities in the reports support the reliability of their findings. Pa205. Indeed, although the State coordinator of the study had concerns with the evaluations, he stated that these concerns did not discredit the reports. Pa209-10. Rather, he felt that the results were credible, Pa211, and that the work of the researchers was valid. Pa214. The State's expert, Ted Goertzel, also agreed that the similarity in findings between the two methodologies rendered the findings more reliable. Pa854-55.

Thus, the results of the Rutgers studies were remarkably consistent: the Child Exclusion affects the reproductive decisions of welfare-reliant women in New Jersey, leading to increased abortions and decreased births among this population. Indeed, Defendant DHS, in its own press release issued on November 2, 1998, concluded: "These findings indicate that the Family Cap may have been a factor in women's reproductive decisions." Pa759-60.

B. The Child Exclusion Harms Poor Women Who Bear a Child While on Welfare by Inflicting Extreme Hardship on the Excluded Child and Other Members of the Family.

Poor women who find it necessary to turn to welfare head families that are often on the edge of intense suffering due to hunger, homelessness, and the deprivation of basic necessities. Pa577-82. See also Pa509-10; Pa450. Even with Food Stamps and child-care subsidies, two-thirds of New Jersey welfare recipients have income placing them below the federal poverty line, and one in four have income below 50% of the poverty line. Pa436. See also Pa337. The State's own expert, Peter Rossi, agreed that welfare benefits, even when coupled with Food Stamps, do not provide sufficient income for most families with children. Pa509-10. For these families, every dollar of income is critical, and denial of even seemingly small amounts of money can have a significant effect on a family's well-being.

When a family is subject to the Child Exclusion, not only is the excluded child likely to suffer serious harm, but her

mother and siblings are also likely to suffer considerable hardship as they attempt to make already meager ends meet in the face of increased family needs. Pa580; Pa600-09; Pa624-25; Pa627; Pa637-41. The denial of benefits for a child can drastically limit an already poor woman's ability to feed, care for, and house her children, and works to harshly penalize her decision to bear a child while receiving benefits.

Plaintiffs have provided ample evidence showing that the Child Exclusion has caused extreme hardship to the named Plaintiffs, both of whom have inadequate housing and run out of money and Food Stamps to feed their families before the end of each month. Plaintiffs have also provided extensive expert evidence explaining the harms to the Plaintiff class imposed by the Child Exclusion. Throughout this litigation, the lower courts inappropriately have failed to recognize these harms and the realities of the past and present circumstances of named Plaintiffs and the Plaintiff class. The experience of the named Plaintiffs, as well as the Plaintiff class, demonstrates the harsh penalty the Child Exclusion imposes on poor women's reproductive choices.

First, the denial of cash benefits resulting from the Child Exclusion increases the risk of hunger and inadequate nutrition for the excluded child and her family. Studies of nutritional deficiency, or undernutrition, among poor children show that the denial of incremental benefits to children born into families receiving welfare increases the prevalence of hunger,

undernutrition, and decline in dietary quality.¹⁰ Pa624-25; Pa653-56; Pa637-38. Even with the availability of Food Stamps and the Women, Infants and Children ("WIC") program, families affected by the Child Exclusion often are unable to purchase food of adequate quality and quantity for the entire month. Pa579; Pa646-47; see also Pa368. For instance, Plaintiff Angela B. reported running out of Food Stamps by the middle of every month and relying on whatever she could collect from food pantries and other charities to feed herself and her children. Pa541; Pa570. Plaintiff Sojourner A. testified that even with WIC assistance, she ran out of milk for her infant by the end of the month and had no money to buy more. Pa558-59.

As proof that the Child Exclusion increases the risk of hunger and lack of adequate nutrition for an excluded child and his or her family, Plaintiffs presented the testimony of Dr. John Cook, an expert on food insecurity and hunger. In Dr. Cook's expert opinion, mild to moderate malnutrition is directly associated with insufficient household income. Pa625. Based on

¹⁰ Undernutrition is a term used by researchers, including Plaintiffs' experts, Drs. Frank and Cook to refer to nutritional deficiency. Pa624-25; Pa653-56; Pa637-38. Hunger and undernutrition in and of themselves are harmful to children and adults. Repeated periods of inadequate nutrition can lead to permanent damage to children's health in the form of cognitive impairments, physical weakness, anemia, stunting, and growth failure. Pa624-25. Iron deficiency, a particular risk when dietary quality declines, has been specifically correlated with behavioral and academic problems as well as long-term developmental problems. Pa637-38; Pa627. In addition, the denial of support for a new baby puts that baby at risk of nutritional deficit at the most important time for brain growth. Pa627; Pa639-40; Pa659.

his lifelong study and research concerning food insecurity and hunger in poor families, Dr. Cook concluded that when a family member is added to an already poor family without additional resources to support that child, the family copes by reducing first the quality of food available and then the actual quantity of food available. Psa9.¹¹

Plaintiffs also presented the testimony of Dr. Deborah Frank, an associate professor of pediatrics and an assistant professor of public health who has authored numerous articles on the impact of undernutrition on children's development. Dr. Frank is the Director of the Growth and Development Program at Boston Medical Center, working in the area of child nutrition and health since 1981 and focusing specifically on the epidemiology of nutritional deprivation in low-income populations. Dr. Frank offered the expert opinion that families experiencing a per capita reduction in public assistance benefits, as is experienced by families subject to the Child Exclusion, suffer extreme hardship and deprivation: the children in these families are at an increased risk of nutritional deficit, with devastating long-term effects, including increased vulnerability to infection, decreased learning capacity, and increased vulnerability to lead poisoning. Pa637. In Dr. Frank's expert opinion, even where families receive additional Food Stamps for an additional child excluded from cash income,

¹¹ Citations to "Psa" refer to Plaintiffs' Supplemental Appendix, appended to Plaintiffs' Appellate Reply Brief.

many families experience inadequate food resources for nutritional health. Pa647. Thus, she believed a reduction in the cash income per individual results in hunger, adversely affecting the health and well-being of excluded children and their families. Pa640.

A recently published study in which experts in pediatrics (including Plaintiffs' experts Dr. Cook and Dr. Frank) surveyed the effects of welfare reductions in six United States cities only confirmed that reductions in benefits result in hunger. Pa624-25; Pa653-56; Pa637-38. This study found that children in families in which welfare benefits were reduced (i.e., families not receiving full grants for all family members) had a greater chance of facing food insecurity than children in welfare families where benefits had not been reduced. These effects were not mitigated if the family received Food Stamps.¹²

Katherine Edin, an assistant professor in sociology at the University of Pennsylvania with extensive experience studying welfare-reliant families and the author of numerous books and scholarly articles concerning how single mothers survive on welfare, confirmed that the health and well-being of welfare-reliant families is jeopardized by the Child Exclusion. Professor Edin offered the expert opinion that a reduction in per capita benefits has a potentially devastating impact in poor

¹² John T. Cook & Deborah A. Frank, et al., Welfare Reform and the Health of Young Children, Arch Pediatric Adolescent Medicine, July 1991.

families where feeding, clothing, and housing one's children is a constant and daily struggle. Pa577. In Professor Edin's opinion, for such families, even a small setback in circumstances—such as results from the denial of benefits to a newborn child under the Child Exclusion—can lead to hunger or homelessness. Pa578. The denial of benefits to a child or children in the family also often results in utility shut-offs, lack of adequate winter clothing, and lack of medical care, especially with respect to over-the-counter medicine like aspirin and cold medications, which are not covered by Medicaid. Pa579. The experience of the named Plaintiffs illustrates this harsh reality. Angela B. reported that the money she received from welfare, meant to cover her needs and the needs of only two of her four children, was insufficient to obtain the basic necessities for her family of five. Pa540-42; Pa574. Because of the Child Exclusion, she does not have enough money to pay for diapers for the baby, medicine, or public transportation to doctors' appointments and elsewhere. Pa541-42; Pa570; Pa574. In short, because of the Child Exclusion, Angela B. simply cannot afford to adequately feed, house, and clothe herself and her children. Pa544-45; Pa574-75. Similarly, Sojourner A. testified that because of the Child Exclusion, she often does not have enough money for diapers, milk, or clothes for her baby. Pa558-59.

Professor Edin explained that most welfare-reliant mothers with an excluded newborn baby cannot ameliorate these hardships

by working because of the high cost and limited availability of child care for young infants. Pa581-82; Pa659; Pa713-15. Work is also not an option for many welfare-reliant mothers with excluded newborns because, as Plaintiffs' expert Dr. Wendy Chavkin, Professor of Clinical Public Health at the Columbia University School of Public Health specializing in issues affecting women, opined, engaging in paid employment immediately before or after childbirth can pose a health risk for poor women, given the jobs they hold. Pa713. Dr. Chavkin stated that lower skilled jobs, such as those most likely to be available to welfare recipients, often involve physical stress and are associated with pregnancy complications such as pre-term delivery. Pa714-715. She noted that WFNJ recognizes the obstacles to new mothers undertaking paid work in other contexts—for example, by exempting women from work requirements for three months after the birth of a new baby and longer if the mother cannot find child care for her infant.¹³ Id.

Similarly, Dr. Gerson Weiss, Professor and Chair of the Department of Obstetrics and Gynecology at UMDNJ-New Jersey Medical School, as well as Chief of Service of the Department of Obstetrics and Gynecology at the UMDNJ-University Hospital,

¹³ Because the Child Exclusion is a blanket denial of benefits to any new child born into a welfare family, the denial still applies even if the mother is physically unable to work after child birth or cannot find adequate child care. Although other families receiving WFNJ benefits do not lose benefits due to failure to work in the first three months after child birth or if child care is unavailable, a family losing benefits due to the Child Exclusion receives no such protection.

offered the expert opinion that the Child Exclusion creates identifiable health risks, to pregnant women, fetuses, infants, and children. Pa657; Pa659. These risks result primarily from the stress placed on a woman who must face the prospect of not being able either to care properly for her newborn child or to protect the health of her older children because of her inability to provide adequate food, clothing, medicine and housing at a critical, formative period of her children's lives. Pa659. The declarations of named plaintiffs Angela B. and Sojourner A. vividly demonstrate the stress such knowledge places upon poor mothers. Pa541; Pa544-45; Pa552.

The Child Exclusion compromises not only the mother's health, but also that of the child's. The study of families in six cities who had their welfare benefits reduced as discussed, supra, at 19, demonstrated that children in these families suffered from repeated hospitalizations and longer, more severe illnesses than children in families that received full grants. Children in families with reduced benefits are also far more likely to be admitted to the hospital following an emergency room visit than children in families receiving full benefits. Again, Food Stamps have no mitigating effect on the higher incidence of hospitalization.¹⁴

The Child Exclusion also makes it far more difficult for families with a new child to maintain adequate housing. Most welfare families in New Jersey must spend far more than 30% of

¹⁴ See Cook & Frank, supra, at 19.

their income to secure housing—indeed, some pay nearly all of their income in rent—thus requiring the family to forgo other necessities. Pa606-07. Many families try to meet shelter costs by sharing living quarters, but these situations are unstable and families are often forced to move from them. Pa578; Pa580; Pa607. See also Pa539-41; Pa564-70. Given this housing situation, any minor setback—such as the birth of a child denied benefits by the Child Exclusion—can push an already poor family over the edge, increasing the risk of homelessness or of inadequate, unsafe, or overcrowded housing. Pa580; Pa608-09. The consequences for the family are dire. Homelessness impedes children’s ability to receive a decent education. Pa605-06; Pa637-38; Pa640. Poor housing is more likely to have unsafe, exposed lead paint and other conditions that harm children’s health. Pa605-06; Pa608-09. Cushing Dolbeare, a consultant on housing and public policy and since 1952 an expert on issues regarding low-income housing, particularly on the housing needs and problems of welfare-reliant households, testified that “[w]ithout a safe and stable place to live, it becomes difficult for children to properly grow, physically and emotionally, and for adults to parent their children in an appropriate manner.” Pa605-06.

The experiences of Plaintiffs Angela B. and Sojourner A. poignantly illustrate housing insecurity created by the Child Exclusion. Angela B. and her children do not have stable housing. They have lived in homeless shelters, in a relative’s

basement, and with friends. Pa538. Although Angela B. is currently living in an apartment with her four children (two of whom are excluded from receiving benefits) and her boyfriend's family, Pa561; Pa571, she constantly worries about being homeless again. She knows that she cannot afford an apartment for five people with the benefits she receives for two children and herself. Pa540-41. Sojourner A. also has not had enough money to house her two children properly, as she tries to care for them both with benefits only meant for one. She lives with relatives and shares a single bedroom with her two children. She cannot afford to rent her own apartment. Pa549-50.

Research conducted by Legal Services of New Jersey ("LSNJ") only confirms the hardships that the Child Exclusion imposes on poor women struggling to care for their families. The LSNJ Report revealed that nearly four out of five (79.8%) welfare-reliant families who experienced a reduction in benefits reported that they were not able to financially support themselves and their households after the reduction. Pa355. More than half reported at least one serious negative effect on their family as the result of the benefit reduction—inability to sufficiently clothe themselves or their families after the reduction; inability to sufficiently feed themselves or their families; inability to obtain necessary health care; loss of housing; need to place their children outside of their homes; and/or exposure to a greater risk of violence or abuse. Pa367. The Child Exclusion is in effect precisely such a reduction in

benefits, with all its attendant harms. As detailed, supra, the named Plaintiffs in this action have experienced many of these hardships, and it is clear that all poor families deprived of benefits for a child suffer significant harm.

In summary, these findings, the experience of the Plaintiffs, and the findings of Plaintiffs' experts make clear that the Child Exclusion causes significant material hardship for the welfare-reliant families to whom the policy applies.

C. The Child Exclusion Does Not Lead Women to Leave Welfare for Work.

In addition to studying the impact of the FDP and the Child Exclusion on women's birth and abortion rates, the Rutgers researchers also conducted a cost-benefit analysis of the program. Pa287. In October 1998, the Rutgers researchers issued findings revealing that the FDP and Child Exclusion did not lead recipients to move off welfare and into jobs or result in less dependence on welfare. Pa811.

Specifically, the Report found that the FDP and Child Exclusion did not result in women moving off welfare more quickly, staying off welfare longer, or earning more money after leaving welfare. See Pa759-60; Pa288. The report further found that the program had no systemic, positive impact on employment and employment stability or earnings among AFDC recipients. Pa288; Pa304. In fact, the Child Exclusion had a slightly

negative impact on earnings when experimental and control groups were compared. Pa287-88.¹⁵

While various provisions of New Jersey's welfare law have been amended since the period studied by the researchers, the Child Exclusion is unchanged and there is no evidence suggesting that it somehow operates differently in WFNJ than it did in the FDP. Indeed, the State's expert, Ted Goertzel, conceded that the Child Exclusion has played no role in whatever positive effects have flowed from welfare reform in New Jersey. Characterizing the Child Exclusion primarily as a "symbolic issue," Professor Goertzel attributed a decline in the welfare rolls and former recipients' increased work participation to policies other than the Child Exclusion, such as time limits on the receipt of benefits. Pa856-57; Pa860. He also noted that at least some of the decline in New Jersey's welfare rolls is due to people being dropped from the rolls for failure to comply with work requirements or to show up for appointments. Pa853.

¹⁵ Given that the Child Exclusion is likely to increase housing instability among affected families, this negative impact on earnings is not surprising. Studies show job placement rates are lower for homeless families or families living temporarily with friends or relatives than for families in transitional housing and that employment retention rates are significantly higher for those with stable housing. Pa606. Similarly, the Child Exclusion's negative impact on children's health is also likely to make it more difficult for a single parent to hold paid employment, as the cumulative effect of undernutrition, lead exposure, and utility cut-offs is likely to be ill health and increased school absenteeism among her children, making it more difficult for her to meet the demands of a job outside the home. Pa640.

Some WFNJ recipients have left welfare for work and are earning more income. However, this has nothing to do with the Child Exclusion or with this lawsuit. As the research and testimony presented above demonstrate, the Child Exclusion does not lead individuals to work. It does not help anyone leave the rolls for work nor does it help those who remain on the rolls find or keep employment.

In sum, the hardships created by the Child Exclusion are imposed on poor women and their families solely in an attempt to coerce, and as punishment for, poor women's reproductive choices. Evidence in the record shows that the Child Exclusion has achieved this coercive effect. As vividly illustrated by named Plaintiffs Angela B. and Sojourner A., and by the extensive testimony and declarations of Plaintiffs' experts, the impact of the Child Exclusion is extraordinary hardship to poor women and their families in the form of hunger; harm to health and child development; increased homelessness or crowded, unstable housing arrangements; and the inability to obtain basic necessities. At the same time, the Child Exclusion (as distinct from other provisions of WFNJ) does not lead to increased employment or earnings, or decreased reliance on welfare.

ARGUMENT

This case involves a question of law under the New Jersey State Constitution. Matters of law are subject to de novo review. Wheaton v. Smith, 160 N.J. 383, 398 (1999).

I. THE CHILD EXCLUSION VIOLATES ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION.

A. The New Jersey Constitution Protects the Rights to Privacy and Equal Protection, Including the Right to Autonomy in Procreative Choices, and Demands the Most Exacting Scrutiny of Any State Infringement of Those Rights.

Article I, paragraph 1 of the New Jersey Constitution protects New Jersey citizens' fundamental right to privacy and guarantees that it will not be discriminatorily abridged. It does so in language "'more expansive'" than that of the federal Constitution, Planned Parenthood v. Farmer, 165 N.J. 609, 629 (2000) (quoting Right to Choose v. Byrne, 91 N.J. 287, 303 (1982)), providing,

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

"By declaring the right to life, liberty and the pursuit of happiness, Art. I, par. 1 protects the right of privacy." Right to Choose, 91 N.J. at 303.

Article I, paragraph 1, of the New Jersey Constitution not only protects the right of freedom of reproductive choice, it also guarantees equal protection for New Jersey citizens, Right to Choose 91 N.J. at 304-05, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79 (1978), thus ensuring that privacy rights will not be discriminatorily infringed. Accordingly, Article I, paragraph 1, requires the government to proceed "in a

neutral manner" and "impartially" in regard to a woman's intimate and personal choice whether or not to have a child, penalizing neither those who choose to procreate nor those who choose not to do so. Right to Choose, 91 N.J. at 307, 307 n.5; see also Planned Parenthood, 165 N.J. at 613 ("Simply, the effect of declaring the notification statute unconstitutional is to maintain the State's neutrality in respect of a minor's childbearing decisions and a parent's interest in those decisions"). "In effect, the State may not affirmatively tip the scale [for or] against the right to choose an abortion absent compelling reasons to do so." Planned Parenthood, 165 N.J. at 613. "In that constitutionally protected zone, the State may be an umpire, but not a contestant." Right to Choose, 91 N.J. at 307 n.5.

The right to privacy and autonomy in reproductive decisions protected by the New Jersey Constitution is broader than the correlate federal right and thus the requirement of state neutrality is applied more rigorously under the New Jersey Constitution. "[S]tate Constitutions are separate sources of individual freedoms and restrictions on the exercise of power by the Legislature. . . . Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights." Right to Choose, 91 N.J. at 300. Accordingly, this Court frequently has held that the New Jersey Constitution "afford[s] our citizens broader protection of certain fundamental rights than that afforded by

analogous or identical provisions of the federal constitution." State v. Novembrino, 105 N.J. 95, 145 (1987). See also Planned Parenthood, 165 N.J. at 631; State v. Norman, 151 N.J. 5, 25 (1997); Right to Choose, 91 N.J. at 300-310; State v. Baker, 81 N.J. 99, 112-14, 114 n.10 (1979); State v. Saunders, 75 N.J. 200, 216-17; Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 43 (1976); Southern Burlington County NAACP v. Mt. Laurel Tp., 67 N.J. 151, 174-75 (1975).

In particular, in examining state infringements upon women's procreative autonomy, this Court has closely adhered to its own admonition that "[w]hen the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so." State v. Hemeple, 120 N.J. 182, 196 (1990). Thus, in the context of privacy rights protected by Article I, paragraph 1, this Court has noted, "[T]he lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest in allowing the State [to infringe on privacy rights] than would be required by the United States Supreme Court." Saunders, 75 N.J. at 217.

This demand of a close nexus between a persuasively and amply demonstrated government interest and any infringement of privacy rights is part of "the most exacting scrutiny" that this Court applies to legislation that burdens the right to privacy

for some individuals and thus potentially violates the state Constitution's privacy and equal protection guarantees. Planned Parenthood, 165 N.J. at 632. Under this demanding standard, the New Jersey Constitution has been held to prohibit the state from denying Medicaid funding for medically necessary abortions while providing Medicaid funding for medically necessary pregnancy and childbirth expenses, despite the United States Supreme Court's holding in Harris v. McRae, 448 U.S. 297 (1980), that such a funding scheme does not violate the federal Constitution. Right to Choose, 91 N.J. at 310. Similarly, this Court found a parental notification and judicial bypass provision for minors seeking abortions to violate the New Jersey Constitution's privacy guarantee, despite the United States Supreme Court's repeated holdings that the federal Constitution does not prohibit states from imposing such requirements. Planned Parenthood, 165 N.J. at 642. Additionally, even after the United States Supreme Court decided that the federal Constitution permitted states to ban elective abortions in city-owned hospitals, Poelker v. Doe, 432 U.S. 519 (1977), New Jersey courts continued to hold that quasi-public hospitals receiving financial support from local governments must provide elective first-trimester abortions. Doe v. Bridgeton Hosp. Ass'n, Inc., 160 N.J. Super. 266, 271 (Law Div. 1978) (holding Poelker irrelevant to earlier New Jersey Supreme Court decision in Doe v. Bridgeton Hospital Association, Inc., 71 N.J. 478 (1976), which prohibited ban of elective first-trimester abortions by quasi-public hospitals).

In contrast to the federal Constitution, the New Jersey Constitution not only protects against direct infringements of the fundamental right to procreative autonomy, but also demands the most exacting scrutiny of indirect infringements of this right. While federal constitutional analysis generally requires a compelling state interest to justify direct infringements on a fundamental right, but analyzes indirect infringements under rational basis review, asking simply whether the challenged legislative provision has a rational relationship to a legitimate state interest,¹⁶ New Jersey constitutional analysis rejects this rigid two-tiered structure. See Right to Choose, 91 N.J. at 308-09. This is because "in cases involving a classification that 'indirectly infringes on a fundamental right,' the inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests." Id. at 630 (quoting Right to Choose, 91 N.J. at 310)

Indeed, this Court has expressly warned that under the New Jersey Constitution it is improper to "use[] the degree of

¹⁶ In Planned Parenthood v. Casey, 505 U.S. 833 (1992), the United States Supreme Court adopted an intermediate level of review for restrictions on women's right to obtain an abortion; rather than applying strict scrutiny, the Court asked whether the challenged legislative provisions imposed an "undue burden" on a woman's right to obtain an abortion. Id. at 877. The United States Supreme Court adopted this intermediate level of review of incursions upon the fundamental right to obtain an abortion, rather than strict scrutiny, as an accommodation to the state's interest in the potential life of the fetus in the particular context of abortion. Id. at 873-76.

interference with the [fundamental] right as the basis for choosing the level of scrutiny to apply." Planned Parenthood, 165 N.J. at 631 n.6. When confronted with a classification that either directly or indirectly burdens a class of individuals' right to privacy, New Jersey constitutional analysis replaces the rigid two-tiered test with a balancing test that "weigh[s] the governmental interest in the classification against the interests of the affected class." Id. In striking the balance, courts must consider "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" Id. (quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)). As this Court has stated, the balancing test required under New Jersey constitutional analysis "is particularly appropriate when . . . the statutory classification indirectly infringes on a fundamental right." Right to Choose, 91 N.J. at 310. As a result of this balancing test, "where an important personal right is affected by government action this Court often requires the public authority to demonstrate a greater public need than is traditionally required in construing the federal constitution.'" Id. (quoting Abbott v. Burke, 100 N.J. 269, 295 (1985) (internal quotations omitted)).

The Appellate Division ignored this body of law. While acknowledging the Child Exclusion affected women's procreative decision-making, Sojourner A., 350 N.J. Super. at 173-74, it applied rational basis review to the provision, based on its

conclusion that the effect on procreative decision-making was indirect. Incorrectly relying on the lenient federal standard explicitly rejected by this Court, the Appellate Division concluded that the Child Exclusion had a rational relation to a legitimate state interest. Id. This analysis was in clear legal error under this Court's precedents.

B. The Child Exclusion Implicates Poor Women's Fundamental Right to Privacy in Making the Intimate Decision Whether or Not to Bear a Child.

In analyzing the constitutionality of the Child Exclusion, this Court must consider the nature of the affected right. Planned Parenthood, 165 N.J. at 630. Past decisions of this Court make amply clear that the right to freedom from state interference in deciding whether or not to have a child is central to the privacy rights protected by Article I, paragraph 1, of the New Jersey Constitution and deserving of the highest level of protection.

The privacy rights the state constitution protects from government interference are those "choice[s] that bear[] so vitally upon a matter of deep personal privacy [that they] may . . . be considered an integral aspect of the 'natural and unalienable right' of all people to enjoy and pursue their individual well-being and happiness." In re Grady, 85 N.J. 235, 250 (1981). Thus, "[a]ny discussion of the right of privacy must focus on the ultimate interest which protection the

Constitution seeks to ensure: the freedom of personal development." Saunders, 75 N.J. at 213 (1977).

As this Court has repeatedly recognized, a critical component of the privacy rights central to citizens' pursuit of individual happiness and free personal development is the right to make autonomous procreative decisions, including the right to make the life-altering and intimate decision whether to become a parent. By incorporation of the right to privacy, the New Jersey Constitution protects "concomitant rights, including a woman's right to make certain fundamental choices." Planned Parenthood, 165 N.J. at 628. Thus, a "fundamental concept" in privacy analysis is "the right of every person to make a free choice about his [or her] reproductive capacity." Grady, at 482 n.9. In particular, in the context of procreative choice, this Court has observed that "a woman's right to control her body and her future" is "fundamental to individual liberty." Planned Parenthood, 165 N.J. at 631-32. Thus, the privacy rights protected by Article I, paragraph 1 include the right of procreation, In re Baby M, 109 N.J. 396, 447-48 (1988), "the right to choose among procreation, sterilization and other methods of contraception," Grady, 85 N.J. at 263, and the necessary correlate to the right to choose to have a child, a woman's right to obtain an abortion, Right to Choose, 91 N.J. at 303-04.¹⁷

¹⁷ The right to privacy protected by the New Jersey Constitution also includes the right to make other intimate decisions involving control over one's body and life, including the right

In Planned Parenthood, this Court stated that it was "keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution." 165 N.J. at 632. As the Appellate Division acknowledged, the Child Exclusion "affects a welfare recipient's decision whether to have another child." 350 N.J. Super. at 171. It thus strikes at the fundamental principle of individual autonomy in reproductive choice and requires this Court's closest scrutiny.

C. The Child Exclusion Imposes a Heavy Burden on Poor Women's Fundamental Right to Procreate by Harshly Penalizing and Deterring the Exercise of That Right.

The Child Exclusion unconstitutionally infringes on the right of poor women to choose whether and when to conceive and bear children by having both the purpose and effect of influencing women's reproductive choices by harshly penalizing the decision to give birth. The constitutional analysis laid out by this Court in Planned Parenthood requires an examination of the effect of the governmental restriction on the fundamental right. 165 N.J. at 630 (citing Greenberg, 99 N.J. at 567). This examination demonstrates that the effect of the Child Exclusion on the exercise of procreative rights is significant.

of consenting adults to engage in sexual activity, Saunders, 75 N.J. at 213-14, and the right to decline medical treatment under certain circumstances, In re Quinlan, 70 N.J. 10, 40 (1976).

As set out, supra, at 9-11, the primary purpose of the Child Exclusion is to coerce poor women in their exercise of their right to procreate. In fact, the provision has succeeded in deterring exercise of the right for many poor women receiving public assistance in New Jersey. A provision that successfully deters the exercise of a constitutional right amounts to an infringement of that right. See Sanchez v. Department of Social Services, 314 N.J. Super. 11, 21-22 (App. Div. 1998). As discussed, supra, at 12-15, according to the state-hired Rutgers research team, the Child Exclusion led to an increase in the rate of abortions and a decrease in the birth rate. Pa724-58. In response to federal and state requests, the Rutgers researchers refined their methodology and added different analyses of the data in various reports. The results remained consistent: as a result of the Child Exclusion, the abortion rate for women on welfare increased at a time when the abortion rate for the general population decreased. Pa742; Pa754. The researchers concluded that the Child Exclusion was the most likely cause of this increase in the abortion rate. Pa745. This evidence was undisputed by Defendants. Thus, by means of the Child Exclusion the State has affirmatively tipped the scale toward abortion for many poor pregnant women in New Jersey, exercising a real and significant influence over their reproductive decisions. See Planned Parenthood, 165 N.J. at 613 (“[T]he State may not affirmatively tip the scale [for or] against the right to choose an abortion absent compelling reasons to do so.”).

Women receiving welfare in New Jersey are more likely to seek abortions because of the significant and real penalties the Child Exclusion levies on the exercise of the right to procreate. When a statute penalizes the exercise of a fundamental right, it is unconstitutional absent a compelling state interest directly served by the statute. See Sanchez, 314 N.J. Super. at 21-24. The reduced per capita benefits mandated by the Child Exclusion work just such a penalty on women exercising the right to give birth. In Sanchez v. Department of Social Services, the only other state constitutional challenge to a provision of WFNJ, the Appellate Division examined the constitutionality of the State's payment of reduced benefits to individuals who moved to New Jersey from a state that provided lower welfare benefits than did New Jersey. For many of those affected by this policy, the actual reduction in benefits was less than the reduction caused by the Child Exclusion. The Appellate Division nevertheless found that while the reduction "does not entirely deprive plaintiff of the basic necessities of life," the lower grant paid to new residents "would leave plaintiff [and her three children] with significantly less funds than other poor parents receive for subsistence for a family of four" and thus would unconstitutionally penalize the exercise of the right to travel without serving any compelling state interest. Sanchez, 314 N.J. Super. at 23. The Child Exclusion operates in exactly the same way as the provision challenged in Sanchez. While not completely cutting off assistance, the Child Exclusion mandates that lower benefits be paid to a family in

which a child is born while the family is receiving welfare than would be paid if the child were born when the family was not receiving benefits. As a matter of law, according to Sanchez, this is a penalty, in this case on the exercise of the right to decide whether and when to bear a child, and thus unconstitutional in the absence of a sufficiently compelling state interest. Id. at 24 ("Providing a reduced level of assistance, rather than no assistance at all, is no less a penalty or burden . . . than [a] total denial."). The lower courts wholly ignored the Sanchez analysis in finding only a slight intrusion caused by a denial of benefits to the excluded child and in concluding that this intrusion did not constitute a penalty. See Sojourner A., 350 N.J. Super at 169.

This legal conclusion is based on the recognition that even a small per capita reduction in welfare benefits works a harsh penalty on poor women and their families as a factual matter. This Court has previously relied heavily on factual and expert evidence demonstrating that a statute impinging on the right to privacy imposed a heavy burden on individuals' right to procreative liberty in actual practice and penalized the exercise of that right. Planned Parenthood, 165 N.J. at 632-36. In this case, Plaintiffs have presented extensive evidence--also unrefuted by the government--of the very real hardship to welfare-reliant women and their children that ensues from denial of benefits to children born into a family receiving welfare.

As demonstrated by Plaintiffs and their experts, denial of benefits designed to meet the needs of an additional child causes real and significant harm. The payment of reduced benefits to the named Plaintiffs under the Child Exclusion has caused them periods of homelessness and hunger, Pa539-41; Pa549; Pa570; Pa574, and has impeded their ability to feed and clothe their families. See discussion, supra, at 20, 23-25. As shown by the LSNJ study, reductions in benefits (the effective result of the Child Exclusion) leave the majority of affected families unable to support themselves and facing significant hardships. Pa368.

Hunger and undernutrition are inevitable results of the denial of benefits that occurs upon the birth of a new child as parents attempt to feed additional children with grants that do not provide for their needs. Pa580; Pa638; Pa645; Pa648; Pa624-25; Pa653. And as a result of the Child Exclusion, families are more likely to face utility shut-offs, to be unable to buy winter clothes, and to be forced to forgo over-the-counter medications. See id. Reduction in welfare benefits also increases the risk of housing crises and homelessness. See supra, at 23; Pa506-07; Pa536; Pa580; Pa608-09.

In Planned Parenthood, this Court engaged in a fact-sensitive, detailed analysis of what a statute requiring parental notification for minors seeking abortion would actually mean for a young woman in New Jersey who wanted to terminate her pregnancy. This Court was sensitive to the actual effect of

seemingly minor obstacles, such as the fact that even making a phone call to a court or an attorney would be difficult for a minor, and, considering all the problems entailed in complying with the law's procedures, this Court concluded that the parental notification requirement impermissibly burdened the minor's right to reproductive choice. Planned Parenthood, 165 N.J. at 635-36. An equally sensitive and detailed analysis of what the Child Exclusion actually means to a family dependent on public assistance establishes that the Child Exclusion impermissibly burdens a welfare-dependent woman's choice whether to give birth to a child while receiving benefits. As explained above, in New Jersey, if a woman with three children is forced to turn to WFNJ for assistance, she will receive a monthly grant of \$488 to care for her family. N.J.A.C. 10:90-3.1 to 10:90-3.3. In contrast, if a woman with two children has a third child while receiving WFNJ benefits, her family will have to subsist on \$424 per month. N.J.A.C. 10:69-10.2(a); 10:90-3.3, Schedule II. For a family in which every dollar counts, that difference of \$64 dollars a month can easily mean the difference between treating an infant's fever or not, between a week's worth of groceries and a week of hunger, or between having a place to live and crowding into a friend's apartment or relying on a homeless shelter. See Pa580 (declaration of Kathryn Edin, stating that her analysis showed each additional \$100 available to a family per month decreased material hardship by approximately 10%). When the actual effect of the Child Exclusion on affected families is considered, it is not

surprising that many recipients felt they had no choice but to terminate their pregnancies rather than suffer under such penalties.

Nor does the State's effectuation of such penalties through funding choices, rather than through direct fiat, insulate those choices from constitutional review. This Court has made clear that the government may not attempt to influence a woman's procreative choices through its power of the purse. Right to Choose, 91 N.J. at 306. In Right to Choose, the Court invalidated New Jersey's ban on Medicaid funding for medically necessary abortions, holding that the State's refusal to provide funding for medically necessary services associated with one reproductive decision—abortion—while providing funding for medically necessary services associated with the alternative decision—childbirth—constituted impermissible governmental interference with a poor woman's constitutional right to decide whether to carry a pregnancy to term. Id. Recognizing the fiscal power of the State—including its control over the welfare system—this Court in Right to Choose held that the government could not use the power of the purse to coerce women to forgo exercising a constitutional right any more than it could directly prohibit them from exercising it. As Right to Choose explicitly states, the state cannot use funding choices "to achieve with carrots what [it] is forbidden to achieve with sticks." Id. In that case, this meant that just as the State could not forbid poor women from having medically necessary

abortions, so it could not attempt to coerce them to forgo abortions by providing funds for medically necessary prenatal and childbirth services but not for abortions. As the Court concluded, "[T]he State may not use its treasury to persuade a poor woman to sacrifice her health by remaining pregnant." Id. at 308. In the same way, in the instant case, the state cannot forbid poor women from having children while receiving government benefits. Therefore, it also cannot attempt to coerce them to avoid pregnancy or to have abortions by denying benefits to children born into a family receiving welfare while providing full benefits to families who do not have additional children.

Right to Choose makes clear that the State may not use its power of the purse to reward women who make procreative choices with which the State agrees, and punish women who make procreative choices with which the State disagrees. 91 N.J. at 308. Evidence showing that the Child Exclusion has, in fact, had the effect of influencing decisions about childbirth makes it even clearer that with this provision, the government has tipped the scale in women's decisions whether or not to have a child by deterring and punishing childbearing. That the coercion of these fundamental choices is accomplished indirectly through state funding decisions in no way alters the analysis of the nature and significance of the burdens imposed. In the instant case, the burdens are severe—and, indeed, effectively deter exercise of women's most fundamental rights.

D. Defendants Have Failed to Demonstrate a Close Nexus Between Their Purported Justification for the Child Exclusion and the State's Infringement on the Right to Privacy.

When legislation burdens a fundamental right, as does the Child Exclusion, the New Jersey Constitution requires reviewing courts to scrutinize the State's purported justification for the legislation closely to determine whether it outweighs the burden on the fundamental right. Planned Parenthood, 165 N.J. at 619-20. For such legislation to be constitutional, the State must "demonstrate a real and significant relationship between the statutory classification and the ends asserted." Id. at 613; See also Taxpayers Ass'n, 80 N.J. at 42-43 ("It must be shown that there is an appropriate governmental interest suitably furthered by the differential treatment. . . . New Jersey has always required a real and substantial purpose between the classification and the governmental purpose which it purportedly serves"). In making this determination, this Court must "carefully examine the factual bases" for the claim that a challenged provision "in fact serve[s] those specific ends" proffered." State v. Miller, 83 N.J. 402, 414-15 (1980). "And care must be exercised that the efficacy of . . . constitutional guaranties shall not be whittled away by indulging in unwarranted presumptions of a factual basis for the legislation." Washington Nat'l Ins. Co. v. Bd. of Review, 1 N.J. 545, 554 (1949).

The Appellate Division failed to hold Defendants to their burden of demonstrating the requisite "real and significant" relationship between means and ends. Sojourner A., 350 N.J. Super. at 172-173. It thus ignored the clear mandate of this Court to look closely at purposes offered by the State to justify infringements on a fundamental right. The court accepted Defendants' claim that the Child Exclusion promotes work and responsibility at face value, making no attempt to determine whether Defendants actually demonstrated any relationship between the legislation and the asserted goals. Id. Defendants have utterly failed to show any relationship between the Child Exclusion and the state interests they assert, any factual basis for assuming that the Child Exclusion will serve these interests, or any evidence that these interests can be realized through the challenged provision. The burden of making such a showing lies squarely on Defendants. See Planned Parenthood, 165 N.J. at 643.

Indeed, the evidence presented by Plaintiffs clearly demonstrates that the Child Exclusion does not further the interests Defendants assert. While defendants assert that the Child Exclusion promotes work, and thus self-sufficiency, among welfare recipients, they provide no evidence that this is the actual effect of the Child Exclusion. Even assuming that the promotion of work among welfare recipients is a compelling state interest, this Court made clear in State v. Saunders that when a proffered interest will not actually be served by a provision

that infringes privacy rights, the provision is unconstitutional, regardless of how compelling the proffered interest is. 75 N.J. at 218; see also Miller, 83 N.J. at 415 (holding that the State must not only articulate a legitimate interest in support of a provision that impinges on constitutional rights, but must also demonstrate how the particular restriction relates to that interest). In Sanchez, the Appellate Division held that while the State's goal of promoting work among welfare recipients may be "salutary," there is no rational relationship between that goal and the provision of reduced welfare benefits to a particular class of recipients—in that case, welfare recipients who exercised their constitutionally protected right to travel. Sanchez, 314 N.J. Super. at 26-28. Similarly, the effect of the Child Exclusion is to provide a lower level of benefits to a class of welfare recipients exercising a constitutionally protected right—the right to procreate—and just as in Sanchez, there is no evident relationship between this penalizing of the exercise of a fundamental right and the promotion of work.

The Rutgers study demonstrates that the Child Exclusion has not led to an increase in employment or earnings among welfare recipients and in fact seems to be associated with a slight decrease in earnings from employment. Indeed, Defendants' own expert conceded that the Child Exclusion has played no role in bringing about whatever positive effects in recipients' employment and earnings that have flowed from welfare reform in

New Jersey. Pa856-57, Pa860. Characterizing the Child Exclusion as primarily "symbolic," he attributed declines in the welfare rolls and increased work participation among recipients to other WFNJ policies, such as time limits on benefits. Id.¹⁸

In proffering the goal of encouraging work and self-sufficiency, Defendants refuse to acknowledge that in the instant lawsuit, Plaintiffs are challenging only a single provision of WFNJ—the Child Exclusion—not New Jersey's implementation of welfare reform as a whole. Thus, in demonstrating the requisite close nexus between a government interest and the challenged provision, Defendants must show what interests are furthered by the Child Exclusion specifically, not those furthered by WFNJ as a whole. Defendants' articulation of

¹⁸ It is self-evident that increases in self-sufficiency under WFNJ are far more likely to flow from provisions that directly address employment, such as work requirements, than they are to flow from the Child Exclusion. This is especially so given that the effect of the Child Exclusion is first felt at that time when a recipient is arguably least able to work—immediately after she gives birth to a child. As Plaintiffs' expert, Dr. Wendy Chavkin, explained, welfare recipients will not be able to work immediately after giving birth due to their health and the nature of their jobs. Pa713-15. In fact, elsewhere in its design of WFNJ, the Legislature recognized that employment might not be desirable or possible in the months immediately after childbirth, exempting WFNJ recipients from work requirements for three months after the birth of a child. N.J.S.A. 44:10-62(e). The likelihood that the Child Exclusion will encourage work is further reduced by the high cost and low availability of child care for infants. Pa581-82. Again, in its design of WFNJ the Legislature has elsewhere recognized that in the absence of adequate child care, employment is not possible or desirable for welfare recipients, and accordingly exempted recipients who are unable to obtain such child care from work requirements. N.J.S.A. 44:10-62(d).

the interests served by work participation requirements, time limits, child support enforcement requirements—as well as the arguable success of these provisions in furthering such interests—is simply irrelevant to the question presented by Plaintiffs’ challenge: what governmental interest is actually furthered by the Child Exclusion?

A review of the record demonstrates that the only interest actually served by the Child Exclusion is an impermissible one: by burdening poor women’s right of procreation, the State has sought to pressure poor women not to have children and to coerce poor pregnant women to seek abortions rather than carry their pregnancies to term. Decisions of this Court and other New Jersey courts clearly demonstrate that such interests in influencing the intimate choices protected by the right to privacy do not justify infringement of fundamental rights under the New Jersey Constitution. Planned Parenthood, 165 N.J. at 613; Right to Choose, 91 N.J. at 307 n.5; Saunders, 75 N.J. at 219; Sanchez, 314 N.J. Super. at 22-23.

According to its sponsor, the intent behind the Child Exclusion is to influence poor women’s childbearing decisions by discouraging them from giving birth. Such a goal is simply impermissible under the New Jersey Constitution, which mandates state neutrality in women’s decisions whether to have a child. Planned Parenthood, 165 N.J. at 613; Right to Choose, 91 N.J. at 307 n.5. If the right to privacy protects against anything, it protects against burdensome legislation motivated by nothing

more than a bare desire to influence those most intimate choices central to personhood that are protected by Article I, paragraph 1 of the New Jersey Constitution. See Saunders, 75 N.J. at 219 ("If we were to hold that the State could attempt to coerce people into marriage, we would undermine the very independent choice which lies at the core of the right of privacy. . . . [W]e can only reiterate that decisions such as whether to marry are of a highly personal nature; they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern."); see also Sanchez, 314 N.J. Super. at 21 (holding that law impinges on fundamental right when impeding fundamental right is its primary objective).

To the extent the State's assertion that having a child while on welfare is "irresponsible and not socially desirable," may be interpreted as articulating a belief that poor women's choices to give birth are immoral in their irresponsibility and thus ought to be discouraged, it has voiced a second goal insufficient to justify infringing the right to privacy under the New Jersey Constitution—namely, that of regulating personal morality. Saunders, 75 N.J. at 219. Legislation that merely serves as "official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs . . . is not an appropriate exercise of the police power." Id.

The Child Exclusion is made even more offensive to the New Jersey Constitution by its success in furthering these impermissible goals. Not only was the Child Exclusion intended

to coerce poor women's procreative decisions, it has actually done so, see supra, at 15, while failing to actually further any state interest that might justify an infringement on constitutionally protected rights. A provision that so burdens the exercise of the right of procreation for women on welfare, without furthering any real and significant state interest, runs afoul of the privacy and equal protection guarantees of Article I, paragraph 1.

In summary, application of the balancing test set out in Planned Parenthood and Right to Choose demonstrates that the Child Exclusion coerces and penalizes welfare-reliant women's exercise of their most fundamental right to procreative choice and in doing so fails to further any legitimate state interest whatsoever. It thus violates the rights to privacy and equal protection guaranteed by the New Jersey Constitution.

II. THE CHILD EXCLUSION UNCONSTITUTIONALLY PUNISHES CHILDREN FOR THE BEHAVIOR OF THEIR PARENTS.

The Child Exclusion creates two classes of children and discriminates against one of them by denying them subsistence benefits based on their status at birth. This is done in an attempt to control the behavior of the parents of the affected children. New Jersey courts have repeatedly held that the state constitution prohibits such discrimination against children based on the circumstances of their birth, over which they have no control. This Court has specifically disapproved such discrimination against children when aimed at influencing their

parents' sexual conduct and moral choices. Schmoll v. Creecy, 54 N.J. 194, 202 (1969); see also State v. Clark, 58 N.J. 72, 88 (1971). By denying benefits to children born while their parents—or someone in their family—receive welfare, the Child Exclusion creates just such impermissible discrimination. The Appellate Division and the trial court failed to address Plaintiffs' claim that the Child Exclusion unconstitutionally discriminates against poor children based on their status at birth in violation of the New Jersey constitutional guarantee of equal protection.

New Jersey courts have refused to tolerate laws that discriminate against children due to their birth status or their parents' conduct. This Court has thus refused to allow birth status discrimination against out-of-wedlock children who wished to recover for the wrongful death of their father. See Schmoll, 54 N.J. 202; see also In re Adoption of V.B., 152 N.J. Super. 546, 549, 552 (Prob. Div. 1977); E. v. T., 124 N.J. Super. 535, 543 (Ch. Div. 1973) (holding birth status discrimination is unconstitutional).

These holdings naturally follow from this Court's conclusion in State v. Clark, that it was impermissible for the State to "use the innocent children as pawns in a design to punish the parents, the mother particularly, for past moral aberrations and to discourage other women of like weaknesses and inclinations from further pregnancies." 58 N.J. at 88. In that case, the Court reversed convictions obtained when an applicant

for public assistance was forced to seek child support from the father of her children in order to receive benefits. Because that filing was an admission that the mother had violated New Jersey's fornication statute, she was prosecuted and convicted. Clark stands for the proposition that the State cannot punish children for the actions of their parents in giving birth to them, particularly when critical subsistence benefits are at stake. As the Court in Clark stated:

If the threat of criminal prosecution results in the mother withholding her plea for welfare aid, who are the sufferers? Obviously the innocent children who are punished for the moral laxity of their parents. Thus society forces a continuance of their impoverishment upon them in order to make possible imposition of criminal sanctions upon their erring mothers and fathers. Such a course in effect denies to needy illegitimate children the benefit which it grants to needy legitimate children. It makes the test for aid the morality of the parents and, consequently, subverts the true statutory test, i.e., the impoverished condition of all children without regard to status. The law should not allow constitutional rights of the parents to be sacrificed as a condition to gaining public assistance for the children . . . Society's interests in its future citizens are not protected when children grow up in need.

58 N.J. at 87-88.

In New Jersey, most birth status cases have involved discrimination against children born out-of-wedlock. But the rationale underlying rejection of less favorable treatment for non-marital as opposed to marital children is the same when

considering discrimination against children born into welfare families. In both cases, children are discriminated against because of their particular status at birth. In both cases, the State punishes the child for the purpose of controlling the parents' behavior. Whether the discrimination arises from the parents' marital status or their welfare status, birth status, the condition of a child at birth, is an immutable characteristic (like race or gender) over which the child herself has no control, and punishing children for the conduct of their parents in conceiving and giving birth to them is illogical, unjust, and unconstitutional. See Karen A. Hauser, Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change, 65 U. Cin. L. Rev. 891, 901-02 (1997). On the basis of these principles, this Court has required a clear state interest to be demonstrated when statutes discriminate against children based on their status at birth. In both Schmoll and Clark, this Court found the State's interest in insuring moral behavior of parents insufficient to support the punishment of a child for her parent's conduct. Similarly, in the instant case the State has failed to demonstrate an interest sufficient to support the irrational punishment of certain poor children through denial of benefits based on the conduct of their mothers in conceiving and bearing them during a period of welfare receipt.

Discrimination on the basis of birth status is recognized as impermissible not only by New Jersey courts, but also by

federal courts and by international covenants.¹⁹ The United States Supreme Court has consistently prohibited discrimination against children on the basis of their status at birth. Beginning with Levy v. Louisiana, 391 U.S. 68 (1968), a case striking a statute prohibiting out-of-wedlock children from recovering wrongful death damages for the death of their mother, the United States Supreme Court has repeatedly struck down statutes that penalize children due to their birth status. See Trimble v. Gordon, 430 U.S. 762 (1977) (striking statute prohibiting non-marital children from inheriting from fathers); Gomez v. Perez, 409 U.S. 535 (1973) (striking bar to non-marital child's right to paternal support); Weber v. Aetna Cas. and Ins. Co., 406 U.S. 164 (1973) (right of non-marital children to workman's compensation award can't be denied); Glonn v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968) (striking bar to mother recovering for death of out-of-wedlock child). As

¹⁹ See International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art. 2 ("The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . birth or other status."); International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory . . . the rights recognized in the present Covenant without distinction of any kind, such as . . . birth or other status."); Convention on the Rights of the Child, adopted Nov. 20, 1989, art. 2 ("States Parties shall respect and ensure the rights set forth . . . without discrimination of any kind, irrespective of the child's . . . birth or other status.").

Justice Powell wrote in Weber v. Aetna Casualty and Insurance Company:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons. . . . But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as unjust - way of deterring the parent. . . . [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where. . . the classification is justified by no legitimate state interest, compelling or otherwise.

406 U.S. at 175-76 (cited with approval in New Jersey Welfare Rights Org., 411 U.S. at 620).

Significantly, in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973), the United States Supreme Court held that New Jersey could not constitutionally restrict welfare payments to families in which the parents were ceremonially married. The Supreme Court squarely rejected the rationale the lower court had accepted—to “preserve and strengthen family life”—finding that this did not justify discrimination against needy children on the basis of the situation of their birth over which they had no control. New Jersey Welfare Rights Org., 411 U.S. at 619. The Court thus struck down the distinction, reasoning that “there can be no doubt that the benefits extended

under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate." Id. at 621. In the same way, there can be no doubt that basic subsistence benefits are as indispensable to children born into families receiving welfare as they are to equally poor children born when their families were not receiving welfare, and thus that New Jersey's Child Exclusion violates the State's equal protection clause.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge this Court to reverse the decision of the Appellate Division in this case, declare the Child Exclusion unconstitutional and enjoin its enforcement.

By: _____
Lawrence S. Lustberg, Esq.
Jennifer Ching, Esq.
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, NJ 07102-5497
(973) 596-4500

Edward Barocas, Esq.
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
35 Halsey Street, Suite 4-B
Newark, NJ 07102
(973) 642-2086

Jennifer Brown, Esq,
Sherry Leiwant, Esq.
Spenta Cama, Esq.
NOW LEGAL DEFENSE AND
EDUCATION FUND
395 Hudson St., 5th Fl.
New York, NY 10014
(212) 925-6635

Lenora Lapidus, Esq.
Emily Martin, Esq.
WOMEN'S RIGHTS PROJECT
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10014
(212) 549-2668

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