
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,

SUPREME COURT OF NEW JERSEY

Docket No. _____
App. Div. Docket No.: A-2787-00T5

Plaintiffs - Petitioners,

v.

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

Defendants - Respondents.

**PETITION FOR CERTIFICATION
AND APPENDIX**

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STATEMENT OF THE CASE

This lawsuit challenges N.J.S.A. 44:10-61 (the "Child Exclusion") which denies cash benefits to poor children conceived and born while their families were receiving public assistance, for the purpose and with the effect of influencing poor women's decisions whether and when to have a child. The suffering experienced by excluded children and their families as a result of this denial was intended to and does coerce poor women's child-bearing decisions in violation of New Jersey's constitutional guarantees of equal protection and privacy.

The Child Exclusion denies subsistence benefits to poor children based solely on the timing of their conception and birth. Generally, the amount a family receives under New Jersey's cash assistance program, Work First New Jersey ("WFNJ"), is determined according to its size: for each child, the family's grant increases by an incremental amount. N.J.A.C. 10:90-3.3, Schedule II. The Child Exclusion is the exception to this scheme. The law provides: "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). See also N.J.A.C. 10:90-2.18.

Without question, this denial of benefits imposes an extreme hardship on the excluded child and his or her family.¹ Depriving

¹ While excluded children are still eligible for Food Stamps and Medicaid, they are deprived of the cash assistance needed to purchase necessities such as clothing, diapers, and over the counter medications, and to obtain housing and transportation.

a child of monetary support when he or she is born into an already struggling welfare-dependent family is likely to cause harm to the child and increase the hardship for the rest of the family, leading to hunger and undernutrition, homelessness or substandard housing, danger to health and safety, utility shut-offs, inadequate clothing, and lack of necessary medical care. Pa 580;² Pa 600-09; Pa 624-25; Pa 627; Pa 637-41.

The Child Exclusion not only harms excluded children and their families, it also coerces poor women's child-bearing decisions, as was its specific intent. The provision's legislative sponsor, in introducing the bill, stated that it "is intended to discourage AFDC recipients from having additional children during the period of their welfare dependence." Pa 872. In accordance with requirements in place at the time of the Child Exclusion's enactment, the State contracted with Rutgers University School of Social Work to evaluate the provision's effects, particularly its impact on welfare recipients' child-bearing decisions. Pa 135-44. See also Pa 188. The Rutgers study found that the denial of benefits to children born to families on welfare resulted in an increased number of welfare-dependent women obtaining abortions, despite a general decline in the abortion rate in the general population. Pa 759-60.

Furthermore, Food Stamps frequently run out before the end of each month, requiring families to use their cash assistance to purchase additional needed food.

² Citations to "Pa" refer to the Plaintiffs' appendix on appeal to the Appellate Division.

Named Plaintiffs exemplify the extreme hardship and influence on child-bearing decisions caused by the Child Exclusion. The excluded children of the named Plaintiffs were the result of unplanned pregnancies, and the Plaintiff mothers considered and rejected the option of abortion, although one Plaintiff chose to terminate subsequent pregnancies rather than have additional children excluded from subsistence benefits. See Pa 552; Pa 556-57. Now these families have inadequate housing and run out of money and Food Stamps before the end of the month. Pa539-42; Pa 544-45; Pa 550; Pa 552; Pa 574-75.

Plaintiffs 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 because it violates the New Jersey Constitution. Pa 1-22. Plaintiffs alleged that the Child Exclusion: (1) violates state constitutional guarantees of the right to privacy, by seeking to coerce procreative decisions and by penalizing Plaintiffs for exercising their fundamental right to bear children; and (2) violates state constitutional guarantees of equal protection by treating otherwise similarly situated children differently based on their mothers' reproductive choices and the timing of a child's conception and birth. Pa 19.

The Parties cross-moved for Summary Judgment, Pa 67-69, Pa 70-72, and on December 18, 2000, the trial court entered an Order in favor of Defendants. Pa 79-81. Plaintiffs appealed, Pa 82-88, arguing that the trial court failed to assess the constitutionality of the Child Exclusion under the standard

mandated by Planned Parenthood v. Farmer, 165 N.J. 609 (2000), Right to Choose v. Byrne, 91 N.J. 287 (1982), and Sanchez v. New Jersey Department of Human Services, 314 N.J. Super. 11 (App. Div. 1998). Specifically, Plaintiffs argued that this Court's privacy and equal protection jurisprudence mandates the application of heightened scrutiny to the State's attempts to influence poor women's reproductive decisions by depriving innocent children of the benefits so vital to their health and development. Plaintiffs also argued that the Child Exclusion violates the New Jersey State Constitution by discriminating against children based on their birth status.

In rejecting Plaintiffs' arguments and affirming the decision of the trial court, the Appellate Division held that, because the Child Exclusion does not substantially infringe on a woman's right to bear a child, rational basis scrutiny is the appropriate standard of review. Sca 23. Under that standard, the court found the provision reasonably related to legitimate governmental objectives. Sca 24-25. Neither the Appellate Division nor the trial court addressed whether the provision wrongly punishes children based on their birth status. Plaintiffs filed their Notice of Petition for Certification on April 19, 2002. Sca 28.

QUESTIONS PRESENTED

1. Whether the Appellate Division applied an incorrect legal standard and therefore erred in concluding that the Child Exclusion does not violate the New Jersey Constitution's

guarantees of privacy and equal protection, and in so doing ignored this Court's precedent in Right to Choose, 91 N.J. 287, and Planned Parenthood, 165 N.J. 609.

2. Whether the Appellate Division erred in failing to address whether the Child Exclusion violates the equal protection guarantees of the New Jersey Constitution by discriminating against innocent children based on their birth status.

WHY CERTIFICATION SHOULD BE GRANTED

Rule 2:12-4 of the New Jersey Rules of Court provides that certification will be granted:

if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court ... if the decision under review is in conflict with any other decision of the same or a higher court. . . and in other matters if the interest of justice requires.

Here, the decision of the Appellate Division eviscerates the state constitutional privacy and equal protection guarantees mandated by this Court with respect to a woman's fundamental right to make procreative decisions. Thus, this case presents questions of significant public importance and directly conflicts with this Court's jurisprudence, namely Right to Choose, 91 N.J. 287, and Planned Parenthood, 165 N.J. 609.

First, the Appellate Division ignored this Court's long-standing precedent that the New Jersey Constitution provides special protections for privacy - greater than those provided by the Federal Constitution - requiring courts to balance the nature of the affected right against the government interests actually served by the law. Under this analysis, a law is subject to

heightened scrutiny even if it has only an indirect impact on a women's right to choose. Planned Parenthood, 165 N.J. at 613; Right to Choose, 91 N.J. at 306. Second, the Appellate Division failed to recognize that, under New Jersey's equal protection jurisprudence, withholding government benefits based on the exercise of a fundamental right unconstitutionally penalizes the exercise of that right. See Right to Choose, 91 N.J. at 306-10; Sanchez, 314 N.J. Super. at 30. By applying a rational basis test to the Child Exclusion and failing to require the State to provide compelling, legitimate justification for its infringement on a woman's right to choose, the Appellate Division's decision conflicts with this Court's clearly articulated privacy and equal protection jurisprudence. See Planned Parenthood, 165 N.J. at 642-43; Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 270 (1998). Finally, the Appellate Division failed even to address Plaintiffs' meritorious argument that the Child Exclusion violates equal protection guarantees by discriminating against children based upon their birth status.

ARGUMENT

I. THE APPELLATE DIVISION DISREGARDED THIS COURT'S CONSTITUTIONAL JURISPRUDENCE IN CONCLUDING THAT THE CHILD EXCLUSION DOES NOT VIOLATE RIGHTS OF PRIVACY OR EQUAL PROTECTION.

This Court has long and proudly held that the State 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 (1977); Taxpayers Ass'n v. Weymouth Township, 80 N.J. 6, 43 (1976), appeal dis'd and cert. denied sub. nom., Feldman v. Weymouth Township, 430 U.S. 977 (1977); Southern Burlington County NAACP v. Mt. Laurel Tp., 67 N.J. 151, 174-75 (1975). Indeed, this Court has emphasized 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. Hempele, 120 N.J. 182, 196 (1990). Here, the Appellate Division failed to fulfill this duty in ascertaining the validity of the Child Exclusion, depriving New Jersey citizens of the special protections that their Constitution provides.

Article I, paragraph 1 of the New Jersey Constitution of 1947 offers broad protections for individuals' rights of privacy and equal protection. Indeed, the state constitutional right to reproductive choice, which includes the right to procreate, is broader than is the correlate federal constitutional right. In Planned Parenthood, for example, this Court invalidated a statute that required minors to notify a parent before obtaining an abortion, notwithstanding several United States Supreme Court decisions upholding similar laws under the Federal Constitution. Planned Parenthood, 165 N.J. at 620. Similarly, in Right to Choose, this Court invalidated a statute that denied Medicaid coverage for medically necessary abortions while providing

funding for medically necessary prenatal and childbirth services, explicitly rejecting United States Supreme Court cases decided under the Federal Constitution. Right to Choose, 91 N.J. at 308.

Consistent with its rigorous protection of reproductive choice, this Court has required "the most exacting scrutiny" of classifications that burden this fundamental right. Planned Parenthood, 165 N.J. at 632. Specifically, the Court has rejected the inflexible tiered analytical framework developed by the United States Supreme Court for assessing privacy claims. See id. at 630. Instead, "[i]n cases involving a classification that 'indirectly infringes on a fundamental right,'" Right to Choose, 91 N.J. at 310, this Court has adopted "a test that weigh[s] the governmental interest in the statutory classification against the interests of the affected class." Id.

Accordingly, where, as in this case, the fundamental right of privacy is indirectly infringed, and this infringement potentially violates state constitutional guarantees of equal protection, New Jersey courts apply a balancing test, weighing the right at stake against the governmental interest served by the statutory classification. Id. This balancing test first examines "the nature of the affected right," Planned Parenthood, 165 N.J. at 631; next considers "the extent of the governmental restriction on that fundamental right," id. at 632; and finally assesses the asserted State interests and whether they are in fact "furthered by the statute." Id. at 642. In this case, the Appellate Division failed to perform this balancing test, and incorrectly applied rational basis review, refused to recognize

that withholding government benefits penalizes the exercise of constitutional rights, and failed to require the State to demonstrate that the Child Exclusion furthers a compelling interest. The court's critical errors endanger fundamental privacy rights and should not be permitted to stand.

A. The Appellate Division Applied the Incorrect Analysis to its Review of the Child Exclusion.

The Appellate Division reviewed the Child Exclusion according to two incorrect standards: rational basis scrutiny and the undue burden test. Although the court recited the applicable standard of review under Article I, paragraph 1 of the New Jersey Constitution, it applied the more relaxed federal standard of rational basis review to Plaintiffs' state constitutional claims. It then applied a test explicitly rejected by this Court - the undue burden test - to determine whether the Child Exclusion infringes on a women's right to choose.

First, after concluding that the Child Exclusion had only an indirect effect on a woman's right to procreate, the court found that rational basis was the appropriate level of scrutiny, based upon federal equal protection analysis. Sca 19 (citing Greenberg v. Kimmelman, 99 N.J. 552, 565 (1985)(setting out federal equal protection analysis)). See also Sca 19-21 (citing Bowen v. Gilliard, 483 U.S. 587 (1987); Califano v. Jobst, 434 U.S. 47 (1977); and Rinier v. State, 273 N.J. Super. 135 (App. Div. 1994)(all applying federal constitutional analysis)). Based on these federal constitutional precedents, the Appellate Division

found the Child Exclusion valid because it "serves a legitimate primary purpose and has a rational basis." Sca 26.

In stark contrast to the analysis used under the Federal Constitution, however, this Court has "rejected a rigid equal protection test based either on mere rationality or strict scrutiny" for state constitutional violations involving fundamental rights, including indirect infringement on these rights. Right to Choose, 91 N.J. at 309. Instead, courts analyzing claims brought under Article I, paragraph 1 of the New Jersey Constitution employ a balancing test, that "weigh[s] the governmental interest in the classification against the interests of the affected class." Planned Parenthood, 165 N.J. at 630. The Appellate Division, however, improperly rejected this balancing test and used rational basis review, ignoring this Court's specific holding that "[t]his balancing test is particularly appropriate when, as here, the statutory classification *indirectly infringes on a fundamental right.*" Right to Choose, 91 N.J. at 310 (emphasis added); accord Planned Parenthood, 165 N.J. at 630. Indeed, the Court has expressly warned that under the State Constitution it is improper to "use[] the degree of 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 (criticizing dissent for concluding abortion restriction constitutional because the "essence of the right to choose" was not "substantially interfered with").

Thus, under this Court's test, when the government withholds a benefit to which a poor woman is otherwise entitled, solely because she has exercised a constitutional right, the resulting burden on her exercise of fundamental rights must be balanced by a sufficiently compelling governmental interest to pass muster under the State Constitution. Right to Choose, 91 N.J. at 306-310. Contrary to the Appellate Division's holding, the fact that the restriction of fundamental rights is accomplished indirectly, through State funding choices, rather than by direct State fiat, does not alter the analysis or permit the application of rational basis review. Id. at 308.

Thus, in Right to Choose, the State could neither forbid poor pregnant women from having medically necessary abortions, nor coerce them into giving up their right to obtain abortions by providing funds only for medically necessary childbirth services. Id. at 308. In precisely the same way, the State should not be permitted to coerce poor pregnant women into having abortions by denying benefits to any child born while their mothers received welfare benefits. Instead, the State must remain neutral with regard to women's procreative choices: it may not use its money to coerce women to avoid pregnancy or to have abortions any more than it may use its money to coerce women to carry their pregnancies to term. The Appellate Division, in applying the incorrect standard of review to Plaintiffs' state constitutional claims, simply ignored this well-established state constitutional doctrine and therefore erred in permitting the State, through its funding decisions, to infringe poor women's right to procreate.

The Appellate Division similarly erred in applying federal precedent to the state constitutional questions at hand by suggesting that the Child Exclusion was *per se* constitutional because it was not a "substantial" burden on the exercise of the right to procreate. Sca at 2, 19, 23. This analysis also ignores the appropriate state constitutional test in favor of the federal "undue burden" test expressly rejected by this Court for analysis of incursions upon privacy rights under the New Jersey Constitution.

Specifically, the undue burden standard articulated by the United States Supreme Court in Planned Parenthood v. Casey, 505 U.S. 833 (1992), is, for state constitutional purposes, supplanted by New Jersey's balancing test. See Planned Parenthood, 165 N.J. at 617-19, 627, 630, 642-43 (applying balancing test and reversing trial court decision that relied on decisions tracking federal "undue burden" case law).³ Thus, courts considering whether a law has infringed a fundamental state constitutional right may not judge the constitutionality of that right based on whether the right is "substantially" or "unduly" burdened. See id. at 631 n.6. Rather, the balancing test set forth by this Court and discussed, supra, is the appropriate means of analysis.

Given the Appellate Division's incorrect application of two federal constitutional analyses in its assessment of the Child

³ In addition, the undue burden standard is inapplicable here because the incursion upon Plaintiffs' fundamental right to procreate is not motivated by any state interest in potential fetal life, as it was in Casey, 505 U.S. at 873-76.

Exclusion's constitutionality, it is critical that the Court accept certification of this case both to perform the correct analysis with respect to this provision and to clarify the correct standard of review under New Jersey's Constitution.

B. The Appellate Division Failed To Recognize That Withholding Government Benefits Based On The Exercise Of A Constitutional Right Unconstitutionally Penalizes The Exercise Of That Right.

Compounding its errors in applying the incorrect standard of review to its analysis of the Child Exclusion, the Appellate Division ignored New Jersey jurisprudence regarding what, in fact, amounts to an infringement of a fundamental right. This error, too, threatens to undermine the protections the New Jersey Constitution extends to a woman's right to privacy.

"Providing a reduced level of assistance, rather than no assistance at all, is no less a penalty or burden" on the exercise of a fundamental right than is totally denying assistance based on the exercise of that right. Sanchez, 314 N.J. Super. at 24. Such a penalty is impermissible under the New Jersey Constitution. Id. at 30. Like the reduction of benefits for new state residents in Sanchez, while the Child Exclusion "does not entirely deprive plaintiff[s] of the basic necessities of life," the lower grant paid to families to whom the Child Exclusion is applied "leaves[s] plaintiff[s] with significantly less funds than other poor parents receive for subsistence for a family of [the same size]." Id. at 23. The reduction thus penalizes poor mothers' decisions to bear children. The Appellate Division ignored this penalty when it upheld the

constitutionality of the Child Exclusion on the ground that it "does not directly effect [sic] a woman's fundamental right to become pregnant." Sca at 25. As such, the Appellate Division decision in this case directly conflicts with Sanchez.

Moreover, the Child Exclusion does, as a factual matter, penalize poor women and their families for women's exercise of their fundamental right to procreate. As the Appellate Division admitted, "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." Sca at 26. Indeed, Plaintiffs have presented extensive, unrefuted evidence of the very real hardship that ensues from denial of benefits to children born while their families are receiving welfare. Pa 579-80; Pa 600-09; Pa 624-25; Pa 627; Pa 653-56; Pa 637-41 (denial of even an apparently small additional welfare benefit increases family's risk of homelessness, malnutrition, hunger, impaired physical and cognitive development of children, inadequate clothing, and inadequate medical care). See Planned Parenthood, 165 N.J. at 632-36 (relying heavily on plaintiffs' unrefuted evidence that parental notification statute in fact imposed a heavy burden on minor's right to procreative liberty). The Appellate Division erred by failing to give due weight to this evidence.

C. The Appellate Division Erred in Failing to Require the State to Prove that the Child Exclusion Furthers a Compelling State Interest and Failed to Acknowledge the True, Impermissible Purpose Undergirding the Provision.

Applying rational basis analysis, the Appellate Division erred in two ways regarding its examination of the State's

interest in the Child Exclusion. First, the Appellate Division failed to require the State to put forth a compelling governmental interest in the Child Exclusion. Second, and as a result, the court failed to recognize the true, impermissible purpose of influencing women's child-bearing decisions upon which the provision rests.

Because the Child Exclusion infringes on women's fundamental right to privacy, it must be declared unconstitutional unless the State demonstrates that the infringement is necessary to further a compelling state interest. See, e.g., Right to Choose, 91 N.J. at 308-09; Saunders, 75 N.J. at 217. The State bears the "burden to present and confirm [some] compelling legitimate governmental interests and a reasonable factual basis for the [legislation]." Bell v. Township of Stafford, 110 N.J. 384, 396 (1988). The Appellate Division failed to hold the State to its burden.

In assessing the purposes of the statute asserted by the State, the Appellate Division found that "the constitutionality of the Child Exclusion does not rest upon its effectiveness so long as it serves a legitimate primary purpose and has a rational basis." Sca 26. As discussed, supra, however, under the New Jersey Constitution, when a fundamental right is at issue, there must be a "real and substantial relationship between the classification and the governmental purpose which it purportedly serves." Taxpayers Ass'n, 80 N.J. at 43. In considering whether the State has met its burden, courts must look beyond the mere assertion of "findings" by the Legislature, Washington Nat'l Insur. Co. v. Bd. of Review, 1 N.J. 545, 554 (1949), and must

"carefully examine the factual bases" for the claim that the legislation "in fact serve[s] those specific ends." State v. Miller, 83 N.J. 402, 414-15 (1980); see also Saunders, 75 N.J. at 218-19. As articulated in Planned Parenthood, this Court requires a clear nexus between the asserted interests of the State and the statutory provision at issue. Id. at 638-43. In Planned Parenthood, this Court struck down the parental notification law after examining the record and finding that the State had failed to demonstrate a "substantial need" for the law, or that the asserted interest was even capable of realization through law enforcement. 165 N.J. at 642-43.

The Appellate Division here failed to conduct such a searching inquiry into the purposes asserted by the State, but, rather, accepted them at face value. The State asserted general interests in the New Jersey welfare program as a whole (diminishing dependency, promoting individual responsibility and strengthening the family unit) without reference to the specific provision at issue, the Child Exclusion. If the court had made such a searching inquiry, it would have been clear that the Child Exclusion does *not* further these purposes. While the larger WFNJ program may have been designed to further the purposes ascribed to the Child Exclusion, the record offers no support for the conclusion that the Child Exclusion -- the only WFNJ provision challenged in the instant lawsuit -- either was designed to, or in fact did, further them. See Sca at 10 (noting researchers' findings that the Child Exclusion was not effective in reducing welfare reciprocity or moving welfare recipients into employment).

In fact, the Appellate Division recognized that Plaintiffs offered substantial evidence showing that, as a result of the Child Exclusion, "women do not move off welfare more quickly, stay off welfare longer, or earn more money when they leave welfare; nor have the regulations improved poor women's employment prospects." Sca 26. Yet, again, the court failed to appropriately weigh this evidence.

In Sanchez, 314 N.J. Super. 11, the only other major challenge to a provision of WFNJ, justifications similar to those proffered here were rejected because they had nothing to do with the statutory provision at issue. Id. at 27-30. There, the State attempted to justify the restriction on welfare benefits at issue by asserting that it encouraged new residents to find work. Id. at 29. The court rejected this justification, finding that there was not even a "rational basis for assuming that reduced benefits will encourage new residents to work." Id. (emphasis added); see also Saunders, 75 N.J. at 217-19.

Here, moreover, the undisputed evidence of record makes clear that the only purpose that the Child Exclusion was designed to serve and has served is the constitutionally impermissible one of influencing poor women's reproductive choices. In introducing the Child Exclusion bill, its sponsor stated that it "is intended to discourage AFDC recipients from having additional children during the period of welfare dependence." Pa 872. The State's initial request seeking a federal waiver permitting it to apply the provision stated that its purpose was to "encourage" women to "be responsible" in their "decision to have another child while

receiving welfare;" described the choice to have a child while on welfare as "irresponsible and not socially desirable;" and required an evaluation of whether the provision achieved its goal of deterring births among welfare recipients. Pa 104-06; Pa 126. The research plan submitted for the required evaluation stated 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." Pa 159. Indeed, the State's own expert admitted that the provision was a "symbolic" statement to discourage women on welfare from having more children. Pa 856-57; Pa 860.

Clearly, this is impermissible. As this Court has held, the choice whether to bear a child is an "intensely personal decision . . . that should be made by a woman in consultation with trusted advisors, such as her doctor, but without undue government interference." Right to Choose, 91 N.J. at 306. This Court has made clear that the State must maintain "neutrality" and act "impartially" with regard to a woman's reproductive decisions. Planned Parenthood, 165 N.J. at 613; Right to Choose, 91 N.J. at 307 n.5. It "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. See also Right to Choose, 91 N.J. at 307 n.5. ("In that constitutionally protected zone, the State may be an umpire, but not a contestant.") When the State seeks to influence this decision it acts unconstitutionally unless the interest that it actually furthers outweighs the effect on the woman's fundamental

constitutional right. Id. at 306-310; see also Sanchez, 314 N.J. Super. at 22 (“A state law impinges on the right to travel, and therefore implicates the compelling-state-interest test, when it actually deters interstate travel, when impeding travel is its primary objective, or when it penalizes the exercise of that right.”). Here, the State simply has no compelling or legitimate interest in the Child Exclusion.

II. THE APPELLATE DIVISION FAILED TO CONSIDER PLAINTIFFS’ ARGUMENT THAT THE CHILD EXCLUSION VIOLATES EQUAL PROTECTION BY DISCRIMINATING AGAINST CHILDREN BASED ON BIRTH STATUS.

Plaintiffs presented arguments based on decisions of this Court that the Child Exclusion impermissibly discriminates against children on the basis of their birth status. See Plaintiffs’ Brief in Support of Appeal, at 59-64. The Appellate Division, however, failed to address this claim in its decision, as did the trial court. Plaintiffs urge this Court to grant certification to consider the argument that a statutory provision that denies cash benefits to children based on the timing of their birth discriminates on the basis of birth status in violation of New Jersey constitutional guarantees articulated in Schmoll v. Creecy, 54 N.J. 194, 202 (1969), rev’d on other grounds, LaFage v. Jani, 164 N.J. 412 (2001), and State v. Clark, 58 N.J. 72, 88 (1971).

New Jersey courts have repeatedly held that the State Constitution prohibits discrimination against children in an attempt to control their parents’ moral choices. Schmoll, 54 N.J. 194; Clark, 58 N.J. 72. The Child Exclusion discriminates against a child whose mother made the choice to give birth while

receiving welfare. Although most birth status cases have involved discrimination against children born out of wedlock, the reasoning behind the protection against discrimination based on birth status is the same whether the discrimination is aimed at the marital status or poverty of the parents: birth status is an immutable characteristic (like race or gender) over which the child has no control, and punishing children for the conduct of their parents in conceiving and giving birth to them is illogical, unjust, and unconstitutional.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Petition for Certification.

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