IN THE NEBRASKA SUPREME COURT

CASE NO. S-01-001265

TYLESHA L. MASON AND FERNANDEZ MASON, BY AND THROUGH LISA CANNON, AS THEIR NEXT FRIEND; HANNAHA WHITE, BY AND THROUGH) CRYSTAL D. WHITE, AS HER NEXT FRIEND; SIMEYON EVANS, BY AND THROUGH ANDREA EVANS, AS HIS NEXT FRIEND; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND RON ROSS, DIRECTOR,

Defendants-Appellants.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION WOMEN'S RIGHTS PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEBRASKA IN SUPPORT OF PLAINTIFFS-APPELLEES

Appeal from the District Court of Lancaster County, Honorable Paul D. Merritt

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

At issue in this case is the eligibility of appellee children and the class they represent for welfare benefits under the Aid to Dependent Children (ADC) program. In order to move people from welfare to work, in the 1990s the Legislature passed the Welfare Reform Act, which included a variety of work incentives and requirements. One such purported incentive is a "Family Cap." Under this policy, impoverished children are denied the $71 per month cash payment that would normally accrue to them (via their caretakers), if they are born more than ten months after their caretakers applied for ADC benefits. That incentive makes no sense for the class in this case. All of the parents of the appellee class are exempt from the work requirements that usually attend ADC benefits, in most cases because they are considered disabled under the federal Social Security program.

The trial court found that the Nebraska Department of Health and Human Services was not authorized to apply the Family Cap to the appellee class. The court held that such an application was "not consistent with the intent of the legislature and purpose of the Welfare Reform Act" because the Family Cap was designed to give participants an incentive to find paid employment, and this justification could not reasonably be applied to those deemed unable to work. (Order at 10.)

SUMMARY OF ARGUMENT

This Court should affirm the trial court's decision because, as the appellees' brief shows, it properly interprets the text and legislative intent of the relevant statute, Neb. Rev. Stat. §§ 68-1708 to -1734. Furthermore, any other interpretation would raise serious questions under the Nebraska Constitution, which must be avoided if possible as a matter of state law.

If construed as the appellants urge, the Family Cap statute would violate the Nebraska Constitution's guarantee of equal protection of the laws. Nebraska's Equal Protection Clause is

relatively recent and has not yet been authoritatively interpreted. However, the clause unquestionably requires greater protection for individual rights than does the federal Constitution. In the appropriate case, this Court must undertake the important task of establishing the precise standards to be applied in interpreting the clause. But under any permissible standard, application of the statute to appellees' families would violate the state Equal Protection Clause because it discriminates against the children of disabled ADC recipients based solely on the circumstances of their birth.

In order to avoid addressing the constitutional infirmities otherwise presented, this Court should affirm the trial court's decision on statutory grounds. However, if the Court finds that the statute permits the appellants' actions, the Court must find the statute violates the state Equal Protection Clause.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE TRIAL COURT'S STATUTORY INTERPRETATION BECAUSE NEBRASKA COURTS SHOULD CONSTRUE STATUTES SO AS TO AVOID GRAVE AND DOUBTFUL CONSTITUTIONAL QUESTIONS.

Amici support the trial court's statutory interpretation for the reasons stated by that court and for the reasons stated in appellees' brief. One further factor supports that interpretation. A fundamental principle of statutory interpretation in Nebraska is that courts should interpret statutes so as to avoid raising serious constitutional questions. "Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted." Doak v. Milbauer, 216 Neb. 331, 335 (1984); see also Ehlers v. Perry, 242 Neb. 208 (1993); State ex rel. Johnson v. Marsh, 149 Neb. 1 (1947). As discussed below, the appellants' interpretation of the statute would likely violate the state Equal Protection Clause. To avoid these questions, this Court should affirm the trial court's conclusion that the Family Cap statute

does not apply to families headed by a disabled parent.

II. THE NEBRASKA EQUAL PROTECTION CLAUSE REQUIRES GREATER PROTECTION FOR INDIVIDUAL RIGHTS THAN PROVIDED UNDER THE FEDERAL CONSTITUTION, PARTICULARLY IN THE CIRCUMSTANCES OF THIS CASE.

The Nebraska Equal Protection Clause provides: "No person shall . . . be denied equal protection of the laws." Neb. Const. art. I, § 3. It was passed in 1998 with the approval of an overwhelming majority of the electorate. Nebraska Blue Book, 2000-2001 Edition 272. The Clause has yet to be decisively construed by this Court. See, e.g., State v. Reeves, 258 Neb. 511 (2000) (declining to specifically address the interpretation of the Clause).

The Equal Protection Clause of the federal Constitution, U.S. Const. Amend. XIV, requires only rational-basis review of most "social" or "economic" legislation. See Dandridge v. Williams, 397 U.S. 471, 486 (1970). This rational-basis review adopted by the U.S. Supreme Court applies whenever a legislative classification does not disadvantage a suspect class or impinge upon a fundamental right. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). Under rational-basis review, the inquiry is "whether the challenged state action rationally furthers a legitimate state purpose or interest." Id. at 55.

The ballot and legislative history of the Nebraska Equal Protection Clause, Nebraska's previous constitutional jurisprudence, the unique demands placed on the courts by the unicameral system, and elementary logic indicate that the state equal protection guarantee requires more than the rational-basis review of legislative acts prescribed by the federal Constitution and that it was intended to provide greater protection than previously existed under either the state or federal Constitution.

A. The Court Has Authority to Interpret the State Equal Protection Clause Independently.

This Court has recognized its authority to develop independent interpretations of state

constitutional provisions, even where the provisions in question closely resemble federal constitutional provisions. See, e.g., State v. LeGrand, 249 Neb. 1, 8 (1995) ("states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal constitution"); Jaksha v. State, 241 Neb. 106, 113 (1992) ("the guarantees contained in the federal Constitution . . . in no way preclude a holding that a similar provision in a state's constitution affords its citizens even greater protections").

Indeed, the primary duty of the Nebraska judiciary is to interpret state law. As "the final arbiter in matters of Nebraska law," this Court must "make its own analysis and reach its own conclusion" in matters of state law. Patteson v. Johnson, 219 Neb. 852, 861 (1985). As such, this Court has previously found in numerous instances that the state Constitution guarantees more protection than is provided by the federal Constitution. See State v. Lee, 251 Neb. 661, 666 (1997) (due process); Gaffney v. State Dep't of Education, 192 Neb. 358 (1974) (rejecting the U.S. Supreme Court's three-pronged Establishment Clause test); Boomer v. Olsen, 143 Neb. 579 (1943) (substantive due process); First Trust Co. v. Smith, 134 Neb. 84 (1938) (Contracts Clause). Even where the provision in question closely resembles that of the federal Constitution, this Court has resisted lock-step interpretation. See LeGrand, 249 Neb. 1; Lee, 251 Neb. 661. Such independent interpretation is frequently found in state supreme courts' analysis of state constitutions. See, e.g., State v. Johnson, 346 A.2d 66, 68 n.2 (N.J. 1975); Baker v. City of Fairbanks, 471 P.2d 386, 398 (Alaska 1970).

B. Principles of Federalism Require Independent State Constitutional Analysis and Support a Broad Interpretation of the State Equal Protection Clause.

The U.S. Constitution was adopted with the expectation that state and federal governments would act independently to protect citizens' rights, thereby providing a "double security" for the people. The Federalist No. 51 (Hamilton or Madison). As Justice Brennan recognized twenty-five years ago, "state courts no less than federal are and ought to be the

guardians of our liberties," and state constitutions are "a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).

Federal equal protection doctrine reflects the unique constraints placed upon federal courts. Rational-basis review was adopted in part to protect against undue federal interference into matters of important state and local concern, particularly in the area of economic and social policy. Dandridge, 397 U.S. at 486. This doctrine thus makes a poor model for state constitutional interpretation. As the U.S. Supreme Court has noted:

> every claim arising under the [federal] Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.

San Antonio Indep. Sch. Dist., 411 U.S. at 44; see also, e.g., State v. Saunders, 381 A.2d 333, 340-41 (N.J. 1977) (finding more exacting scrutiny required under the state Constitution, in part because of "the lack of constraints imposed by considerations of federalism"); Serrano v. Ivy Baker Priest, 557 P.2d 929, 952 (Cal. 1976) (finding that the California Equal Protection Clause requires more demanding review because "the constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in determining whether our own state's [laws] runs afoul of state constitutional provisions"). Importing federal equal protection doctrines to state constitutions therefore risks serious underenforcement of equal protection norms.

Indeed, state constitutions affirmatively address and respond to precisely those matters of social and economic policy that federal rational-basis review avoids. Every state constitution in the United States addresses social and economic concerns. Helen Hershkoff, Positive Rights and

State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1135 (1999). The Nebraska Constitution is, of course, no different. See, e.g., Neb. Const. art. VII, § 1 (providing for free education); Neb. Const. art. III, § 18 (guarding against exclusive privileges or immunities granted to corporations, associations, and individuals); Neb. Const. art. XII, § 8 (forbidding corporate ownership of farms). As was noted during the legislative debates on the new Equal Protection Clause, state and federal constitutions therefore require different kinds of scrutiny of legislative acts. See Senator Ernie Chambers, Transcript Prepared by the Clerk of the Legislature, 95th Leg., 1st Sess. 532, at 541-42 (Jan. 30, 1997) (noting that courts "cannot rely strictly on what is in the Federal Constitution, because that interpretation by the . . . Supreme Court is for a national constitution.").

The democratic concerns that animate federal rationality review also operate differently in the states. Rationality review plays a prudential role in the federal constitutional system, because judicial overreaching can only be corrected by an extremely arduous federal amendment process. U.S. Const. art. V. State courts are less vulnerable to the "countermajoritarian difficulty," because they have a closer relationship to the citizenry and because they interpret constitutions that are more easily revisable. Hershkoff, supra, at 1162-63; see also Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992) ("No court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state's own high court. In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling."); Judith S. Kaye, Contributions of State Constitutional Law to the Third Century of American Federalism, 13 Vt. L. Rev. 49, 56 (1988) ("[S]tate courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessment they may make more readily redressable."). This is particularly true of Nebraska's

Constitution, which has been amended more than 200 times since its inception (including at least fifty-two times in the last twenty years). Nebraska Blue Book, 2000-2001 Edition 257-275.

C. The Nebraska Equal Protection Clause Provides Greater Protection to Individual Rights Than the Federal Constitution.

In interpreting a provision of the state Constitution's Bill of Rights, Nebraska courts will consider "its history, the development of the evil sought to be restrained by its provisions, the established laws, usages and customs of the country at the time of its adoption, and the scope of the remedy its terms imply." First Trust Co., 134 Neb. at 104-05 (citations omitted). The courts will also attempt to discern and give voice to the wishes of the electorate. See State ex rel. Spire v. Public Employees Retirement Bd., 226 Neb. 176 (1987); Cunningham v. Exon, 207 Neb. 513 (1980); Ramsey v. Gage County, 153 Neb. 24, 30 (1950). Finally, Nebraska courts commonly look to the jurisprudence of sister state courts when interpreting the state Constitution. See, e.g., State v. LaChapelle, 234 Neb. 458 (1990); State v. Comeau, 233 Neb. 907 (1989). Significantly, "twenty-one out of the forty-eight states that guarantee equal protection in their state constitutions explicitly hold that their states' equal protection affords greater protections" than the federal Constitution. Randal S. Jeffrey, Equal Protection in State Courts: The New Economic Equality Rights, 17 Law & Ineq. J. 239, 254 (1999).

1. The History of the Nebraska Equal Protection Clause Indicates that It Provides Greater Protection to Individual Rights Than the Federal Constitution.

Although the federal and state Equal Protection Clauses superficially resemble one another, it would confound law and logic to interpret them as having the same substantive content. The history of the two clauses is dramatically different. Because "[t]he language of the constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption," State ex rel. Caldwell v. Peterson, 153 Neb. 402 (1950), the state Equal Protection Clause demands its own interpretive framework. It is inconceivable that

the words in question meant the same thing to Nebraskans in 1998 as they did to Americans in 1865 (none of whom were citizens of the state of Nebraska).

Not surprisingly, the legislative and ballot history of the Equal Protection Clause indicates that the legislators and people of Nebraska believed it to provide more protection than the federal clause. Members of the Constitutional Commission who drafted the Amendment saw the new clause as an opportunity for Nebraska to "forge ahead beyond the federal government" and guarantee that "our rights as citizens [are] strengthened." Senator Witek, Transcript Prepared by the Clerk of the Legislature, 95th Leg., 1st Sess. 532, at 538 (Jan. 30, 1997) (quoting statements by members of the Constitutional Commission). Furthermore, the Legislature embraced the Commission's expansive purpose. Senator Chambers testified that the purpose of state constitutional provisions was to restrain the Legislature in a way that the federal Constitution could not. Id. at 541-42. Senator Doug Kristensen, co-sponsor of the Amendment, sounded a similar note: "A theme that you will see over and over again will be that the state constitution will have more meaning and will be looked to for greater rights and for greater interpretation of issues as we go forward in the upcoming years." Transcript of Hearing, Committee on Judiciary, 95th Leg., 1st Sess. 88, at 3 (Jan. 22, 1997). Senator Witek also urged Senators to "be aware . . . that when you [add] this constitutional language to the state constitution . . . you will complicate the constitution and give people that extra opportunity . . . to use that equal protection clause." Transcript Prepared by the Clerk of the Legislature, 95th Leg., 1st Sess. 3609, at 3615 (Apr. 9, 1997).

Consequently, the Nebraska Equal Protection Clause should be interpreted as requiring greater judicial scrutiny than is guaranteed by federal constitutional law.

2. Special Legislation Clause Jurisprudence Demonstrates that the Nebraska Equal Protection Clause Requires More Than Federal Rational-Basis Review.

Prior to adoption of the state Equal Protection clause, the Nebraska courts held that the "Special Legislation Clause," Neb. Const. Art. III § 18, guaranteed equal protection of the laws and demanded more than rational-basis review of legislative acts. Haman v. Marsh, 237 Neb. 699, 713 (1991) ("The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test. Classifications must be based on some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."). According to this Court, the heightened standard supplements federal equal protection analysis and changes the plaintiffs' "burden of persuasion" as to the constitutionality of a legislative provision. Id.

Under Nebraska law, where an amendment modifies a previous constitutional provision, "the original provision actually remains a part of the Constitution for purposes of construction. It is therefore possible to consider the original section as well as the amendment to determine the intent of the people in adopting the amendment." Ramsey, 153 Neb. at 29; see also Jaksha, 241 Neb. at 110-11 (A [state] constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument."). In addition, established Nebraska precedent mandates that the courts construe no part of a new amendment as "meaningless or superfluous." Ramsey, 153 Neb. at 30. This principle of construction makes clear that the state Equal Protection Clause incorporates and expands protections previously guaranteed citizens by the Special Legislation Clause.

The intent of the Legislature and the electorate also demands such an interpretation. The purpose of the Constitutional Commission that proposed the new Amendment was to "enhance

the rights of individual citizens" under the state Constitution, with a particular emphasis on increasing the accountability of the Executive. Dick Herman, Transcript of Hearing, Committee on Judiciary, 95th Leg. 1st Sess. 88, at 6-7 (Jan. 22, 1997). Senators commented extensively upon equal protection problems that remained unsolved in Nebraska, supporting the need for a new, more vigorous Equal Protection Clause. See, e.g., Senator Chambers, Transcript Prepared by the Clerk of the Legislature, 95th Leg., 1st Sess. 532, at 545 (Jan. 30, 1997). Such statements indicate that those who drafted and voted for the Amendment thought that it would provide something that the state Constitution did not already provide. See, e.g., id. ("this is one more protection for me [a woman Senator], this is one more protection for my granddaughter"); Transcript Prepared by the Clerk of the Legislature, 95th Leg., 1st Sess. 3609, 3617 (Apr. 9, 1997) ("will somebody use [the Equal Protection Clause] in a lawsuit? I'm sure they will. . . . The issue for us to decide is, what should the framework be?).

The voters of Nebraska amended their Constitution because they meant to change it. It is implausible that seventy percent of the electorate went to the polls to vote for a constitutional amendment intended to do nothing. Additionally, anyone who encountered legislative or media discussion of the new Equal Protection Clause would have been aware that the amendment signaled a desire for expanded protections under the state Constitution. See, e.g., Ballot Issues, Omaha World-Herald, Oct. 25, 1998, at 1k (new amendment "could lead to a broader interpretation of the clause and result in more lawsuits"); 'Protection' Amendment is Unnecessary, (Editorial) Omaha World-Herald, Oct. 30, 1998 (the amendment "could be a means of stretching the law beyond its current limits"). Legislators' and voters' overwhelming approval of the amendment suggests that they approved of this expansive interpretation. See, e.g., Leslie Reed, Reeves Case Highlights Trend State Courts Granting Broader Rights Than Required Federally, Omaha World-Herald, Jan 17, 1999, at 1b (quoting Senator Chambers, as

saying, "[t]hose of us who take the Constitution seriously do not amend it for symbolic purposes," and State Attorney General Stenberg agreeing that when the "people amend the Constitution, the courts generally presume that they intend to change something.").

Thus, this Court must adopt an interpretation of the new Equal Protection Clause that both gives effect to Special Legislation Clause jurisprudence and avoids interpreting the new clause as merely redundant of the Special Legislation Clause. At the very least, the new Equal Protection Clause enshrines the Haman holding and makes clear that the Nebraska Constitution requires more than rational-basis review of legislative acts in the equal protection context. To avoid interpreting the new Equal Protection Clause as surplusage, however, the Court should further recognize that it provides even greater individual protection against imperfect legislative classifications than contemplated by Haman. Principles of Nebraska constitutional interpretation thus clearly dictate that the Equal Protection Clause guarantees more rigorous scrutiny of legislative classifications than federal rational-basis review.

3. Nebraska's Unique Legislative System Requires Rigorous Scrutiny of Legislative Acts, Particularly in the Equal Protection Context.

In our system of separated powers, judicial scrutiny acts to balance legislative power. Thus, more concentrated legislative power demands more stringent judicial review. Nebraska's unicameral system was instituted with an expectation that the judiciary would play an expansive role to compensate for the legislative check once provided by the other house of the Legislature. James R. Rogers, Judicial Review Standards in Unicameral Legislative Systems: A Positive Theoretic and Historical Analysis, 33 Creighton L. Rev. 65, 79-80 (1999). Unicameral legislatures operate under different institutional constraints than bicameral legislatures: they are at greater risk of factional legislation, and tend to distribute the costs and benefits of policies less equitably. Id. at 88-96. Because unicameral legislatures are more likely to pass suspect legislation than are bicameral legislatures, the Nebraska courts should apply more rigorous

review of legislative acts, particularly in the representation-reinforcing context of equal protection jurisprudence. Id. at 102.

4. The State Equal Protection Clause Requires Special Scrutiny of Laws that Discriminate Against Children Because of Birth Status.

As set out below, see infra Part III(B), the Family Cap, as interpreted by appellants, discriminates against children in the provision of necessary income supports based solely on the circumstances of their birth. Nebraska's history of protecting children from discrimination on the basis of birth status predates the new Equal Protection Clause. Specifically, Nebraska has affirmed its "paramount" interest in assuring that children receive proper care and support. State v. Duran, 204 Neb. 546, 554 (1979). Defending these interests, this Court has held that discrimination on the basis of birth status violates Article I, §§ 1 and 25 of the Nebraska Constitution. Findaya W. v. A-T.E.A.M. Co., 249 Neb. 838, 845 (1996) (striking down a statute that made it more difficult for illegitimate children to receive workman's compensation benefits); see also Shoecraft v. Catholic Soc. Servs. Bureau, Inc., 222 Neb. 574, 577 (1986) ("That the state has a compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care, is accepted."). By grounding the right to be free from birth status discrimination in § 25 of the Nebraska Constitution (which protects against discrimination between citizens "in respect to the acquisition, ... enjoyment or descent of property"), courts have implied that they will be particularly vigilant where such discrimination threatens the economic interests of children. Findaya W., 249 Neb. 838. Such discrimination against illegitimate children is deemed wrong because it denies children equal treatment and threatens their well-being based on the circumstances of their birth, over which they have no control. The Family Cap applied to appellees functions in the same manner. See generally Hicklin v. Hicklin, 244 Neb. 895, 899 (1994) (noting that "the sins of the parents shall not be visited upon their children").

As one of the "usages and customs of the country at the time of its adoption," this tradition of protecting children against discrimination must inform the interpretation of the Equal Protection Clause. First Trust Co., 134 Neb. at 104-05. Thus, it is clear that the Equal Protection Clause requires rigorous examination of any law that discriminates by birth status.

III. AS APPLIED TO THE APPELLEES, THE FAMILY CAP VIOLATES THE NEBRASKA EQUAL PROTECTION CLAUSE.

A. The Court Need Not Decide What Standard of Review To Apply Under the Nebraska Equal Protection Clause.

In an appropriate case, this Court will be required to establish standards to govern analyses under the state equal protection clause. In doing so, the Court can receive assistance from other states that have established more protective standards than federal rational basis review. See, e.g., Planned Parenthood v. Farmer, 762 A.2d 620, 630 (N.J. 2000) (describing state constitution equal protection balancing test, under which "the governmental interest in the statutory classification [is weighed] against the interests of the affected class"); Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976) (describing "rational basis" review under state constitution as more demanding than federal rational basis review and noting under state standard "[j]udicial tolerance of overinclusive and underinclusive classifications is notably reduced"). However, this process will be difficult and have far reaching implications. Because the Family Cap as interpreted by appellants violates the Nebraska constitution under any reasonable standard, and because the Court can avoid the need to determine the precise standard applicable by affirming the trial court's interpretation of the statute, the Court need not engage in that process in this case.

B. Under Any Available Standard, the Statute as Interpreted by Appellants Violates the State Equal Protection Clause.

The Family Cap, applied to appellees, discriminates against children based on the circumstances of their birth. A child born to a disabled parent in a family receiving ADC is

ineligible for benefits. In contrast, similarly-situated children in equally needy families of the same size will receive benefits as long as they were born while their parents were employed or otherwise ineligible for ADC. In addition, children who are ineligible for benefits because of the Family Cap can become eligible if their parents leave welfare for a period of six months or more. (See Appellees' Br., at 25-26.) Thus, when a child is born to a nondisabled parent receiving ADC and is excluded from benefits, the family will leave welfare when the parent gains sufficient earnings from employment; thereafter, if the family returns to welfare, the child previously excluded from the family's ADC grant will be eligible for benefits. In contrast, a child born to a similarly needy disabled parent receiving ADC benefits is in effect excluded from benefits for life, since her parent is unable to work and thus the family will never earn sufficient wages to leave the ADC rolls. As a result, a child whose parent cannot obtain employment, for reasons of disability, will never be able to receive the ADC benefits available to other children in similarly needy families.

In other words, virtually any parent except parents of the appellee class (parents who are receiving benefits and cannot work) has a method by which he or she can obtain benefits for a child born after the Family Cap's implementation. The parents of the appellee class cannot, and thus the appellee class is permanently excluded from benefits receipt. The sole basis for this distinction is the legislature's desire to create incentives for work, a basis which is irrational in the context of parents who cannot work. For this reason, the statute as interpreted by appellants violates the state Equal Protection Clause.

In Dandridge v. Williams, the U.S. Supreme Court applied rational-basis review to a welfare policy that was similar but not identical to the provision challenged in this case. The Court found a state policy of limiting welfare grants to a specified maximum amount regardless of family size or need did not violate the federal Equal Protection Clause. 397 U.S. at 486.

Dandridge is distinguishable, as the policy examined in that case did not differentiate between children in identically needy families of identical size based solely on the circumstances of their birth. One family of four was treated just like every other family of four. Far more importantly, the Dandridge standard, simple rational-basis review with minimal examination of the fit between the legal classification and the governmental purpose, is inapplicable under the Nebraska Equal Protection Clause, which demands more rigorous review of legislative classifications, particularly when they discriminate on the basis of birth status, as set out above.

The Family Cap, as interpreted by appellants, denies certain children of disabled parents ADC benefits in pursuit of no governmental purpose solely on the basis of the circumstances of their birth. The Nebraska Constitution demands some more substantial rationale for excluding needy children from eligibility for necessary income supports.

IV. CONCLUSION

The application of the Family Cap to children whose parents are deemed unable to secure paid employment would violate Nebraska's Equal Protection Clause. The only interpretation of the statute that does not raise serious constitutional questions is the one adopted by the District Court, i.e., that the Family Cap does not apply to this group of children. This Court should therefore affirm the decision below.

Date: August 5, 2002

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

TYLESHA L. MASON AND FERNANDEZ) MASON, BY AND THROUGH LISA) CANNON, AS THEIR NEXT FRIEND;) HANNAHA WHITE, BY AND THROUGH) CRYSTAL D. WHITE, AS HER NEXT) FRIEND; SIMEYON EVANS, BY AND) THROUGH ANDREA EVANS, AS HIS) NEXT FRIEND; AND ON BEHALF OF) ALL OTHERS SIMILARLY SITUATED,)) Plaintiffs-Appellees,)) v.)) STATE OF NEBRASKA, NEBRASKA) DEPARTMENT OF HEALTH AND) HUMAN SERVICES, AND RON ROSS) DIRECTOR,)) Defendants-Appellants.)	Case Number S-01-001265 CERTIFICATE OF SERVICE

I hereby certify I served a copy of the brief of *amici curiae* ACLU Women's Rights Project and ACLU Nebraska Foundation upon all parties of record by placing same in the U.S. Mail, postage prepaid, addressed to Plaintiffs-Appellees' counsel Becky Gould and D. Milo Mumgaard, 941 O Street, Suite 105, Lincoln, Nebraska, 68508, and Defendant-Appellants' counsel Assistant Attorney General Royce Harper, 2115 State Capitol Building, 1445 K Street, Lincoln, Nebraska, 68509, and Michael Rumbaugh, P.O. Box 95026, Lincoln, Nebraska, 68509-5026, on this 6th day of August, 2002.

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