

IN THE  
**Supreme Court of New Jersey**

**No. 072804**

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**NEW JERSEY DIVISION OF YOUTH AND  
FAMILY SERVICES,**

*Plaintiff-Respondent,*

v.

**Y.N.,**

*Defendant-Appellant.*

**IN THE MATTER OF P.A.C., a minor.**

:  
: **CIVIL ACTION**  
:  
: ON CERTIFICATION TO THE APPELLATE  
: DIVISION, SUPERIOR COURT,  
: DOCKET No. A-5880-11T2  
:  
: *Sat Below:* HON. RONALD B. GRAVES,  
: J.A.D.; HON. MARIANNE ESPINOSA, J.A.D.;  
: HON. MICHAEL A. GUADAGNO, J.S.C.  
:  
: ON APPEAL FROM THE SUPERIOR COURT,  
: CHANCERY DIVISION, FAMILY PART, ESSEX  
: COUNTY,  
: DOCKET No. FN-07-297-11.  
:  
: *Sat Below:* STEPHEN J. BERNSTEIN, J.S.C.  
:

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**BRIEF OF AMICI CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY and the  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION**

**EDWARD BAROCAS**  
**JEANNE LoCICERO**  
**ALEXANDER SHALOM**  
American Civil Liberties Union of New  
Jersey Foundation  
Post Office Box 32159  
89 Market St., 7<sup>th</sup> Floor  
Newark, New Jersey 07102  
973-854-1717

**RONALD K. CHEN** (NJ Lawyer ID No. 027191983)  
Rutgers Constitutional Litigation Clinic  
Center for Law & Justice  
123 Washington St.  
Newark, NJ 07102  
(973) 353-5378

*Attorney for Amicus Curiae American Civil Liberties  
Union of New Jersey*

**ALEXA KOLBI-MOLINAS**  
*(pro hac vice motion pending)*  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2633

*Of Counsel and On the Brief.*

January 2, 2014.

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## **PRELIMINARY STATEMENT**

Amici Curiae American Civil Liberties Union of New Jersey and American Civil Liberties Foundation (hereafter referred to collectively as the "ACLU") respectfully submits this brief in support of Appellant Y.N. in the above captioned action.

Amicus ACLU fully joins in and adopts the brief submitted by Amicus Curiae Statewide Parent Advocacy Network, Inc. ("SPAN"), submitted on December 26, 2013. Amicus ACLU particularly emphasizes the arguments raised in Parts I.A. and I.B. of SPAN's Amicus Brief, which argues that the Appellate Division's rigid per se rule – which finds abuse or neglect any time a pregnant woman's medical decisions cause her newborn harm, even if the harm was a known side-effect of a treatment designed to prevent even greater injury to the woman or her newborn – is inconsistent with legislative intent both as a matter of the plain text of Title 9 and accepted notions of statutory construction.

Amicus ACLU also stresses the importance of the argument raised in Part II of SPAN's Amicus Brief, which explains that the Appellate Division's decision, if not reversed, will dissuade pregnant women who seek appropriate prenatal treatment. The breadth of the Appellate Division's ruling that abuse or neglect is found when *any* harm to the child results, even if

unavoidably, from a physician prescribed course of medical treatment will likely have unintended consequences that may actually negatively impact the welfare of newborn children.

In the interests of brevity, ACLU will not repeat the arguments described above that are ably presented in the SPAN Amicus Brief. ACLU therefore submits this brief limited to further discussion of the doctrine of constitutional avoidance (SPAN Amicus Brief Part I.C.), and in particular how serious due process and equal protection issues would be raised, particularly under Article 1, paragraph 1 of the New Jersey Constitution, if Title 9 were interpreted with the breadth and rigidity that Appellate Division would impose upon it.

#### **STATEMENT OF PROCEDURAL HISTORY**

Amicus ACLU adopts the Statement of Procedural History contained in the Supplemental Brief of Appellant Y.N. dated January 6, 2013, which Amicus ACLU has had the advantage of reviewing in draft.

#### **STATEMENT OF FACTS**

Since Amicus ACLU does not have access to the confidential record in this case, it relies primarily on the statement of facts contained in the Supplemental Brief on Behalf of Defendant-Appellant Y.N. dated January 6, 2013, which Amicus ACLU has had the advantage of reviewing in draft.

## ARGUMENT

### I. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE ABUSE AND NEGLECT STATUTE SHOULD BE CONSTRUED TO AVOID THE SERIOUS CONSTITUTIONAL DEFECTS CREATED BY THE APPELLATE DIVISION'S INTERPRETATION.

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At the outset, it is essential to recapitulate the stark and inflexible nature of the Appellate Division's interpretation of the abuse and neglect statute, N.J.S.A. § 9:6-8.21. In the Appellate Division's view, the sole fact of relevance was that Y.N.'s "use of methadone was the direct cause of Paul's severe withdrawal symptoms." Division of Youth and Family Services v. Y.N., 431 N.J. Super. 74, 83 (App. Div. 2013). The fact that Y.N. was using methadone legally pursuant to physician prescribed treatment program is irrelevant, according to the court below. "Where there is evidence of actual impairment, it is immaterial whether the drugs taken were from a legal or illicit source." Id. at 82. Similarly irrelevant was Y.N.'s testimony that her physician advised her that she risked miscarriage or harm to the fetus if she abruptly withdrew from Percocet, leaving methadone as the only safe course of withdrawal treatment for her and for her baby. "The fact that defendant obtained the methadone from a legal source does not preclude our consideration of the harm it caused to the newborn. An inquiry under N.J.S.A.9:6-8.21 must focus on the harm to the

child, rather than on the intent of the caregiver." 431 N.J. Super. at 81. The Appellate Division's reasoning therefore precludes consideration of countervailing considerations, such as the health of the mother, or the alternative consequences to the child, and rejects any sort of balancing analysis or consideration of circumstances that could counter what essentially amounts to an irrebuttable presumption of abuse or neglect stemming solely from the finding that the child experienced Neonatal Abstinence Syndrome at birth.

Simply as a matter of statutory interpretation, this relentless and remorseless interpretation of Title 9 is too extreme to be countenanced. Under this reasoning, any pregnant woman with any underlying health condition – even one caused by the pregnancy itself – could be precluded from undergoing safe, legal medical treatment simply because such treatment *could* cause harm, even if only temporary, to the newborn child. Indeed, rather than risk an abuse or neglect adjudication with its permanent legal consequences, a woman might even be tempted to terminate a pregnancy (see, N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1 (2013) (abuse and neglect statute applies to children not fetuses and is limited to condition of a child after birth)), even if she would otherwise not do so, rather than undergo an otherwise indicated medical treatment.



The Appellate Division's unwillingness even to inquire into countervailing circumstances that would justify the mother's decision to engage in a professionally supervised and approved course of medical treatment not only contradicts the terms of the statute, but it raises serious constitutional questions under the guarantees of due process and equal protection provided in the United States and New Jersey Constitutions.

This Court need not reach those constitutional issues, however, if it engages in sensible interpretation of the relevant statutes. It is axiomatic that under the doctrine of constitutional avoidance, "a challenged statute will be construed to avoid constitutional defects if the statute is 'reasonably susceptible' of such construction." Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 366 (2007) (quoting Board of Higher Educ. v. Board of Dirs. of Shelton College, 90 N.J. 470, 478 (1982)). "Even though a statute may be open to a construction which would render it unconstitutional or permit its unconstitutional application, it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." State v. Profaci, 56 N.J. 346, 350 (1970). Thus, this Court presumes that the Legislature "intended the [statute] to function in a constitutional manner," and

"articulation of the elements which furnish that essential intent need not appear in the statutory language." Id. at 349.

Even if the statute itself were ambiguous and capable of the interpretation placed upon it by the Appellate Division, the doctrine of constitutional avoidance advises against extending the words of the statute beyond all reasonable bounds.

**A. The Per Se Rule of Abuse or Neglect Adopted By The Appellate Division Would Raise Serious Procedural Due Process Concerns.**

"The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Moriarty v. Bradt, 177 N.J. 84, 101 (2003) (citations omitted). Accord, In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

This case implicates an attempt by the Division to interfere with the fundamental interest in family autonomy. As this Court recently noted, "If the Division can prove abuse or neglect, that finding has significant consequences." N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 25-26 (2013) (citations omitted). The court can enter a dispositional order that places the child in the custody of a relative or another suitable person for a substantial period of time. The Division

can also bring an action to terminate parental rights, which may rely on a Title 9 judgment. Id. There are also collateral consequences that flow from being placed on the child abuse central registry that could affect future employment. Although the Division has not yet taken action to remove P.A.C. from Y.N.'s care, the Appellate Division's decision, if allowed to stand, could have dramatic impact on future similar cases. An abuse or neglect finding therefore has the potential of depriving a parent of the ability to raise her child.

The Fourteenth Amendment's Due Process Clause thus has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," Washington v. Glucksberg, 521 U.S. 702, 720 (1997), including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66 (2000) (decisions regarding visitation of minor child are presumptively vested in fit parent); Stanley, 405 U.S. at 651 (interest of parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements).

This Court has made clear that before intruding into family autonomy, the state must satisfy "a threshold harm standard that

is a constitutional necessity because a parent's right to family privacy and autonomy are at issue." Moriarty v. Bradt, 177 N.J. 84, 118 (2003). As Moriarty explained:

A significant difference between the child's best interests test and the parental termination or 'exceptional circumstances' standard is that the former does not always require proof of harm to the child. In contrast, the latter always requires proof of serious physical or psychological harm or a substantial likelihood of such harm.

Id. at 113 (emphasis in original, quoting Watkins, 263 N.J. at 248). The polestar in any fact-finding hearing in which parental rights might be terminated is therefore whether the record sustains, by clear and convincing evidence, "proof of serious physical or psychological harm or a substantial likelihood of such harm."

These same stringent standards are relevant even when the parent's history deviates significantly from the norm of perfection, including parents who are being treated for substance addiction.

A child's "best interests" standard does not contain within it any idealized lifestyles. It can never mean the better interest of the child. It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills.

Watkins v. Nelson, 163 N.J. 235, 254-255 (2000) (internal quotation marks and citations omitted). "[W]hen the State seeks, by statute, to interfere with family and parental

autonomy, a fundamental right is at issue." Moriarty, 177 N.J. at 103. Such a statute "is subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling state interest." Id. (citing Glucksberg, 521 U.S. at 720-21). And it is axiomatic that "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." E.g., Bernal v. Fainter, 467 U.S. 216, 219 (1984); Fullilove v. Klutznick, 448 U.S. 448, 518 (1980) (government action satisfies strict scrutiny "only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available").

These substantive principles have an important procedural corollary that bears directly upon this case: before the State can interfere with family autonomy, it must meet its heavy evidentiary burden to establish the constitutionally mandated factual elements. And the person subject to the potential deprivation must have the opportunity to present available controverting evidence that negates the State's case. The Appellate Division's interpretation of Title 9, however, would essentially abrogate that critical procedural right by beginning and ending the relevant evidentiary inquiry with the existence of any injury to the child. It would render irrelevant evidence that would balance against the existence of such injury,

including the medical needs of the mother, and the alternative harm that might have befallen the fetus absent the methadone treatment, including the risk of miscarriage.

The State cannot avoid its constitutionally mandated burden of proof simply by redefining the factual inquiry in a way that makes any injury to the child that may result from medically prescribed treatment of the mother a "strict liability" offense that automatically results in a finding of abuse or neglect. At the least, under principles of procedural due process, Y.N. must be able to present countervailing evidence that such harm was outweighed by other factors. A construction of Title 9 that would empower the State to "stack the deck" in this way would therefore have serious constitutional flaws. The doctrine of constitutional avoidance therefore favors rejection of such an interpretation.

**B. The Categorical Approach of Finding Abuse and Neglect Caused by Professionally Prescribed Medical Treatment Violates Principles of Equal Protection and Fundamental Fairness.**

This case also implicates several substantive individual rights and interests that are constitutionally cognizable under both the United States and New Jersey Constitutions. First, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Largey v. Rothman, 110 N.J. 204, 207 (1988). "Anglo-American law starts

with the premise of thorough self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment.” Id. at 209. “The right of a person to control his own body is a basic societal concept, long recognized in the common law.” In re Conroy, 98 N.J. 321, 346 (1985).

In this case, Y.N.’s decision, in consultation with health care professionals, to undertake a course of medical treatment to address her substance addiction, was an exercise of her fundamental right to engage in self-determination. To the extent that the State now seeks to impose adverse consequences on the exercise of that fundamental right, it must justify that restriction pursuant to stringent constitutional norms.

Amicus ACLU in particular emphasizes this Court’s analytical framework under Article I, paragraph 1 of the New Jersey Constitution, which although roughly analogous to the Equal Protection Clause of the United States Constitution, has been found in many instances to be more protective of individual rights than its federal counterpart. Rejecting the tiered scrutiny analysis used in federal constitutional analysis, this Court instead uses a three-part balancing test, that provides a “more flexible analytical framework” than the federal standards, and evaluates each claim on a “continuum that reflects the

nature of the burdened right and the importance of the governmental restriction." Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003). In applying this test, therefore, the court considers: (1) the nature of the affected right, (2) the extent to which the governmental restriction intrudes upon it, and (3) the public need for the restriction. Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985).

This Court has also recognized that while a right may not be deemed fundamental, it still may be protected from state interference. The "label of a right as 'fundamental' takes on no talismanic significance." Abbott v. Burke, 100 N.J. 269, 295 (1985). Under New Jersey's constitutional scheme, "where an important personal right is affected by governmental action, the Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." Right to Choose v. Byrne, 91 N.J. 287, 309 (1982) (quoting Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 43 (1976)). "In striking the balance . . . the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right." George Harms Constr. Co. v. New Jersey Tpk. Auth., 137 N.J. 8, 29 (1994).

Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is



arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

Robinson v. Cahill, 62 N.J. 473, 492 (1973).

It cannot be gainsaid that the ability of a person to choose her own therapeutic treatment in consultation with appropriate medical professionals constitutes an "important personal right." The burden should therefore rightfully fall to the State to justify the need to impose an abuse or neglect finding upon a woman who is undergoing an authorized and medically indicated therapeutic procedure. While Amicus ACLU of course acknowledges that the protection of the welfare of a child is in general an important state interest, it is not enough under the New Jersey Constitution merely to incant the existence of that interest. The State must also demonstrate the fit between the ends and the means. "New Jersey has always required a real and substantial relationship between the classification and the governmental purpose which it purportedly serves." Taxpayers Ass'n of Weymouth Twp., 80 N.J. at 43-44.

A blanket bright line rule that any significant adverse effect to a child due to the mother engaging in a prescribed methadone treatment program in and of itself justifies an abuse or neglect finding, without any particularized consideration of the medical need for the treatment or other extenuating

circumstances, is too blunt a doctrinal instrument to pass muster under Article I, paragraph 1 of the New Jersey Constitution. Rather, individual fact finding would be required before the State can intrude on a pregnant woman's personal liberty.

As with the procedural due process claim, however, there is no indication that the Legislature ever intended Title 9 to be read in so draconian a fashion as to trigger a constitutional confrontation, and constitutional avoidance is particularly appropriate when a less extreme interpretation is consistent with manifest legislative intent.

#### **CONCLUSION**

For the reasons expressed herein, and in the brief submitted by Amicus Curiae Statewide Parent Advocacy Network, Amicus American Civil Liberties Union of New Jersey urge this Court to reverse to judgment of the Appellate Division below and remand this matter to the Family Part for further proceedings.

Respectfully submitted,



EDWARD BAROCAS  
JEANNE LOCICERO  
ALEXANDER SHALOM  
American Civil Liberties Union  
of New Jersey Foundation  
89 Market St.  
Newark, NJ 07102

RONALD K. CHEN  
NJ Lawyer ID No. 027191983  
Rutgers Constitutional Rights  
Clinic  
Center for Law & Justice  
123 Washington St.  
Newark, NJ 07102  
973-353-5551

ALEXA KOLBI-MOLINAS  
*(pro hac vice motion pending)*  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
(212) 549-2633

Attorney for Amicus Curiae  
American Civil Liberties Union  
of New Jersey

Of Counsel and On the Brief.

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