SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JANE HOPE, et al.,

Plaintiffs,

V.

CESAR A. PERALES, Commissioner, New York State Dept. of Social Services, and DAVID AXELROD, M.D Commissioner, New York State Dept. of Health,

Defendants.

IAS Part 15
Index No.
21073/90

BRIEF OF THE NEW YORK STATE CATHOLIC CONFERENCE AS AMICUS CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF THE AMICUS CURIAE

The New York State Catholic Conference has been organized by the Roman Catholic Bishops of the State of New York as the instrument by which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference advocates and promotes the social teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigration, civil rights, criminal justice and the economy. When permitted by court rules and practice, the Conference files briefs as amicus curiae in litigation of importance to the Catholic Church and the people of the State of New York. This is especially so in cases affecting the most fundamental of rights -- the right to life. The Conference filed written comments in support of the legislation enacted as the Prenatal Care Assistance Program, Chapter 584 of the Laws of 1989.

The Conference is deeply concerned that the invalidation of the Prenatal Care Assistance Program will hinder the effective provision of vital prenatal services for pregnant poor women as well as pre - and post-natal services to children in the State of New York. The eight New York State Roman Catholic Dioceses support and sponsor numerous health care facilities that function as providers within the Prenatal Care Assistance Program. The Conference -- as well as other organizations -- was an advocate in support of the adoption of the Prenatal Care Assistance Program which enables more women and their infants to be eligible for expanded services by adding labor, delivery and post-partum care.

Chapter 584 of the Laws of 1989 is consistent with the Conference's legislative objective to expand needed prenatal care services to pregnant women and their offspring. The instant case challenges the Prenatal Care Assistance Program for failing to include abortion among the prenatal care services provided under the program, an omission which is consistent with legislative intent, constitutional principle, and sound public policy. The effect of sustaining this challenge would be to strike down the Prenatal Care Assistance Program and all of the services that the program provides. For that reason, the Conference supports the defense of the Prenatal Care Assistance Program by the Commissioners of the Department of Social Services and the Department of Health before this Court.

STATEMENT OF THE CASE

This lawsuit is a class action challenge to the constitutionality of New York State's 1989 Prenatal Care Assistance Program (PCAP) as it has been applied since its effective date of January 1, 1990. Prenatal Care Act, ch. 584, 1989 N.Y. Laws 1224 (codified at N.Y. Pub. Health Law 2521, 2522, 2529 (McKinney Supp. 1990); N.Y. Soc. Serv. Law 365-a, 366, 368-a (McKinney Supp. 1990)). The 1989 PCAP funds comprehensive prenatal care for women with household incomes between 100% and 185% of the federal poverty level. Plaintiffs' claim relies exclusively on the New York State Constitution; no federal civil rights or federal constitutional claims are pled. The named defendants are two directors of state departments who administer the PCAP program -- Cesar A. Perales, the Commissioner of the New York State Department of Social Services, which oversees the program, and David Axelrod, Commissioner of the New York State Department of Health, which supervises issues pertaining to maternal and child health and which sets standards for Medicaid providers.

The plaintiffs purportedly consist of two women with income levels between 100% and 185% of the federal poverty level, who seek publicly funded abortions. "Jane Hope" is alleged to be a 19-year old, single woman who lives with her mother with an annual income of approximately $12,000 who discovered she was pregnant at 17-weeks gestation. At the filing of this suit she was 21 weeks into

her pregnancy.[1] She is also purportedly a carrier of sickle cell anemia and fears "that she might transmit the disease to the baby." She claims that a delay in having the abortion, and the lack of funds to pay for the abortion, has made the pregnancy "unendurable for her." P. Memo. at 13. "Jane Moe" is a single, non-pregnant, 28-year old mother of two children. However, she states that if she engages in sexual relations, she is at "high risk of repeated, unintended pregnancies because of her inability to use most forms of contraception." P. Memo. at 13. In 1989, "Jane Moe" purportedly bore twins because she not could afford an abortion. One died of trisomy 13 after five weeks of life, and she fears conceiving another child with the same anomaly. These women seek standing as representatives of a class of women who are "similarly situated." The plaintiffs also include physicians and organizations who are eager to perform publicly funded abortions. A Unitarian Universalist minister and a United Methodist minister who counsel women who seek such abortions are also plaintiffs. One of the plaintiff organizations, the New York State Public Health Association, was previously a strong supporter of the bill. Statement of Senator Michael J. Tully, Jr., Transcript of Senate Vote, at 5407.

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[1] Papers filed on behalf of the defendants state that "Ms. Hope was able to obtain an abortion and counsel advised that the provider will submit a claim to DSS for reimbursement. Under current law, that request will be denied. Nathan Aff. at 4." Defendants' Memorandum of Law In Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 15 (hereinafter D. Memo.).

Plaintiffs claim that PCAP is constitutionally invalid because it provides funds only for women, unborn children, and infants who seek prenatal care and provides no funds for abortions. Plaintiffs contend that the PCAP program is invalid under a potpourri of state constitutional provisions, including the due process clause (Article I, §6), the equal protection clause (Article I, §11), the free exercise of religion clause (Article I, §3), "aid, care and support of the needy" clause (Article XVII, §1) , and the public health clause (Article XVII, §3).

Plaintiffs seek to have publicly funded prenatal care services enjoined unless the Legislature includes in the PCAP program funding for abortions and abortion-related services for women in the same income class. Plaintiffs filed their complaint on September 21, 1990 and moved for a temporary restraining order (TRO). The TRO was denied on September 4, 1990. Plaintiffs have now moved for a preliminary injunction against the 1989 PCAP. On November 15, defendants filed a memorandum opposing plaintiffs' request for a preliminary injunction and a cross-motion for summary judgment upholding the constitutionality of the program.

SUMMARY OF ARGUMENT

Plaintiffs' preoccupation with abortion and its advocacy leads them to oppose an expansion of the state prenatal program targeting a critical public health concern -- advancing healthier babies and reducing infant mortality and low birth weight babies. New York has one of the worst infant health records in the country. In what all agree is a appropriate and laudable goal, the New York Legislature enacted the Prenatal Care Assistance Program to address the primary cause of poor maternal and fetal health, the lack of adequate prenatal care for the near poor. That the Legislature chose to extend this care -- that directly related to the delivery of healthy children -- to pregnant women at 100% to 185% of the poverty line does not render the program unconstitutional.

The Legislature is under no obligation to provide any assistance to this class of women. Choosing to exclude form the prenatal care program the public funding for abortion services is consistent with the narrow purpose of the legislation, which is to ensure that near poor women receive adequate prenatal care they may not otherwise be able to afford. Providing this assistance to a class of women not covered by any state provision and defining the scope of the benefit is within the Legislature's discretion. Plaintiffs requests that this court require that the Prenatal Care Assistance Program to be redrafted to include abortion services; a request the Legislature rejected.

The Legislature rejected plaintiffs' public policy arguments that abortion services be included in the prenatal program. These

arguments are no more persuasive when couched in constitutional terms. Article 17, §1, of the New York state Constitution states that the "aid, care and support" of the needy is of public concern and it imbues the Legislature with discretion and the power to provide for these persons. Fundamental and dispositive of plaintiffs' challenge is that (1) the Legislature may exercise this authority as it determines appropriate, and (2) the Legislature may classify persons as "needy" for some, but not all, types of public assistance. Plaintiffs wrongly assume that Article 17, §1, hamstrings the Legislature and removes any discretion the Legislature has in the manner in which certain persons will receive public assistance.

Plaintiffs' claim that Article 17, §3, stating that the protection and promotion of public health are matters of public concern, requires that PCAP include abortion funding likewise lacks merit. Publicly funded prenatal care to near poor women provides such benefits to at least 28,000 women and 40,000 children in New York state. The reduced incidence of low birth weight infant and maternal mortality and morbidity, associated with appropriate prenatal care evidence the substantial public health benefit PCAP provides.

Because the Prenatal Care Assistance Program does not burden any asserted abortion right, Plaintiffs' claims that Article I, §6 (equal protection clause); Article I, §11 (due process clause); and Article I, §2 (free exercise clause), are unavailing. New York has no affirmative obligation to provide assistance to persons above

the poverty line. That the Legislature chose to make an exception to the rule that the near poor must pay their own medical expenses in the limited context of prenatal care, places no obstacle in the path of any New York women who may desire an abortion. An abortion is readily available, and like all other medical services, a low income woman would qualify pursuant to the spend down provisions of the Medicaid program. Accordingly, PCAP causes no equal protection or due process violations. Likewise, that some women hold religious beliefs that counsel in favor of abortion in certain instances does not entitle such women to publicly funded abortions, nor does it require the invalidation of PCAP. Indeed, as defendants argue, such funding may run afoul of the constitutional prohibition on establishing a religion.

Plaintiffs' claims are uniformly without merit. The Prenatal Care Assistance Program provides a specific type of assistance -- prenatal care designed to promote the delivery of healthy babies -- to a class of near poor women who but for their pregnancy have no claim to any state assistance. The Legislature's decision to expand the scope of available assistance for a narrow purpose is constitutionally sound. Unmasked, Plaintiffs' assertions to the contrary are policy arguments, rejected by the Legislature, and short of constitutional significance.

ARGUMENT

POINT I

THE STATE'S 1989 PRENATAL CARE ASSISTANCE PROGRAM (PCAP) FOR MOTHERS WITH HOUSEHOLD INCOMES BETWEEN 100% AND 185% OF THE FEDERAL POVERTY LEVEL MEETS A COMPELLING NEED FOR MOTHERS AND THEIR CHILDREN.

The Governor of the State of New York, Mario Cuomo, in approving the Prenatal Care Assistance Program, made the points:

> Too many pregnant women in New York receive late or no prenatal care. This deficiency in the delivery of medical care has tragic consequences and huge societal costs. Women who receive late or no prenatal care are much more likely to give birth to infants who die before their first birthday, who suffer from birth defects, or who are otherwise disadvantaged due to the effects of low birth weight.
>
> This bill expands coverage under the Prenatal Care Assistance Program so that every pregnant woman with a family income less than 185% of the poverty level will have access to prenatal care, either through the traditional Medicaid program or through the Prenatal Care Assistance Program. Medical assistance will also be available for infants up to the infant's first birthday. Approximately 28,000 women and 40,000 infants, who would not otherwise receive appropriate medical care, now will have access to necessary care. This expansion will result in a significant lessening in the incidence of low birth weight, and will contribute to the improved health and well-being of the citizens of New York.

Governor Cuomo, Approval Memorandum, NYS Legislative Annual -- 1989, 258-59. In 1986, against New York State's worsening low birth weight rates, infant mortality and morbidity rates, in 1986, several private organizations, led by the March of Dimes and supported fully by the New York State Catholic Conference, launched a "Campaign for Healthier Babies." Declaring that "[a] healthy

baby is our most precious future resource," these groups united to support an expanded prenatal care program. The 1989 Prenatal Care Assistance Program at issue in this litigation is the result of this statewide campaign.[2] The PCAP program's goal is to reduce low birthweight and prematurity among newborns by promoting and funding prenatal care.

A. The Legislative History of the Prenatal Care Assistance Program (PCAP) Demonstrates the Legislature's Intent to Respond to the Critical Health Problems of Infant Mortality, Low Birthweight, and Prematurity in New York.

The PCAP program was created to address the specific, compelling needs of tens of thousands low income women and babies in New York -- the need of prenatal and post-natal care. The New York Legislature responded with the Prenatal Care Act of 1987. Ch. 822, 1987 N.Y. Laws 1542. The legislative history of the PCAP program documents the critical health problems which precipitated the program. The purpose of 1987 PCAP is clearly spelled out:

> The legislature finds that access to prenatal care is an important societal and health care goal. New York state's statistics on infant mortality and morbidity and the percentage of low income pregnant women receiving late or no prenatal care must be reduced. The legislature further finds that early and continuous prenatal care is critical to the reduction of infant mortality and low birth weight babies. Low birth weight babies are at greater risk for physical, neurological and development disabilities and often require intensive neonatal medical care and special education services throughout their lives. These outcomes can be reduced significantly through programs which provide prenatal care services. Programs should be available throughout the state so that low income pregnant women are provided

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[2] Greater New York March of Dimes, The Campaign for Healthier Babies: Fighting the Problem of Low Birthweight in New York City 1 (Nov. 1986).

> access to prenatal care despite financial, educational, geographic or programmatic barriers.
>
> Improved pregnancy outcomes cannot be achieved unless there is reasonable access to specialty maternity services and labor and delivery services for low income women. Hospitals that provide such services should be encouraged to participate in this program, so that the critical component of continuity of care is established and maintained.

Prenatal Care Act of 1987, Ch. 822, 1987 N.Y. Laws 1542. The 1987 PCAP was enacted unanimously by both houses of the Legislature -- by an Assembly vote of 143-0 and a Senate vote of 56-0.[3] The New York State Catholic Conference (Conference) strongly supported the state funding of prenatal care from 1986 forward. In a letter to the members of the Assembly, the Conference set forth the basis for its support.

> As an advocate and provider of prenatal services for poor women desiring to bring their babies to term, the New York State Catholic Conference supports this bill.
>
> There is a large population of young, low-income high-risk women who must forego necessary and consistent prenatal services because they are either unavailable or inaccessible. Research indicates that more than 25% of the diseases, defects and deaths which occur in the perinatal period could be prevented if treatment began early enough in pregnancy and continued throughout. Unfortunately, many poor women see an obstetrician for an initial visit at the onset of pregnancy and are not able to return until the child's birth.
>
> New York's high rates of low birthweight babies and infant mortality can be significantly decreased by

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[3] In a July 28, 1987 letter to Evan A. Davis, counsel to the Governor, Assembly Majority Leader James Tallon cited the problems that can result from lack of prenatal care, including maternal and infant death, low birth weight babies, prematurity and disabilities. "In the Morrisania section of the Bronx, the infant mortality rate is 21.4 deaths per thousand live births; in Central Harlem it is 27.6 and in the Bedford section of Brooklyn it is 25.3."

> enactment of this bill. Medical, nutritional, educational and social services would all be enhanced, assuring more positive pregnancy outcomes for New York women.

Letter form New York State Catholic Conference to New York State Assembly Members (June 30, 1987). The Conference subsequently indicated its support for the program to the Governor's Counsel and chairpersons of relevant committees in the Assembly. The Conference also provided leadership and strong support for the 1989 PCAP at issue in this case.

The 1989 PCAP legislation establishes that women who have "household income" levels between 100% and 185% of the federal poverty level are eligible for these publicly funded services.[4] The Department of Health estimates that "the population targeted will now include all pregnant women who are Medicaid eligible (at or below 185% of poverty) ... approximately 130,000." N.Y. State Dept. of Health, Prenatal Care Assistance Programs: 1989 Annual Report i (1990) (hereinafter 1989 DOH Annual Report).

Plaintiffs' challenge is misleading in its claim that PCAP "explicitly excludes abortion...." Plaintiffs' Memorandum of Law In Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 2 (hereinafter "P. Memo."). The program has no "abortion exclusion"; it does not address abortion or many other types of medical services. As defendants point out,

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[4] The Defendant State Commissioners of Health and of Social Services subsequently promulgated regulations to implement the program. N.Y.S. Register (Jan. 10, 1990); N.Y.S. Register (April 4, 1990); N.Y.S. Register (May 23, 1990) (adding to section 85.40 of Title 10 NYCRR).

PCAP does not fund "vasectomies for income eligible men or chemotherapy for income eligible women." D. Memo at 20. The program identifies those prenatal care services directly related to the program's goal of healthier children. N.Y. Pub. Health Law sec. 2522(1)(k). Specifically, PCAP defines the comprehensive prenatal care services available under the program to include:

* prenatal risk assessment,
* prenatal care visits,
* laboratory services,
* educating both parents about prenatal care,
* referral for pediatric care,
* referral for nutrition services,
* mental health and related social services,
* transportation services for prenatal care,
* labor and delivery services,
* post partum services, including family planning services,
* inpatient care,
* dental services,
* emergency room services,
* home care,
* pharmaceuticals.

In enacting the 1989 Prenatal Care Assistance Program, New York identified a specific, compelling health concern -- infant low birthweight and prematurity -- and responded to that concern by funding prenatal care for women in a particular income category, those between 100% and 185% of the poverty level. Contrary to Plaintiffs' assertions, PCAP is not a comprehensive medical program for pregnant women. Beyond the prenatal care provided under this program, New York has not chosen to fund any medical care for either men or women in this income category. That the New York legislature has chosen to address a serious, specific state health problem -- but not every state health problem -- through PCAP, does not render the program constitutionally deficient.

B. The State of New York Has a Compelling Interest in Addressing the Serious Problems of Low Birthweight and Infant Mortality That Exist in New York.

"Prevention of poor pregnancy outcomes is a major public health priority in New York State." 1989 DOH Annual Report, at i. Adequate prenatal care is necessary to accomplish this.

> Low birth weight is the major threat to the health and lives of babies born today. The incidence of low birthweight and infant mortality in New York State continues to be significantly higher than the Surgeon General's 1990 objectives: our state ranks 34th nationally in the percentage of births that are low birthweight.
>
> Low birthweight is largely preventable. Scientific studies have repeatedly shown that the incidence of low birthweight can be greatly reduced with quality prenatal care (at substantial cost savings). Unfortunately, many pregnant women in New York State lack these vital services: our state ranks 48th in the nation in providing prospective mothers with early and regular prenatal care.

Letter from March of Dimes to Governor Cuomo (July 8, 1989) (in support of Senate Bill 6397)(emphasis supplied).

In New York City, each year nearly 10,000 low birthweight babies are born. This represents 8.4 percent of all live births, a rate 25 percent higher than the national average. Greater New York March of Dimes, The Campaign for Healthier Babies: Fighting the Problem of Low Birthweight in New York City 1 (Nov. 1986). The medical cost of treating these infants in neonatal intensive care units is conservatively estimated at $190 million a year. Greater New York March of Dimes, The Campaign for Healthier Babies: Hospitals are Eliminating Financial Barriers to Prenatal Care for All New Yorkers 4 (March 1989). See also, Statement of Senator

Olga Mendez, Transcript of Senate Vote, at 5398-99 (low birth weight babies cost "at least $55,000, taxpayers' money to bring that baby up to par.").

The need for adequate, available prenatal care in New York State is acute. The importance of such care and its efficacy in improving pregnancy outcome is well-established. Prenatal care has been long recognized as critical to protecting maternal and fetal health.[5] Recent research demonstrating the risk of fetal harm posed by otherwise routine behavior, such as maternal smoking, tobacco chewing, alcohol use, carbon-monoxide exposure, coffee consumption, heavy work, and sexual intercourse highlights the vital importance of early prenatal care.[6] The scope of prenatal care recommended from early in pregnancy has expanded to encompass health assessment, medical services, social services, nutritional

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[5] Meyer Aff. ¶ 5. See generally, H. Speert, Obstetrics and Gynecology in America: A History, 142-143 (1980). Direct therapy for unborn infants appeared as far back as 1928, when transabdominal application of drugs for fetal asphyxia was introduced. Dudenhausen, Historical and ethical aspects of direct treatment of the fetus, 12 J. Perinatal Med. 17 (1984); D. Danforth & J. Scott, Obstetrics and Gynecology 5 (5th ed. 1986).

[6] Socol, et al., Maternal smoking causes fetal hypoxia: experimental evidence, 142 Am. J. Ob. Gyn. 214 (1982); Krishna, Tobacco chewing in pregnancy, 85 Brit. J. Ob. Gyn. 726 (1978); Streissguth, et al., IQ at age 4 in relation to maternal alcohol use and smoking during pregnancy, 25 Develop. Psych. 3 (1989); Astrup, et al., Effect of moderate carbon-monoxide exposure on fetal development, ii Lancet 1220 (1972); Kurppa, et al., Coffee consumption during pregnancy and selected congenital malformations: a nationwide case-control study, 73 Am. J. Pub. Health 1397 (1983); Manshande, et al., Rest versus heavy work during the last weeks of pregnancy: influence on fetal growth, 94 Br. J. Ob. Gyn. 1059 (1987); Grudzinskas, et al., Does sexual intercourse cause fetal distress?, ii Lancet 692 (1979).

services, patient education, and psychological support. Ryan, et al., Prenatal care and pregnancy outcome, 137 Am. J. Ob. Gyn. 876 (1980).[7] Numerous studies document that proper prenatal care decreases likelihood of prematurity and fetal or neonatal mortality[8], while inadequate prenatal care increases the likelihood of maternal and fetal morbidity.[9] It is these preventable problems and realizable benefits that PCAP is intended to address.

Yet, adequate prenatal care services are either unavailable or inaccessible to a needy segment of the target PCAP population. In 1985, only 68% of all pregnant women in the United States

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[7] See also Fingerhut, et al., Delayed prenatal care and place of first visit; differences by health insurance and education, 19 Fam. Plan. Persp. 212 (1987).

[8] Hemminki, et al., Patterns of Prenatal Care in the United States, 8 J. Pub. Health Pol'y 330 (1987); Moore, The perinatal and economic impact of prenatal care in a low-socioeconomic population, 154 Am. J. Ob. Gyn. 29 (1986); Ryan, et al., Prenatal care and pregnancy outcome, 137 Am. J. Ob. Gyn. 876 (1980).

[9] Moore, The perinatal and economic impact of prenatal care in a low-socioeconomic population, 154 Am. J. Ob. Gyn. 29 (1986) (significantly greater neonate morbidity for women without prenatal care versus women who received prenatal care); Ryan, et al., Prenatal care and pregnancy outcome, 137 Am. J. Ob. Gyn. 876 (1980) ("the group with inadequate prenatal care had significantly higher fetal, neonatal, and perinatal mortality rates." "It is clear that the presence or absence of early and adequate prenatal care is strongly related to pregnancy outcome"); Tokuhata, et al., Prenatal care and obstetric abnormalities, 76 J. Chron. Dis. 163 (1973) (prematurity rate of 6.9% with prenatal care versus 23.6% without prenatal care; 1155 congenital anomalies out of 100,000 births for those with prenatal care versus 1,622 anomalies for those without prenatal care; 8,365 pregnancy complications out of 100,000 births with prenatal care compared to 16,298 complications with no prenatal care).

received adequate prenatal care.[10] Twenty percent of pregnant teenagers and ten percent of all black women obtain little or no prenatal care.[11] The figures for New York are considerably worse. Such underutilization of prenatal care is frequently caused by a lack of information about where to go for prenatal care. Miller et al., Barriers to Implementation of a Prenatal Care Program for Low Income Women, 79 Am. J. Pub. Health 62 (1989). "Women who are less educated are less likely to get adequate prenatal care, and [] potential program recipients identify lack of knowledge about where to go for care as an important impediment to seeking out services." Id. at 63. Providing adequate and prompt information regarding prenatal care resources and facilitating use of such care are especially important for women with unplanned pregnancies who often delay seeking prenatal care because of negative views of the pregnancy. Brown, Drawing Women into Prenatal Care, 21 Fam. Plan. Persp. at 76. Methods of improving access to services include: "Improving institutional practices to make services more easily accessible and acceptable to clients; [a]ttracting women in need of prenatal care through a wide variety of casefinding methods, including...cross-agency referrals and the provision of incentives; and [p]roviding social support to encourage continuation in

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[10] Brown, Drawing women into prenatal care, 21 Fam. Plan. Persp. 73, 74 (1989).

[11] McGoldrick, 45 J. Am. Med. Women's Assoc. at 35. See also Witwer, Prenatal care in the United States; reports call for improvements in quality and accessibility, 22 Fam. Plan. Persp. 31 (1990).

prenatal care." Id. at 78.

Prenatal care has proven to be a cost-effective treatment for a significant national health concern. Institute of Medicine, Prenatal Care: Reaching Mothers, Reaching Infants (1988). Early and adequate prenatal care results in healthier newborns. One dollar spent on prenatal care may reduce the costs of postnatal care by three dollars[12]; a savings of approximately $2,100 per patient in 1986.[13] In fact, recognition of the relative cost-effectiveness of prenatal care vis-a-vis post-natal care was relevant in the passage of this legislation. (E.g., "Economically, the provision of prenatal care costs far less than the provision of care to an ill infant. The National Institute of Medicine estimates that for every dollar spent on prenatal care, $3.38 in after-birth care is saved." Governor Cuomo's "Approval Memorandum," NYS Legislative Annual -- 1989, p. 259.

The results of the 1987 PCAP legislation (no data exist for the 1989 PCAP) are promising.

> PCAP clients delivering in 1988 (the most recent year for which vital records data were available) had significantly better birth outcomes than matched controls, and demonstrated a lower rate of low

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[12] McGoldrick, Prenatal care; investing in the future, 45 J. Am. Med. Women's Assoc. 35 (1990); see also Brown, Drawing women into prenatal care, 21 Fam. Plan. Persp. 73 (1989).

[13] Moore, 154 Am. J. Ob. Gyn. at 32. The U.S. Office of Technology Assessment reported that "for every low-birth-weight birth averted by earlier or more frequent prenatal care, the U.S. health care system saves between $14,000 and $30,000 in newborn hospitalization, rehospitalizations in the first year, and long-term health care costs associated with low birth weight." U.S. Congress, Office of Technology Assessment, Healthy Children: Investing in the Future 9 (1988).

birthweight babies (<2500 grams) than the 1988 general birthing population (7.6% vs. 7.8%).

* PCAP clients had a low birthweight rate of 7.6 percent, compared to matched controls of 10.1 percent.

* Differences between PCAP and control group women who were black were larger than differences between other subgroups. PCAP women who were black had a low birthweight rate of 9.5 percent, compared to 14.3 percent for controls.

* PCAP meets the Surgeon General's draft health goal for the year 2000 to decrease the very low birthweight (<1500g) births among black infants to 2.0 percent. Statewide, the PCAP rate for births of black infants below 1,500 grams was 1.8 percent.

N.Y. State Dept. of Health, Prenatal Care Assistance Programs: 1989 Annual Report i-ii (1990).

The PCAP program can successfully play a critical role in removing the informational gap and access difficulties that stand as obstacles between pregnant women and adequate prenatal care. By providing access to prenatal care and prenatal care services, the PCAP program can materially advance maternal and fetal health among those in greatest need of such assistance -- the poor, minority women, and teenagers. As a link between pregnant women and networks of community organizations, physicians, and social service agencies, the PCAP program can contribute to decreased maternal mortality, infant mortality, and low birth weight.

C. The Prenatal Care Assistance Program (PCAP) Is Rationally Related to New York's Compelling Interest in the Health of its Children.

Prenatal care is the most effective -- and, in fact, the only effective -- safeguard against low birth weight and infant morbidity and mortality. As the legislative history of the PCAP

program demonstrates, prenatal care is also cost effective. Numerous scientific and sociological studies indicate that prenatal care access is imperative for a reduction of low birth weight rates and similar adverse pregnancy outcomes related to maternal nutrition and care. The comprehensive nature of the prenatal care provided under the Prenatal Care Assistance Program evidences the Legislature's intention of responding effectively to the dire lack of adequate prenatal care in New York for women at 100% to 185% of the poverty level.

The PCAP program does not provide public funds for all medical treatment a pregnant woman may desire. Nor does it entitle all women to PCAP's benefits. It is, rather, a targeted program designed to alleviate the major cause of poor infant health in New York state -- inadequate prenatal care. In enacting the program, the Legislature took a deliberate step forward in advancing public health. This is a matter appropriately within the discretion of the Legislature; the Legislature cannot be considered to have acted unreasonably for choosing not to include abortion in a program intended to promote the delivery of healthy children.

> We should not fault a program of public assistance because the legislative choice favors the more vulnerable of our population or declines to treat all afflictions equally. The State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," selecting "one phase of one field and apply a remedy there, neglecting the others."

Montoroula v. Parry, 54 A.D.2d 327, 332 (2d Dept. 1976) quoting, Williamson v. Lee Optical Co., 348 U.S. 483, 489.

POINT II

THE PRENATAL CARE AND ASSISTANCE PROGRAM IS CONSISTENT WITH NEW YORK STATE'S DUTY TO CARE FOR THE NEEDY AND PROTECT THE PUBLIC HEALTH UNDER ARTICLE XVII, SECTIONS 1 AND 3 OF THE NEW YORK STATE CONSTITUTION.

New York's social welfare constitutional provisions, taken together, provide that "the aid, care and support of the needy," N.Y. Const. Art. XVII, §1, and the "protection and promotion of the health of the inhabitants of the state," N.Y. Const. Art. XVII, §3, are public concerns. The Legislature is to exercise its authority to address these concerns through the implementation of programs consistent with these obligations. In enacting the PCAP program, the legislature provided a much needed, but otherwise unavailable, service -- prenatal care -- to New York State's pregnant women at 100 to 185 percent of the poverty level. With this prenatal care statute, the Legislature seeks to eliminate, or at least lessen, the low birth weight rates, infant mortality and infant morbidity that have given New York State one of the poorest infant health records in the country.

Plaintiffs contend that by failing to include public funds for abortion services, PCAP violates Article XVII, §1 of the state constitution. This provision states:

> The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

This provision vests the Legislature with the power and wide discretion necessary to effectively provide for the "aid, care and

support of the needy.". Plaintiffs' claim denies this authority and instead seeks to bind the Legislature in its attempts to determine how best to care for near poor pregnant women within the State.

The PCAP program does not alleviate every medical condition that may present itself in a pregnant woman. It is not an all-encompassing health care package for pregnant women. Nor is it designed to be. As its name clearly indicates, it is a prenatal care program. As such, there are certain aspects of medical care that are not provided. This does not mean the program is constitutionally deficient; instead, it points to the obvious fact that PCAP is designed to address a specific problem -- the lack of adequate prenatal care services to poor women in New York State. The failure of a State program to meet every need, or every perceived need, in the State does not invalidate the created program. It is properly within the Legislature's discretion to prioritize health needs in the State and to implement programs to meet these needs. By enacting the Prenatal Care Assistance Program, the Legislature so acted.

However, the Legislature need not meet with particularity the needs of each potential public assistance recipient. In Matter of Bernstein v. Toia, 43 N.Y.2d 437 (1977), the New York Court of Appeals approved a program, which like this one, provided the same assistance to all potential beneficiaries. In Bernstein, the court upheld a flat grant maximum on a shelter allowance against a challenge brought by several grant recipients who had medical

conditions that required them to live in apartments with rents higher than the allowance maximums. The court found the allowance maximum to be "a legitimate approach to the problems posed by the increasing needs and demands for public assistance." Id. at 445. The court's reasoning applies with full force to the PCAP program which offers the same assistance -- prenatal care -- but not abortion, to pregnant women within a defined income category. Accord Jiggetts v. Grinker, 148 A.D.2d 1 (1st Dept. 1989), rev'd on other grounds, 75 N.Y.2d 411 (1990) (families with same income could be eligible for Home Relief and AFDC, but Legislature could impose different requirements).

The text of Article XVII, §1, fixes a duty on the State to provide for care of the needy as a matter of public concern, but "in such manner and by such means as the legislature may from time to time determine." RAM v. Blum, 425 N.Y.S.2d 735, 737 (1980). While the legislature may not evade its duty, "the manner and means of the discharge of this duty lie within the broadest legislative discretion." Id.

Plaintiffs err in claiming that once New York State provides any medical services to pregnant women, it must provide prenatal and abortion services "neutrally". This ignores the clear right the State has to match program goal with intended program beneficiary. To accomplish this, the State must treat some persons as "needy" for some, but not all, types of public assistance. PCAP does not define women with household incomes between 100% and 185% of the federal poverty level as "needy" for all purposes or even

for all medical services. It narrowly defines them as "needy" because they carry an unborn child who, unless given adequate prenatal care, is at risk for being born prematurely and/or at below normal weight, post-natal illness, or even death -- before or after birth. Recognizing the relative costliness of appropriate prenatal care compared with non-care or inadequate care, and the crucial role this care plays in positive pregnancy outcome, the Legislature determined that women at 100% to 185% of the poverty level are in need of public assistance in order to obtain adequate prenatal care. Accordingly, for purposes of prenatal care only, such women are "needy".

Plaintiffs' conclusion to the contrary -- that they are entitled to publicly funded abortions because they are at 100% to 185% of the poverty level and pregnant -- is wrong. Being pregnant and at the income level covered by PCAP does not mean that a woman is "needy" for non-PCAP services. "[T]he constitution ... authorizes the Legislature to create categories of public assistance and to determine the needs of individuals in those categories." Matter of Lee v. Smith, 43 N.Y.2d 453, 460 (1977). The Legislature has so acted; in the Prenatal Care Assistance Program, the "category of public assistance" is prenatal care and the individuals in need of such care are pregnant women at 100% to 185% of the poverty level. Plaintiffs are not seeking to avail themselves of the category of public assistance created by PCAP; therefore, they cannot complain that another potential category of assistance -- publicly funded abortion -- is not available.

Moreover, PCAP provides prenatal coverage to a class of persons not otherwise defined as needy; it does not involve "a refusal to aid persons already classified as needy." D. Memo. at 39. Accordingly, Matter of Tucker v. Toia, 43 N.Y.2d 1 (1977), is inapposite. In Tucker, the question was whether the Legislature could "deny all aid to certain individuals who are admittedly needy, solely on the basis of criteria having nothing to do with need?" Id. at 10. Correctly posed, the question in this case is "whether the Legislature may expand its criteria of eligibility for persons seeking services related to healthy pregnancies and deliveries, without also having to include persons seeking abortions." D. Memo. at 39. Tucker requires no such expansion.

Article XVII, §3, provides no basis on which to invalidate PCAP's prenatal care only assistance. The public health clause states:

> The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

"Striking the proper balance among health concerns, cost and privacy interests...is a uniquely legislative function." Boreali v. Axelrod, 71 N.Y.2d 1, 12 (1987). In establishing PCAP, the Legislature properly exercised its power to create a program targeting the major obstacle to healthy pregnancy outcome -- inadequate prenatal care. As the legislative history demonstrates, the benefits of quality prenatal care are remarkable. Prenatal

care delivered to a population otherwise receiving little, if any, of such care will result in a reduction in low birth weight babies, a decrease in infant mortality and infant morbidity rates, and healthier mothers. PCAP is designed to promote and to protect public health. The Legislature cannot be faulted for extending public assistance to near poor pregnant women who otherwise would receive no such care.

POINT III

THE 1989 PRENATAL CARE ASSISTANCE PROGRAM (PCAP) IS CONSISTENT WITH ARTICLE I, SECTION 6 (DUE PROCESS CLAUSE); ARTICLE I, SECTION 11 (EQUAL PROTECTION CLAUSE); AND ARTICLE I, SECTION 3 (FREE EXERCISE CLAUSE) OF THE NEW YORK CONSTITUTION.

The Prenatal Care Assistance Program prohibits none of the plaintiffs from obtaining an abortion at their own expense. New York women who have incomes at 100% to 185% of the poverty level are given the same opportunity that all New York women above the poverty line are given to effectuate a choice to abort. This choice is unfettered and the woman obtaining the abortion is responsible to pay for the procedure. The PCAP program in no way affects this.

However, plaintiffs claim is that the State of New York has a constitutional duty to pay for the abortions of women who are not otherwise defined to be needy. This claim must fail. New York has no affirmative obligation to subsidize the medical expenses of the near poor. Any financial difficulty near poor women experience in

obtaining an abortion is a result of their indigence, a condition that the State did not create and that the State is in no way required to alleviate. That the Legislature chose to extend public assistance for prenatal care to a category of women who were otherwise without any public aid does not force the State to provide tax-funded abortion services.

Moreover, plaintiffs misconceive the impact of PCAP when they claim that the State is not "neutral" when it funds prenatal care only. As plaintiffs themselves state, prenatal care for any women is much more expensive than an abortion, which is usually performed before 13 weeks gestation and which averages under $250. Even late term abortions, such as Plaintiff Jane Hope's, which can cost nearly $2,000, are inexpensive when compared to the cost of quality prenatal care. By funding prenatal care but not abortion services, the Legislature recognized that the high cost of prenatal care may cause some near poor women to elect to forego prenatal care. This decision -- to empower women at 100% to 185% of the poverty level to choose proper prenatal care -- was an attempt to provide some assistance to women not otherwise receiving any public help. It is not, as plaintiffs claim, an attempt to "achieve with carrots what [the state] is forbidden to achieve with sticks." Harris v. McRae, 448 U.S. 297, 333 (1980) (Brennan, J., dissenting); Moe v. Secretary of Administration and Finance, 417 N.E.2d 387, 402 (Mass. 1981). P. Memo. at 36. Plaintiffs' claim further evidences their misunderstanding of PCAP and New York law. PCAP expresses a healthy child policy, not an anti-abortion policy. Publicly

assisted prenatal care is consistent with this policy preference; abortion is not. New York State picks up only part of the cost of bearing and rearing a child. A woman who carries her child to term and raises it -- even with PCAP services -- will incur a much greater expense than a woman who obtains an abortion, regardless of the stage of pregnancy.

Plaintiffs' equal protection claim also fails to establish any weakness in the PCAP program. An equal protection violation under the New York State Constitution will only be found if the classification created under PCAP burdens a fundamental right and is not justified by a compelling State interest.

PCAP places no burdens on the choice of abortion enunciated in Roe v. Wade, 410 U.S. 113 (1973). The prenatal care program extends benefits to women at 100% to 185% of the poverty level in an effort to combat New York State's serious infant health problems. Men and women above 185% of the poverty line, like men and women at 100% to 185% of the poverty line, may obtain non-PCAP services with their own resources. They are in the same position they would be in if PCAP had not been enacted. Because PCAP does not impinge on a fundamental right, the program should be reviewed under the rational basis standard.

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Matter of Davis, 57 N.Y.2d 382, 388 (1982) (quoting Dandridge v.

Williams, 307 U.S. 471 (1971); Golden v. Clark, No. 277 (N.Y. App. Oct. 23, 1990), slip op. at 5.

Plaintiffs' claim that PCAP violates the free exercise of religion clause in the New York State Constitution (Article I, §2) is without merit. At its essence, this assertion states that the government is required to fund the exercise of constitutional rights in some way connected with religious beliefs. Plaintiffs' claim should be dismissed. First, plaintiffs lack standing to assert the alleged violation. Second, the allegation is entirely without merit.

None of the Plaintiffs claims that the decision to obtain an abortion would be "under compulsion of religious belief." Harris v. McRae, 448 U.S. 297, 320 (1980). Plaintiffs' allegations only establish that clergy member plaintiffs state that the decision to have an abortion can be a "conscientious, religious decision." Complaint at ¶89. Without more, Plaintiffs fail to establish any basis on which to assert this claim.

Even if the court were at look to the substance of plaintiffs' free exercise claim, the court would have to dismiss it. The Prenatal Care Assistance Program inhibits no one from obtaining an abortion, whether the decision to obtain an abortion is in some way religiously motivated, or not. That a decision to effectuate one's constitutional rights is religiously inspired in no way obliges the State to subsidize it. The free exercise clause only requires "that the government will not interfere with the exercise of religious freedom." Right to Choose v. Byrne, 450 A.2d 925, 939

(N.J. Sup. Ct. 1982). Indeed, for the State to provide the funding of an abortion because the decision is religiously based may create establishment of religion problems. Id.

In sum, the funding of prenatal care does not violate the equal protection clause or due process, nor does it inhibit the free exercise of religion under the New York State Constitution.

CONCLUSION

Because the plaintiffs have no likelihood of success on the merits, and based upon the foregoing reasons, the plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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