Court of Appeals

State of New York

JANE HOPE and JANE MOE, on behalf of themselves and all others similarly situated, VICKI ALEXANDER, M.D., SOLAN CHAO, M.D., E. HAKIM ELAHI, M.D., ARNOLD ROUFA, M.D., FRANCES THACHER, C.N.M., REVEREND RICHARD S. GILBERT, REVEREND JULIA QUINLAN, BUFFALO GYN WOMEN SERVICES, CAYUGA FAMILY PLANNING CENTER, COMMUNITY FAMILY PLANNING COUNCIL, ERIE MEDICAL CENTER, PLANNED PARENTHOOD OF NEW YORK CITY, PLANNED PARENTHOOD OF SUFFOLK COUNTY, PLANNED PARENTHOOD OF TOMPKINS COUNTY, THE COMMITTEE FOR HISPANIC CHILDREN AND FAMILIES, THE LEAGUE OF WOMEN VOTERS OF NEW YORK STATE, THE NEW YORK BLACK WOMEN'S HEALTH PROJECT, and the NEW YORK STATE PUBLIC HEALTH ASSOCIATION,

Plaintiffs-Respondents,

against

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

Defendants-Appellants.

BRIEF OF THE NEW YORK STATE CATHOLIC CONFERENCE AS *AMICUS CURIAE*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 16

ARGUMENT 20

I. THE NEW YORK PRENATAL CARE ASSISTANCE PROGRAM (PCAP) MEETS THE COMPELLING NEED OF NEW YORK'S LOW INCOME MOTHERS AND THEIR CHILDREN TO RECEIVE ADEQUATE PRENATAL CARE, THE UNAVAILABILITY OF WHICH HAS RESULTED IN NEW YORK HAVING ONE OF THE WORST INFANT AND MATERNAL HEALTH RECORDS IN THE UNITED STATES 20

A. The State of New York Has a Compelling Interest In Addressing the Serious Problems of Low Birthweight and Infant Mortality that Exist in this State 20

B. PCAP Directly and Specifically Targets the Critical Health Problems of Infant Mortality, Low Birthweight and Prematurity in New York 26

II. THE DUE PROCESS CLAUSE OF THE NEW YORK CONSTITUTION, ART. I, § 6, DOES NOT ENCOMPASS A RIGHT TO A PUBLICLY FUNDED ABORTION 31

A. No State Constitutional Right Is Implicated Here . 32

B. PCAP Imposes No Burden on a Woman's Ability to Obtain an Abortion and Therefore Does Not Violate the Due Process Clause 39

III. PCAP DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION, ART. I, § 11, BECAUSE IT DOES NOT BURDEN A FUNDAMENTAL RIGHT OR DISCRIMINATE AGAINST A PROTECTED CLASS OF PERSONS 40

IV. PCAP IS CONSISTENT WITH NEW YORK'S DUTY TO CARE FOR THE NEEDY AND TO PROTECT THE PUBLIC HEALTH UNDER ART. XVII, §§ 1, 3 OF THE NEW YORK CONSTITUTION 43

V. THE LOWER COURTS EXCEEDED THEIR AUTHORITY IN REWRITING PCAP TO INCLUDE ABORTION FUNDING 48

CONCLUSION 50

Montgomery v. Daniels, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975) 33

New York Public Interest Research Group v. Steingut, 40 N.Y.2d 250, 353 N.E.2d 558 (1976) 32

People v. Lohman, 2 Barb. 216 (1848) 34

People v. Lovell, 40 Misc.2d 458, 242 N.Y.S.2d 958 (1963) . . 34

People v. Scott, People v. Keta, 79 N.Y.2d 474, 583 N.Y.S.2d 920 (1992) 36-37

Pharm. Mfrs. Assn. v. Whalen, 54 N.Y.2d 493, 446 N.Y.S.2d 217, 430 N.E.2d 1270 (1981) 33

RAM v. Blum, 425 N.Y.S.2d 735 (1980) 44

Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E.2d 337 (1986) 38

Roe v. Wade, 410 U.S. 113 (1973) 2, 16

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 2

Schneider v. Sobel, 559 N.Y.S.2d 221 (1990) 41, 42

SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 488 N.E.2d 1211 (1985) 32

Turner v. Safley, 482 U.S. 78 (1987) 37

Under 21 v. City of New York, 65 N.Y.2d 344, 492 N.Y.S.2d 522, 482 N.E.2d 1 (1985) 40

Warner v. Beers, 23 Wend. 103 (N.Y. 1840) 32

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 2, 39

Wilkinson v. Skinner, 34 N.Y.2d 53, 356 N.Y.S.2d 15, 312 N.E.2d 158 (1974) 33

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Statement of Senator Michael J. Tully, Jr., Transcript of Senate Vote 3

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INTEREST OF THE AMICUS CURIAE

The New York State Catholic Conference (the Conference) has been organized by the Roman Catholic Bishops of New York State as the institution through which the Bishops speak cooperatively and collegially in the field of public affairs. The Conference 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, the Conference files briefs as amicus curiae in litigation of importance to the Catholic Church and to 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 has consistently supported public and private efforts to enhance the health of women and their children--born and unborn. The Conference, as well as other organizations, supported the passage of the New York Prenatal Care Assistance Program (PCAP) and filed written comments in support of the legislation, enacted as Chapter 584 of the Laws of 1989. The eight New York State Roman Catholic Dioceses sponsor numerous health care facilities that function as PCAP providers. The Conference is concerned that the invalidation of PCAP will hinder the effective provision of vital prenatal services for pregnant, lower income women as well as pre- and post-natal services to children in New York.

maternal and child health and which sets standards for Medicaid providers.

St. Vincent's Hospital and Medical Center of New York, Our Lady of Mercy Medical Center, and St. Mary's Hospital of Brooklyn sought to intervene as party defendants with a direct interest in protecting the integrity of PCAP from diminution through abortion funding. Ms. Alma Poindexter, a pregnant woman receiving prenatal care under PCAP, also sought to intervene separately in support of PCAP. Special Term denied both motions (slip op. at 2-3),[3] and the Appellate Division affirmed (595 N.Y.S.2d at 954). Subsequent attempts to appeal these rulings to this Court were unsuccessful. See Orders Entered July 6, 1993, Motion Nos. 622, 665.

Special Term recognized the standing of one individual plaintiff ("Jane Hope"), and the jus tertii standing of four physicians, certain abortion providers[4] and abortion advocacy organizations purporting to have PCAP-eligible members. Slip Op. at 6.[5] "Jane Hope" is allegedly a 19-year old, single woman who lived with her mother, with an annual income of approximately $12,000--less than 185% of the federal poverty level and thus eligible for PCAP benefits--and who discovered that she was

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[3] The court's ruling on intervention was not included in the reported opinion.

[4] The New York State Public Health Association, one of plaintiff organizations, was previously a strong supporter of the bill. Statement of Senator Michael J. Tully, Jr., Transcript of Senate Vote, at 5407.

[5] The court's discussion of standing was omitted from the reported opinion.

religion clause (Article I, § 3), the "aid, care and support of the needy" clause (Article XVII, § 1), and the public health clause (Article XVII, § 3).

On April 15, 1991, Justice Ciparick granted the Plaintiffs' motion for summary judgment and ruled that PCAP violated state constitutional provisions relating to due process (Art. I, § 6), equal protection (Art. I, § 11), care for the needy (Art. XVII, § 1) and public health (Art. XVII, § 3). Hope v. Perales, 571 N.Y.S.2d 972 (Sup. 1991). The court concluded that (1) while economic conditions not of the state's creation are "the proximate cause" of a PCAP-eligible woman's difficulty in obtaining an abortion, "PCAP becomes an affirmative act by the State blocking a woman without means from obtaining an abortion," in violation of the due process clause of the New York Constitution (Art. I, § 6), 571 N.Y.S.2d at 979; (2) by enacting a limited purpose program such as PCAP, extending prenatal care services (and no other medical services) to pregnant women between 100% and 185% of the federal poverty level, such persons must be regarded as "needy" within the meaning of Art. XVII, § 1, and, therefore, must be afforded a full range of medical services, including abortion, id. at 980-81; and (3) the decision to choose abortion is unconstitutionally burdened in violation of the state equal protection clause (Art. I, § 11) when the State funds prenatal care but not abortion, id. at 981-82. The court, however, rejected Plaintiffs' claim that PCAP violated the state's free exercise clause (Art. I, § 3). Slip Op. at 24-

in the direction of giving birth, thereby limiting the reproductive freedom of those women whose family incomes are between 100 and 185 percent of the poverty level." Id. According to the court, PCAP "has the effect of forcing needy women to give birth even when this is not medically indicated and is detrimental to their physical and mental well-being." Id. at 953. Reiterating this theme, the per curiam opinion states that, "as a practical matter, low income women who are unable to obtain aid for therapeutic abortions under PCAP may be compelled to delay or forego altogether medically indicated procedures or to continue pregnancies that undermine their health." Id. Because PCAP, "by excluding funding for therapeutic abortions, has the practical effect of being a measure that supports childbirth, sometimes at the expense of the mother's health," it is "in conflict with the requirement that government actions be constitutionally neutral in affecting the exercise of fundamental rights." Id.

The per curiam opinion also agreed with Special Term that once the Legislature decided to treat low income pregnant women as "needy" for some purpose, it could not deny the same women medical service "'on the basis of criteria having nothing to do with need.'" 595 N.Y.S.2d at 953 (citing Matter of Tucker v. Toia, 43 N.Y.2d 1, 9). "Once the state assumed the responsibility of helping needy, pregnant women," the court reasoned, "it was required to do so in a neutral nondiscriminatory manner that does not coerce poor women into choosing childbirth even at the expense of their health and well-being." Id. at 954.

interfered with a woman's exercise of her right of reproductive choice. 595 N.Y.S.2d at 956. In fact, "there is no reproductive option that a PCAP eligible woman might elect that PCAP would not significantly ease." Id. If a woman chooses to carry her pregnancy to term, "PCAP will pay for nearly all the pregnancy related costs entailed by that decision." Id. But if a woman chooses to terminate her pregnancy by means of an abortion, "PCAP will still pay for the same array of pregnancy related services until the abortion, and for post-partum care for 60 days thereafter." Id. As a consequence, "although PCAP does not fund abortions, it does defray many of the other more costly expenses incurred as a consequence of pregnancy and so leaves a PCAP recipient with significantly more resources to pay for an abortion should she choose to have one." Id.

The gravamen of plaintiffs' argument, in Justice Murphy's view, is that PCAP is flawed "because it does not facilitate all reproductive options equally." 595 N.Y.S.2d at 956. Because PCAP provides no "direct subsidy" for abortion, so the argument goes, the legislation "has the effect of pressuring eligible women to continue with pregnancies that they might otherwise elect to abort." Id. As Justice Murphy noted, PCAP does not make abortions less affordable or in any other practical sense less accessible. Id. Rather, plaintiffs argue that "its funding scheme constitutes an unbalanced inducement for women to have babies rather than abortions." Id. "The offer by government of such an unbalanced inducement, it is said, impermissibly pressures a woman to carry a

the end then, plaintiffs' choice is limited not by the enactment about which they complain but rather by underlying economic circumstances existing despite rather than because of the considerable benefits PCAP provides." Id. Justice Murphy saw PCAP as facilitating a woman's decision to abort in cases where continuation of a pregnancy entails medical risks to the mother. "[B]y dramatically improving the accessibility of prenatal medical supervision, PCAP helps assure that women receive appropriate medical care early in their pregnancies and, accordingly, that they are timely advised of any health risks which might render the continuation of a pregnancy medically ill-advised." Id. "[F]ar from discouraging abortion or providing an inducement to carry a pregnancy to term, PCAP goes a long way toward insuring that medically relevant information and advice, including that indicating the need to abort a pregnancy, will be afforded and afforded at a time when abortion is still a relatively inexpensive and safe option." Id.

> If PCAP may be said to have any effect on a woman's decision respecting the fate of her pregnancy then, it would seem far more probable that it would be to encourage women to take medically prudent choices--which is to say to encourage women in medically appropriate circumstances to obtain abortions--rather than to encourage the continuation of unwanted and potentially dangerous pregnancies. The scenario urged by the plaintiffs in which women are lured ever further into medical jeopardy and drawn inexorably toward the immense open-ended responsibilities of parenthood by the promise of limited pregnancy related care is not only highly improbable but completely without evidentiary support.

Id.

Concluding his analysis of the due process question, Justice

them of a benefit to which they would otherwise be entitled." Id. Although expressing some sympathy for this argument, id. at 958-59, Justice Murphy found it inapplicable to the instant case because of the limited nature of the PCAP program.

In enacting PCAP, the Legislature "neither recognized nor purported to address a wider need for comprehensive Medicaid coverage; what the legislature did do was to extend certain Medicaid benefits selectively in order to assist women with incomes just in excess of the maximum allowable for Medicaid eligibility, to afford the often extraordinarily expensive medical care necessary to maintain a healthy pregnancy - the legislature's express objective being that of reducing, the extent possible, what were widely regarded at the time of PCAP's enactment, to be unacceptably high levels of infant mortality and morbidity attributable to inadequate pre-natal care." 595 N.Y.S.2d at 959. PCAP does not "constitute a blanket extension of comprehensive Medicaid benefits" or "even purport to be comprehensive within the field it addresses." Id. PCAP does not provide "all pregnancy-related care, but . . . only such care as is reasonably necessary to assure . . . that if a woman chooses to carry her pregnancy to term she will bear a healthy child." Id. Abortion is "not entailed by PCAP's specific objectives." Id.

Unlike the Medicaid cases "in which abortion funding had been specifically excluded from previously established baselines of comprehensive health care entitlement . . . , here there has been no exclusion but merely a failure to include which . . . is

prohibitively high." Id. Financing abortions does not, however, "advance this discrete objective." Id.

> [A]n offer by the government to fund abortions would not be relevant to the health of newborn infants; while it would undoubtedly facilitate the termination of pregnancies with potentially problematic outcomes, it would not in any way improve the outcomes of those pregnancies which were brought to term. Of course, the availability of abortion funding may affect whether a woman of limited means will be able to obtain an abortion, but the purpose of PCAP is not to assure the availability of abortions to all who want or need them, but rather to help assure that those pregnancies which are carried to term have the healthiest possible outcomes. This is not to say that PCAP eligible women, whose incomes barely surpass the poverty level, are not in need of assistance in obtaining medically necessary abortions or that it would not be a prudent exercise of legislative discretion to provide such assistance, for certainly there is strong indication in the record . . . that such a need may exist, only that that need was neither expressly nor implicitly recognized by the Legislature when it enacted PCAP, the objectives of which simply do not entail such recognition.

Id.

Article XVII, §§ 1, 3, "do not mandate that the Legislature, in the course of fulfilling its constitutional obligation to the needy, meet every need at once, but only 'in such manner and by such means, as the legislature may from time to time determine.'" 595 N.Y.S.2d at 960 (quoting Art. XVII, § 1). It is a matter "within the Legislature's discretion to determine the extent of the need to be addressed." Id. (citing Matter of Tucker v. Toia, 43 N.Y.2d 1, 8). Concluding his analysis of the Article XVII questions Justice Murphy noted that the Legislature's "determination to deal with the distinct and pressing problem of poor neonatal health without at the same time comprehensively addressing all aspects of prenatal medical care was entirely reasonable, and certainly no one

its advocacy leads them to oppose an expansion of the state prenatal program targeting a critical and well-documented public health concern--reducing prematurity, low birth weight, and infant mortality and thereby promoting healthier babies within the State. New York has one of the worst infant health records in the country. In what all agree is an appropriate and laudable goal, the New York Legislature enacted PCAP to address the primary cause of poor maternal and fetal health--the lack of adequate prenatal care for low income women and infants. Providing prenatal care assistance to low income women, who are not in poverty (as defined for Medicaid purposes), is not mandated under the New York Constitution and is therefore entirely within the Legislature's discretion. The lower courts erred in transforming the provision of this previously unavailable, narrow range of aid into a constitutional entitlement to abortion--a category of assistance having no relationship to the goals of the PCAP program. Choosing not to include within a prenatal care program the public funding of abortion services is consistent with the narrow purpose of the legislation, which is to ensure that low income women and their unborn and newborn children receive medical care intended to prevent serious health problems.

The lower courts' conclusion that PCAP is unconstitutional is without support in either the language or interpretation of the state constitution. PCAP imposes no burden whatsoever on a woman desiring an abortion. The decision to abort is entirely unfettered; that it is not publicly funded for those above the federal poverty level places no obstacle in the woman's path to abort. The great

assistance in making specific costly medical care accessible to persons otherwise unqualified for public assistance does not define these persons as "needy" under the constitution; (3) even if this Court were to deem PCAP-eligible women to be "needy", the Legislature may classify persons as "needy" for some, but not all, types of public assistance; and (4) prenatal care is ultimately targeted to infant's health, first and foremost, because it is the infant who suffers more from the lack of prenatal care. Prenatal care assumes that the child is needy. Based upon the State's record of prematurity and low birthweight, PCAP targets infants as "needy." As such, PCAP is narrowly tailored by providing prenatal care for infants.

PCAP represents a bold step in providing for the protection and promotion of public health concerns, under Article XVII, § 3. PCAP was enacted in response to a massive public campaign aimed at improving New York's dismal poor infant mortality and infant health records. Under PCAP, at least 28,000 women and 40,000 children in New York will receive prenatal care important to their well-being, care they might not otherwise receive. The well-documented reduction of low birth weight and maternal mortality and morbidity, associated with appropriate prenatal care are ample evidence of the substantial public health benefit PCAP provides. In a fiscal environment in which the required funding of one program will clearly take away funding from another program, invalidating PCAP will take from PCAP-eligible women the care vital for healthy pregnancies. It will deplete available PCAP funds and thus

health need motivating the Legislature to enact the program:

> 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.

"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

vital importance of early prenatal care.[11] The scope of prenatal care recommended from early in pregnancy has expanded to encompass health assessment, medical services, social services, nutritional services, patient education, and psychological support. Ryan, et al., Prenatal care and pregnancy outcome, 137 Am. J. Ob. Gyn. 876 (1980).[12] Numerous studies document that proper prenatal care decreases likelihood of prematurity and fetal or neonatal mortality,[13] while inadequate prenatal care increases the likelihood of maternal and fetal morbidity.[14] It is these

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[11] 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).

[12] 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).

[13] 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).

[14] 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

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 case finding methods, including . . . cross-agency referrals and the provision of incentives; and [p]roviding social support to encourage continuation in prenatal care." Id. at 78.

Prenatal care has proven to be a cost-effective treatment. 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;[17] a savings of approximately $2,100 per patient in 1986.[18] 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, as the Governor has pointed out. "Economically, the provision of prenatal

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[17] 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).

[18] 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).

maternal health records. Accordingly, the lower courts' rejection of the Legislature's considered response to such need, in spite of the voluminous evidence on which the Legislature relied in formulating PCAP, should be reversed.

The PCAP program implemented in 1989 is supported by a long and thoroughly documented history. In 1986, several private organizations, led by the March of Dimes and supported actively by the Conference, launched a "Campaign for Healthier Babies" against the state's worsening low birth weight rates, infant mortality and morbidity rates. Declaring that "[a] healthy baby is our most precious future resource,"[19] these groups united to support an expanded prenatal care program. The Conference strongly supported the state funding of prenatal care and lobbied diligently for such a program. 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 peri-natal 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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[19] Greater New York March of Dimes, The Campaign for Healthier Babies: Fighting the Problem of Low Birthweight in New York City 1 (Nov. 1986).

> 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, however, did not extend such benefits to all portions of the state. This limitation was lifted in 1989, when the Legislature enacted the current Prenatal Care Assistance Program to extend statewide prenatal care to pregnant women under 185% of the federal poverty level. The 1989 PCAP legislation, extending the 1987 PCAP throughout the state, establishes that women who have "household income" levels between 100% and 185% of the federal poverty level are eligible for these publicly funded services. 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).

Specifically, PCAP defines the 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,

> 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 1989 Department of Health report on PCAP provides clear evidence that PCAP is effective. The success of the program was also noted by Justice Murphy.[21] PCAP plays a critical role in removing the informational gap and access difficulties that stand as obstacles between lower income pregnant women and adequate prenatal care. By providing access to prenatal care and prenatal care services, PCAP materially advances maternal and fetal health among those in greatest need of such assistance--the near-poor, minority women, and teenagers. As a link between pregnant women and networks of community organizations, physicians, and social service agencies, PCAP contributes to decreased maternal mortality, infant mortality, and low birth weight. PCAP subsidizes those prenatal services directly related to the goal of healthier children and leaves all other services as available to women as before PCAP was enacted.

II. THE DUE PROCESS CLAUSE OF THE NEW YORK CONSTITUTION, ART. I, § 6, DOES NOT ENCOMPASS A RIGHT TO A PUBLICLY-FUNDED ABORTION.

The lower court opinions are the first by any New York courts declaring abortion to be a state constitutional right. Those courts relied upon state statutes, municipal regulations, court decisions interpreting statutes and regulations, and dissenting

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[21] "There is no dispute that the program has markedly improved the access of eligible women to prenatal care and that the children born to these women have as a consequence had a healthier start in life. No one questions that the program as it is presently constituted has been immensely beneficial." 595 N.Y.S.2d at 955.

clause of the New York Constitution, New York courts have traditionally looked to English practices. Cooper v. Morin, 49 N.Y.2d 69, 80, 424 N.Y.S.2d 168, 175, 399 N.E.2d 1188 (1979). The brief of the American Academy of Medical Ethics makes clear that the English common law did not protect any right to abortion, that New York adopted the English common law, that New York law adopted proscriptions against abortion from earliest times, and that, as developments in medical science educated society, New York adopted statutory prohibitions on abortion which were designed to protect the health of the mother and the life of the unborn child as a human being. New York State history consistently demonstrates that there was no legal protection for abortion as a "right" before the New York Legislature eliminated criminal prohibitions of abortion before 24 weeks in 1970.[23]

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legislation, "every legislative enactment enjoys a strong presumption of constitutionality which, although rebuttable, requires the challenging party to demonstrate that the enactment is unconstitutional beyond a reasonable doubt." Pharm. Mfrs. Assn. v. Whalen, 54 N.Y.2d 493, 446 N.Y.S.2d 217, 220, 430 N.E.2d 1270 (1981). "As a matter of substantive law every legislative enactment is deemed to be constitutional until its challengers have satisfied the court to the contrary." Montgomery v. Daniels, 38 N.Y.2d 41, 54, 378 N.Y.S.2d 1, 11, 340 N.E.2d 444, 451 (1975). Even if this court could conclude that the failure to fund abortion was "unwise," still "[t]he role of the courts is not to put a stop to practices that are unwise, only to practices that are unconstitutional or illegal." Wilkinson v. Skinner, 34 N.Y.2d 53, 62, 356 N.Y.S.2d 15, 24, 312 N.E.2d 158, 164 (1974).

[23] "[T]he common law governed the colony of New York, including the criminal courts. The common law was recognized in the first New York Constitution of 1777, and the common law of crimes was specifically recognized by statute before 1788." Marzen, et al., Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 205 (1985) (citing 2 J. Dougherty, Legal and Judicial History of New York 16-17 (1911); N.Y. Const. of 1777, art. 35; Act of Feb. 21, 1788, ch. 37, § 2; 1788 N.Y. Laws 664, 665 (codified at 2 N.Y. Laws 242

> may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring legal personality.

286 N.E.2d at 890. The Court added:

> Whether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject again of course to the Constitution as it has been "legally" rendered. That the legislative action may be wise or unwise, even just and violative of principles beyond the law, does not change the legal issue or how it is to be resolved. The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.

286 N.E.2d at 889. Justice Jasen specially concurred with the proposition that the abortion issue was exclusively within the domain of the Legislature:

> As Judge Breitel's opinion recognizes, the formidable task of resolving this issue is not for the courts. Rather, the extent to which fetal life should be protected "is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government." [cit. omit.]

Id. at 891. No amendments to the constitution have been subsequently adopted by which the citizens of New York have expressed their intent to withdraw abortion from the legislative domain--where it has resided since the seventeenth century in New York--and set it apart as a state constitutional right.

City of New York v. Wyman, 30 N.Y.2d 537, 330 N.Y.S.2d 385, 281 N.E.2d 180 (1972), also acknowledges, at least implicitly, that the regulation of abortion is a matter for the other branches of state government. In Wyman, this Court upheld an administrative directive of the New York City Commissioner of Social Services that Medicaid reimbursements for abortions be limited to "medically

N.Y.S.2d 920, 933 n.3 (1992), id. at 502, 583 N.Y.S.2d at 938 (Kaye, J., concurring) ("I agree that, under the State Constitution, defendants' reasonably expectation of privacy--not some new privacy right, but the privacy right encompassed within the guarantee against unreasonable searches and seizures, as that guarantee is uniformly defined--has been transgressed"). And none of the three Court of Appeals decisions cited by the Appellate Division in its due process analysis (595 N.Y.S.2d at 954) supports the conclusion that the New York Constitution protects either a general right to privacy or a specific right to choose abortion.

In Doe v. Coughlin, 71 N.Y.2d 48, 523 N.Y.S.2d 782, 518 N.E.2d 536 (1987), cert. denied, 109 S.Ct. 196 (1988), this Court held, in a 4-3 decision, that a prison inmate had no constitutional right of privacy to participate in a conjugal visit program. Three judges rejected the proposition that the inmate's privacy claim encompassed conjugal visits, applying a rational basis test and citing federal, not state, law (Turner v. Safley, 482 U.S. 78 (1987)). 523 N.Y.S.2d at 786. A fourth judge concurred in the result, believing that a higher standard of scrutiny than rational basis was required, but also relying on the same federal law (Turner). 523 N.Y.S.2d at 791 (Opinion of J. Wachtler).

In Cooper v. Morin, 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979), cert. denied, 446 U.S. 984 (1980), the Court held that "pretrial detainees are entitled to contact visits of reasonable duration" under the due process clause of the state constitution. The Court balanced "the harm to the individual resulting from the

and unwarranted.[27]

B. PCAP Imposes No Burden on a Woman's Ability to Obtain an Abortion and Therefore Does Not Violate the Due Process Clause.

Even assuming, arguendo, a state constitutional right to privacy, the lower courts failed to explain how that right includes a right to a publicly funded abortion. Plaintiffs, it must be emphasized, do not contend that the government is under a general obligation to fund abortions. Rather, their argument is that the Legislature's discretionary decision to provide limited financial assistance to pregnant women for some specific purposes creates a duty on the part of the Legislature to provide additional assistance, including the funding of "medically necessary" abortions, to the same class of women.

The court acknowledged, as previously noted, that "any woman is at liberty to obtain an abortion and that PCAP does not interfere with a woman's right in that respect," 595 N.Y.S.2d at 951, and did not dispute that the impecuniousness of women near the poverty level is not a factor of the State's creation. In

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[27] Although not mentioned by the Appellate Division, the policy of New York State and New York City to pay for some elective abortions for the past 21 years was cited by Special Term in support of its holding that there is a state constitutional right to choose abortion. This policy of publicly funding abortions, of course, is broader than that which is mandated by the Federal Constitution. Cf. Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Harris v. McRae, 448 U.S. 297 (1980). But the fact that New York has funded abortions in ways that are permitted, but not required, by the Federal Constitution has no bearing on the question whether a state right to abortion is of constitutional dimension such that it requires the state to fund abortion. Special Term failed to explain how 21 years of publicly funded abortion could create a constitutional right to such funding.

(1990). The Equal Protection Clause of the Federal Constitution is not violated by a refusal to fund abortion. Harris v. McRae; Maher v. Roe. Indeed, the denial of funding upheld on the federal level is broader than the exclusion of abortion funding in PCAP. That being the case, the lower courts should have summarily denied Plaintiffs' claim.

However, even on an independent analysis of equal protection, Plaintiffs' claim should have been rejected. To establish an equal protection violation, it is first necessary to determine whether a fundamental right exists. If one does exists, then the question is whether a state statute "significantly burdens" the right. If so, then the provision must advance a "compelling state interest." Golden v. Clark, 76 N.Y.2d 618 (1990); Schneider v. Sobel, 559 N.Y.S.2d 221, 222 (1990). As demonstrated above, PCAP does not burden any right to abort. Nor does PCAP employ any suspect classifications. Because PCAP is directly related to the state's important interest in improving infant health by decreasing low birth weight and prematurity through adequate prenatal care, the lower courts' judgments should be reversed.

Women who have abortions and women who decide to carry their child to term are not similarly situated. Women who decide to give birth will incur health care, infant and child care expenses that will not be incurred by women who abort. In addition, women who decide to continue bearing their child are likely to give birth to a child with various health problems if prenatal care is not obtained. Women who abort do not have prenatal care and will not

pregnant woman who meets PCAP's income eligibility standards is not disqualified from receiving any benefit made available by PCAP by reason of her election to obtain an abortion." 595 N.Y.S.2d at 958.

PCAP cannot fairly be described as a general medical services program for persons slightly above the poverty line. Rather, it is a limited program that offers assistance for specific purposes. Those purposes do not in any way reflect a legislative animus toward abortion, as the per curiam opinion incorrectly assumed. 595 N.Y.S.2d at 954. As Justice Murphy stated in dissent, "here there has been no exclusion but merely a failure to include which . . . is unremarkable given PCAP's limited objectives." Id. at 959. "No inference of legislative exclusion can be drawn," Justice Murphy reasoned, "where inclusion of the sought benefit is not only unprecedented . . . , but is unnecessary to the achievement of the legislation's ends." Id. This distinction, in the scope and purpose of the program, distinguishes PCAP from the general assistance programs struck down in other States on state constitutional grounds.

IV. PCAP IS CONSISTENT WITH NEW YORK'S DUTY TO CARE FOR THE NEEDY AND TO PROTECT THE PUBLIC HEALTH UNDER ARTICLE XVII, §§ 1, 3, OF THE NEW YORK CONSTITUTION.

Article XVII, § 1, provides:

> 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.

Article XVII, § 3 provides:

> The protection and promotion of the health of the inhabitants of the state are matters of public concern

permissible one. Thus, while the lower courts paid lip-service to the Legislature's broad authority in acting pursuant to § 1, the courts nonetheless invalidated the program.

The lower courts' assumption that PCAP-eligible women are "needy" within the meaning of § 1 is without foundation. PCAP extends one form of assistance to women who are not needy--those whose incomes are between 100% and 185% of the federal poverty level--but whose limited resources would likely not permit them to obtain adequate prenatal care. Undeniably, the Legislature considered prenatal care services to be of great importance to the health of PCAP-eligible women and their children; PCAP's legislative history makes this abundantly clear. However, a legislative determination to provide a specific type of vitally important yet costly assistance to a portion of the population does not translate into a conclusion that these persons are "needy" within the meaning of § 1, and thus constitutionally entitled to the full range of public assistance services, otherwise the state social service programs would quickly grind to a bankrupt halt. That the Legislature chose to extend prenatal care services (and no other services) to pregnant women (and no other persons) does not support the conclusion that pregnant women with incomes of nearly twice the federal poverty level are "needy" as that term is meant in § 1.

Because the Legislature has at no time treated New Yorkers between 100% and 185% of the federal poverty level as "needy" under § 1, the lower courts' reliance on Matter of Tucker v. Toia, 43

to the obvious fact that PCAP is designed to address a specific problem--the lack of adequate prenatal care services to near-poor women in New York. That the program does not meet every need, or every perceived need, of persons between 100% and 185% of the poverty level does not invalidate PCAP. It is properly within the Legislature's discretion to set priorities in meeting health needs and to implement programs to meet these needs.

In responding to public health concerns, the Legislature need not address the particularized needs of each potential public assistance recipient but may provide assistance calculated to meet the needs of most eligible persons. In Matter of Bernstein v. Toia, 43 N.Y.2d 437 (1977), this Court 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 PCAP 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).

uniquely legislative function of making spending decisions. The lower courts claimed authority to "expand" PCAP to include abortion funding to correct the supposed constitutional flaw. However, not even the most free-wheeling of definitions supports the action taken by the lower courts.

The lower courts relied principally on Childs v. Childs, 69 A.D.2d 406, 419 N.Y.S.2d 533, cert. denied, 446 U.S. 901 (1980), for their result. Childs does not support the rewriting engaged in by the lower courts. In Childs, the Appellate Division ruled that equal protection guarantees required the substitution of "spouse" for "wife" in New York's domestic relations law, thereby making counsel fees available on a gender-neutral, needs-only basis. The court explained that absent such an expansion, "inequitable circumstances, totally unforeseen by the Legislature" would arise. 419 N.Y.S.2d at 541. No such situation exists here. In enacting PCAP, the Legislature considered separate pieces of legislation: one including abortion funding within PCAP, the other omitting abortion funding. After debate and much public participation, the Legislature chose to adopt a PCAP that did not include abortion funding as a prenatal care option. Accordingly, the "appropriate circumstances" present in Childs are lacking here. Plaintiffs' complaint is not the result of unanticipated circumstances. Instead, the lack of abortion funding under PCAP is precisely the result the Legislature intended. Moreover, the magnitude of the statutory expansion in Childs is slight compared to that of the courts here. In Childs, the court substituted the gender-neutral