

February 7, 2011

VIA HAND DELIVERY

Joseph H. Orlando
Appellate Division Clerk
Superior Court of New Jersey, Appellate Division
Hughes Justice Complex, 25 W. Market Street
P.O. Box 006
Trenton, New Jersey 08625

Re: Guaman v. Velez, et al. Docket No. A-001870-10

Dear Mr. Orlando:

Brett D. Kahn
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This firm represents thirteen prospective *amici* in the above-captioned matter. Enclosed for filing please find a signed original and five (5) additional copies of the following:

- (1) Notice of Motion for Leave to Appear as *Amici Curiae*; and
- (2) Certification of John Kelly, Esq. in Support of Motion for Leave to Appear as *Amici Curiae*; and
- (3) Brief in Support of Motion for Leave to Appear as *Amici Curiae*; and
- (4) Certificate of Service

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Please note in accordance with the Court's January 11, 2011 Order, two copies of the above-mentioned pleadings have been forwarded, via Federal Express, to the chambers of the Honorable Phillip S. Carchman, P.J.A.D., the Honorable Ronald Graves, J.A.D., and the Honorable Carmen Messano, J.A.D.

Please charge our Account No. 66800 (reference 091050-01456) for the filing fee. Kindly file the original and four copies and return a stamped "filed" copy of the brief to our messenger who has been instructed to wait for the same. Please do not hesitate to contact me if you have any questions. I can be reached at (973) 639-8497.

Very truly yours,



Brett D. Kahn

BOSTON

HARTFORD

NEW YORK

NEWARK

PHILADELPHIA

STAMFORD

WILMINGTON

cc: Jennifer Brooke Condon, Esq. (via hand delivery)
Larry Lustberg, Esq. (via hand delivery)
Dianna Rosenheim, Esq. (via hand delivery)
Honorable Phillip S. Carchman, P.J.A.D. (via Federal Express)
Honorable Ronald Graves, J.A.D. (via Federal Express)
Honorable Carmen Messano, J.A.D. (via Federal Express)

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MANUEL GUAMAN, MARIA GUAMAN,
NADIA CHERY, DEYINIRA VALENZUELA,
ROSA RODRIGUEZ, AND KEITHON
BLAKE,

Plaintiffs,

v.

JENNIFER VELEZ, COMMISSIONER OF
NEW JERSEY DEPARTMENT OF HUMAN
SERVICES; JOHN GUHL, DIRECTOR OF
MEDICAL ASSISTANCE AND HEALTH
SERVICES,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001870-10

Transferred from the Superior Court
Law Division, Mercer County

Civil Docket No. L-1608-10

Sat Below:

Hon. Linda R. Feinberg, J.S.C.

Civil Action

CLASS ACTION

**NOTICE OF MOTION FOR LEAVE
TO APPEAR AS AMICI CURIAE**

TO: Jennifer B. Codon
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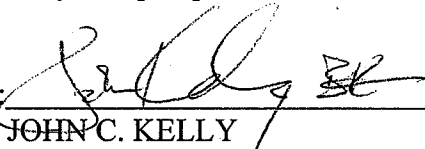
Dianna Rosenheim
Deputy Attorney General
R.J. Hughes Justice Complex
8th Floor; P.O. Box 112
Trenton, New Jersey 08625-0712

PLEASE TAKE NOTICE that applicants, proposed *amici curiae* in the above captioned case hereby move, move before the Superior Court of New Jersey, Appellate Division, for an Order, pursuant to R. 1:13-9, granting leave to file an amicus brief in support of Plaintiffs' Motion for Emergent Relief. The proposed *amici* group would includes the following thirteen (13) organizations:

New Jersey Appleseed Public Interest Law Center; New Jersey Policy Perspective; New Jersey Citizen Action; State Parent Advocacy Network; Family Voices of New Jersey; Next Step; New Jersey Working Families Alliance; Blue Wave; South Jersey Chapter of the National Organization of Women; The Unitarian Universalist Legislative Ministry of New Jersey; The Lutheran Office of Governmental Ministry in New Jersey; Latino Action Network; and Democracia

PLEASE TAKE FURTHER NOTICE that we shall rely upon the Certification of John C. Kelly, Esq. attached hereto.

McCARTER & ENGLISH, LLP
Attorneys for prospective *Amici Curiae*:

By: 
JOHN C. KELLY
EMILY B. GOLDBERG
BRETT D. KAHN
AMY TODD KLUG
LAUREN S. JONES

DATED: February 7, 2011

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Attorneys for prospective *Amici Curie*

MANUEL GUAMAN, MARIA
GUAMAN, NADIA CHERY, DEYINIRA
VALENZUELA, ROSA RODRIGUEZ,
AND KEITHON BLAKE,

Plaintiffs,

v.

JENNIFER VELEZ, COMMISSIONER
OF NEW JERSEY DEPARTMENT OF
HUMAN SERVICES; JOHN GUHL,
DIRECTOR OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001870-10

Transferred from the Superior Court, Law
Division, Mercer County

Civil Docket No. L-1608-10

Sat Below:

Hon. Linda R. Feinberg, J.S.C.

Civil Action

CLASS ACTION

**CERTIFICATION OF
JOHN C. KELLY, ESQ. IN SUPPORT
OF MOTION FOR LEAVE TO
APPEAR AS AMICI CURIAE**

John C. Kelly, Esq. of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and the a Partner at the law firm of McCarter & English. I submit this Certification in support of applicants' Motion for Leave to Appear as *Amici Curiae*.

2. The Motion is filed on behalf of prospective *amici curiae*: New Jersey Appleseed Public Interest Law Center; New Jersey Policy Perspective; New Jersey Citizen Action; State Parent Advocacy Network; Family Voices of New Jersey; Next Step; New Jersey Working Families Alliance; Blue Wave; South Jersey Chapter of the National Organization of Women;

The Unitarian Universalist Legislative Ministry of New Jersey; The Lutheran Office of Governmental Ministry in New Jersey; Latino Action Network; and Democracia.

3. The role of an *amicus curiae* is to “assist in the resolution of an issue of public importance.” R. 1:13-9. Such assistance may be rendered by “provid[ing] the court with information pertaining to matters of law about which the court may be in doubt, *Keenan v. Bd. of Chosen Freeholders*, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court “of certain facts or circumstances relating to a matter pending for determination,” *Casey v. Male*, 62 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of *amicus curiae* is particularly appropriate in cases with “broad implications,” *Taxpayers Ass’n of Weymouth Township v. Weymouth Township*, 80 N.J. 6, 17 (1976), or of “general public interest,” *Casey*, 63 N.J. Super. at 259; *see also State v. Maguire*, 84 N.J. 508 (1980) (granting leave to appear as *amicus curiae* due to public importance of the issues involved).

4. Prospective *amici curie* are organizations actively involved in advocating for full and equal access to medical care and the improvement of the health care system in New Jersey, generally, as well as for the equal treatment of New Jersey’s diverse immigrant communities. As part of that advocacy, prospective *amici curiae* share a particular interest in the “issue of public importance” that is at issue in this case: equal access to healthcare for individuals and families in New Jersey. Consequently, prospective *amici curie* oppose any law that distinguishes between lawful permanent residents and citizens in the provision of state funded medical assistance, as these regulations unfairly restrict equal access to healthcare and unnecessarily burden the state’s health care system, generally.

5. The first eleven of the thirteen prospective amici participate in “NJ For Health Care,” a broad-based coalition of 70 organizations that represents more than two million New Jerseyans. NJ for Health Care advocates for policies to expand health insurance coverage and bring high quality, affordable health care to all New Jersey residents.

6. **New Jersey Appleseed Public Interest Law Center** is a non-profit organization that strives to protect and advance the rights and interests of the most underserved and underrepresented New Jersey residents, by addressing systemic social and political problems -- with a particular focus on health care issues. It currently serves on the Leadership Team of the NJ for Healthcare coalition and has participated as amicus in several health care policy matters before this Court.

7. **New Jersey Policy Perspective (NJPP)** is a nonprofit, nonpartisan organization established in 1997 to conduct quantitative research and policy analysis on important state issues. NJPP has focused significant resources on NJ FamilyCare, the health insurance program at issue in the instant case. Its research indicates that that this program has been quite successful in providing critical health care coverage to low and moderate income children and their parents who might not otherwise have insurance. NJPP also serves on the Leadership Team of the NJ for Healthcare coalition.

8. **New Jersey Citizen Action (NJCA)** is the state’s largest independent citizen watchdog coalition working to protect and expand the rights of individuals and families, and to ensure that government officials respond to the needs of people. Through organizing campaigns that promote economic, social, racial and political justice, NJCA encourages the active

involvement of New Jersey residents in speaking out about the public policies that affect their lives. NJCA coordinate the NJ for Healthcare coalition and serves on its Leadership Team.

9. **State Parent Advocacy Network (SPAN)** empowers families and concerned professionals to advocate on behalf of the development of New Jersey's children. SPAN provides training, technical assistance and support to families on issues impacting their children including health care, health coverage, and mental health services. SPAN also houses the Children's Health Insurance Program Reauthorization Act Immigrant Outreach and Enrollment Project, which seeks to connect immigrant families to health insurance and health services.

10. **Family Voices of New Jersey** is the state chapter of a national grassroots network of families. The national network advocates for health care services that are family-centered, community-based, comprehensive, coordinated and culturally competent for all children with special health care needs. Family Voices of New Jersey specifically assists families of children with special health care needs to access the services and supports their children need to maximize their healthy development. Through its work, the organization understands the special needs of immigrant families trying to navigate our health system.

11. **Next Step**, incorporated as "People with Disabilities for Social and Economic Justice," is a grassroots movement that attacks the root causes as well as the symptoms of the social and economic exclusion of people with disabilities and other devalued groups through non-violent strategies and tactics of social change. Next Step has a special interest in ensuring that all people with disabilities are guaranteed access to high quality, affordable health care.

12. **New Jersey Working Families Alliance** is a coalition of community, labor and environmental organizations that works to promote social and economic justice in New Jersey. The organization advocates increased investment in the state for services that protect the health

and quality of life for all its residents, and is committed to achieving quality, affordable health care for all residents regardless of income level, race, or immigrant status.

13. **Blue Wave** is a grassroots organization working to protect and improve the rights, opportunities and quality of life of all people through direct advocacy, public education on critical issues and community mobilization. It is an active proponent of the expansion of the FamilyCare program and opponent of restrictions in that program, especially based on immigrant status.

14. **South Jersey Chapter of the National Organization of Women** is the State's second largest chapter of the National Organization of Women, and one of the most active NOW chapter in the nation. It has been in existence since 1971 and works to identify problems facing New Jersey women, publicize those problems, and find solutions. Through its ties to state-funded health clinics, chapter members have already seen first-hand the consequences of the decision to terminate health insurance for immigrants who have not resided in the state for five years.

15. **The Unitarian Universalist Legislative Ministry of New Jersey** is a not-for-profit corporation representing Unitarian Universalist Congregations of New Jersey to support and give voice to their values in matters of public policy in the state. The issuance of Medicaid Communication 10-01, and the resulting exclusion of New Jersey residents based solely upon their immigration status is offensive to not only their basic dignity as human beings and their right to equal treatment, but also to the first and second principles of Unitarian Universalism.

16. **The Lutheran Office of Governmental Ministry in New Jersey** is the public policy office of the Evangelical Lutheran Church in America (ELCA) and the New Jersey Synod ELCA. The Lutheran Office of Government Ministry in New Jersey advocates for policies that

are consistent with the ECLA Social Statement on Health and Health Care issued in 2006, and a recent resolution calling on government to ensure that all people in the United States have access to basic health care coverage.

17. The remaining two organizations, which are not members of the coalition, are dedicated to advancing the civil and social rights of immigrants residing in New Jersey. Each has a particular interest in, and knowledge of the deleterious effects that Medicaid Communication Co. 10-01 and N.J.A.C. 10:78-3.2 will have on immigrant families residing in the State due to its discriminatory and unfair impact on their ability to secure health insurance coverage and medical services.

18. **Latino Action Network (LAN)** is a non-profit, 501(c)(4) corporation established in 2010, with a grassroots membership consisting of dozens of organizations and individuals from across New Jersey dedicated to the fair and equal treatment of Latinos in general, and Latino immigrants more specifically. On behalf of its members, LAN sponsors activities to prevent and uncover abuse and civil rights violations suffered by Latinos in New Jersey. The organization also engages in collective action at the local, state and national level in order to advance the inclusion of the diverse Latino communities in all aspects of United States society.

19. **Democracia** is a nonprofit organization with a presence in seven states, including New Jersey, that works to increase the prominence and participation of Hispanics in every aspect of the political process. Democracia is committed to advancing federal and state legislation vital to Hispanic communities, and its work on legislative issues is grounded in its commitment to the basic principles of equality under the law and opportunity for all. Health care issues are a significant part of the organization's agenda, and Democracia advocates for policies that will ensure Hispanic communities have full access to health care.

20. Proposed *Amici curiae* seek to file a brief in support of the Class Plaintiffs' Motion for Emergent Relief in order to respectfully urge this Court to order the State to immediately reinstate Class Members' New Jersey FamilyCare ("NJFC") assistance. Based on their experience with health care and immigration issues, proposed *amici* strongly believe that the decision to terminate Plaintiffs' NJFC assistance will cause irreparable physical harm to many Class Members, will compromise the public interest by placing an unnecessary burden on the state's health care system, and undermines basic equal protection principles.

21. For these reasons, the proposed *amici curiae* listed above respectfully request that this Court grant their Motion for Leave to Participate as *Amici Curiae* by filing a brief in the above-captioned matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John C. Kelly", is written over a horizontal line.

JOHN C. KELLY, ESQ.
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Dated: February 7, 2011

MANUEL GUAMAN, MARIA GUAMAN,
NADIA CHERY, DEYINIRA VALENZUELA,
ROSA RODRIGUEZ, AND KEITHON
BLAKE,

Plaintiffs,

v.

JENNIFER VELEZ, COMMISSIONER OF
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Defendants.

SUPERIOR COURT OF NEW JERSEY
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DOCKET NO. A-001870-10

Transferred from the Superior Court
Law Division, Mercer County

Civil Docket No. L-1608-10

Sat Below:

Hon. Linda R. Feinberg, J.S.C.

Civil Action

CLASS ACTION

**BRIEF OF PROSPECTIVE *AMICI CURIAE* NEW JERSEY APPLESEED PUBLIC
INTEREST LAW CENTER; NEW JERSEY POLICY PERSPECTIVE; NEW JERSEY
CITIZEN ACTION; STATE PARENT ADVOCACY NETWORK; FAMILY VOICES OF
NEW JERSEY; NEXT STEP; NEW JERSEY WORKING FAMILIES ALLIANCE;
BLUE WAVE; SOUTH JERSEY CHAPTER OF THE NATIONAL ORGANIZATION OF
WOMEN; THE UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY OF NEW
JERSEY; THE LUTHERAN OFFICE OF GOVERNMENTAL MINISTRY IN NEW
JERSEY; LATINO ACTION NETWORK; AND DEMOCRACIA; IN SUPPORT OF THE
PLAINTIFF CLASS**

John C. Kelly

Emily B. Goldberg

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STATEMENTS OF INTEREST

Amici curiae are organizations actively involved in advocating for full and equal access to medical care and the improvement of the health care system in New Jersey, generally, as well as for the equal treatment of New Jersey's diverse immigrant communities. *Amici* thus have a particular interest in, and knowledge of, the deleterious effects that Medicaid Communication No. 10-01 and *N.J.A.C.* 10:78-3.2 will have: causing unequal access to medical care and burdening the already fragile health care system in this State. They are also deeply concerned about the fact that the policy challenged here results in State-sanctioned discrimination against lawful residents of this State based solely on their immigration status and alienage. Their specific interests and expertise are described in detail below.

A. Prospective Amici -- Members of the "NJ For Health Care" Coalition.

Eleven of the thirteen prospective *amici* participate in "NJ For Health Care," a broad-based coalition of 70 organizations that represents more than two million New Jerseyans. NJ For Health Care advocates for policies to expand health insurance coverage and bring high quality, affordable health care to all New Jersey residents.

- **New Jersey Appleseed Public Interest Law Center** is a non-profit organization that strives to protect and advance the rights and interests of the most underserved and underrepresented New Jersey residents, by addressing systemic social and political problems, with a particular focus on health care issues. It currently serves on the Leadership Team of the NJ for Healthcare coalition and has participated as amicus in several health care policy matters before this Court.

- **New Jersey Policy Perspective (NJPP)** is a nonprofit, nonpartisan organization established in 1997 to conduct quantitative research and policy analysis on important state issues. NJPP has focused significant resources on NJ FamilyCare -- the health insurance program at issue in the instant case. Its research indicates that that this program has been quite successful in providing critical health care coverage to low and moderate income children and their parents who might not otherwise have insurance. NJPP also serves on the Leadership Team of the NJ for Healthcare coalition.

- **New Jersey Citizen Action (NJCA)** is the state's largest independent citizen watchdog coalition working to protect and expand the rights of individuals and families, and to ensure that government officials respond to the needs of people. Through organizing campaigns that promote economic, social, racial and political justice, NJCA encourages the active involvement of New Jersey residents in speaking out about the public policies that affect their lives. NJCA coordinates the NJ for Healthcare coalition and serves on its Leadership Team.

- **State Parent Advocacy Network (SPAN)** empowers families and concerned professionals to advocate on behalf of the development of New Jersey's children. SPAN provides training, technical assistance and support to families on issues impacting their children, including health care, health coverage, and mental health services. SPAN also houses the Children's Health Insurance Program Reauthorization Act Immigrant Outreach and Enrollment Project, which seeks to connect immigrant families to health insurance and health services.

- **Family Voices of New Jersey** is the state chapter of a national grassroots network of families. The national network advocates for health care services that are family-centered, community-based, comprehensive, coordinated and culturally competent for all children with special health care needs. Family Voices of New Jersey specifically assists families of children

with special health care needs to access the services and support their children need to maximize their healthy development. Through its work, the organization understands the special needs of immigrant families trying to navigate our health system.

- **Next Step**, incorporated as “People with Disabilities for Social and Economic Justice,” is a grassroots movement that attacks the root causes as well as the symptoms of the social and economic exclusion of people with disabilities and other devalued groups through non-violent strategies and tactics of social change. Next Step has a special interest in ensuring that all people with disabilities are guaranteed access to high quality, affordable health care.
- **New Jersey Working Families Alliance** is a coalition of community, labor and environmental organizations that works to promote social and economic justice in New Jersey. The organization advocates increased investment in the state for services that protect the health and quality of life for all its residents, and is committed to achieving quality, affordable health care for all residents regardless of income level, race, or immigrant status.
- **Blue Wave** is a grassroots organization working to protect and improve the rights, opportunities and quality of life of all people through direct advocacy, public education on critical issues and community mobilization. It is an active proponent of the expansion of the FamilyCare program and opponent of restrictions in that program, especially based on immigrant status.
- **South Jersey Chapter of the National Organization of Women** is the State’s second largest chapter of the National Organization of Women, and one of the most active NOW chapters in the nation. It has been in existence since 1971 and works to identify problems facing New Jersey women, publicize those problems, and find solutions. Through its ties to state-funded health clinics, chapter members have already seen first-hand the consequences of the

decision to terminate health insurance for immigrants who have not resided in the state for five years.

- **The Unitarian Universalist Legislative Ministry of New Jersey** is a not-for-profit corporation representing Unitarian Universalist Congregations of New Jersey to support and give voice to their values in matters of public policy in the state. The issuance of Medicaid Communication No. 10-01, and the resulting exclusion of New Jersey residents based solely upon their immigration status, is offensive not only to their basic dignity as human beings and their right to equal treatment, but also to the first and second principles of Unitarian Universalism.

- **The Lutheran Office of Governmental Ministry in New Jersey** is the public policy office of the Evangelical Lutheran Church in America (ELCA) and the New Jersey Synod ELCA. The Lutheran Office of Government Ministry in New Jersey advocates for policies that are consistent with the ELCA Social Statement on Health and Health Care issued in 2006, and a recent resolution calling on government to ensure that all people in the United States have access to basic health care coverage.

B. Prospective Amici -- Advocates for the Rights of Immigrants in New Jersey.

The following prospective *amici* organizations—which are not members of the above-described coalition—are dedicated to advancing the civil and social rights of immigrants residing in New Jersey. Each has a particular interest in, and knowledge of the deleterious effects that Medicaid Communication No. 10-01 and *N.J.A.C.* 10:78-3.2 will have on immigrant families residing in the State due to its discriminatory and unfair impact on their ability to secure health insurance coverage and medical services.

- **Latino Action Network (LAN)** is a non-profit, 501(c)(4) corporation established in 2010, with a grassroots membership consisting of dozens of organizations and individuals from across New Jersey dedicated to the fair and equal treatment of Latinos in general, and Latino immigrants more specifically. On behalf of its members, LAN sponsors activities to prevent and uncover abuse and civil rights violations suffered by Latinos in New Jersey. The organization also engages in collective action at the local, state and national level in order to advance the inclusion of the diverse Latino communities in all aspects of United States society.
- **Democracia** is a nonprofit organization with a presence in seven states, including New Jersey, that works to increase the prominence and participation of Hispanics in every aspect of the political process. Democracia is committed to advancing federal and state legislation vital to Hispanic communities, and its work on legislative issues is grounded in its commitment to the basic principles of equality under the law and opportunity for all. Health care issues are a significant part of the organization's agenda, and Democracia advocates for policies that will ensure Hispanic communities have full access to health care.

PRELIMINARY STATEMENT

Amici curiae submit this brief in support of the Class Plaintiffs' Motion for Emergent Relief, filed with this Court on January 14, 2011.¹ More specifically, *amici* respectfully urge this Court to order the State to reinstate immediately Class Members' New Jersey FamilyCare ("NJFC") assistance for the reasons described herein.

First, *amici* write to amplify Plaintiffs' discussion of the serious physical harm that Class members will experience as a result of losing NJFC assistance. As described below, Class members are unlikely to gain access to other forms of insurance, *e.g.*, employer-based or private insurance, and many will be forced to forgo health insurance altogether. The consequences for this sizeable new group of insureds will be grave: they will lack access to important medical care, and will suffer disproportionately poor healthcare outcomes.

Second, the decision to terminate this group's NJFC assistance causes an independent injury that constitutes "irreparable harm" as a legal matter: the violation of its right to equal protection of the laws. This kind of harm, which includes an emotional element caused by the stigma of being labeled a disfavored group in the eyes of the State, constitutes an independent basis on which to grant emergent relief.

Third, *amici* are mindful of the fact that the Court must consider whether the challenged State action serves a valid "public interest," a question that is phrased slightly differently under the federal analysis. Although the State has raised the specter of the fisc, the decision to terminate Plaintiffs' health insurance will *not* further the public interest. To the contrary, this so-called "cost-saving" measure will further burden New Jersey's hospital system by increasing the number of the uninsured population and, thus, triggering a corresponding increased demand for

¹ *Amici* adopt the Factual & Procedural History set forth in Plaintiffs' Brief, at pp. 3-11.

uncompensated charitable care. Hospitals will not shoulder this financial burden alone. Since hospitals receive hundreds of millions of dollars in State subsidies for charity care, the State itself will ultimately pay for the very medical costs that it tried to avoid in the first instance. The policy at issue here thus creates, in effect, a “shell game”—underlying which there simply is no legitimate basis on which to discriminate against the Plaintiff Class.

Finally, as advocates who promote full and equal access to the State’s health care system, *amici* take issue with the State’s decision to implement this policy by “administrative fiat,” as discussed at length in Plaintiffs’ brief. For *amici*, this unlawful approach to lawmaking has effectively stolen their voice: had they been permitted to engage in a proper “Notice and Comment” process, they would have advocated against this policy. However, because the State prevented them from doing so, *amici* are forced to make the arguments that they would have made before the Agency in the foregoing brief.

In short, *amici* submit that the challenged State action not only constitutes unlawful discrimination, it is bad health care policy. Accordingly, *amici* respectfully urge the Court to grant Plaintiffs’ motion and order the State to restore Plaintiffs’ NJFC assistance. Any delay in doing so will undoubtedly have grave consequences—for the Class members’ physical well-being and for the well-being of the New Jersey health care system.

ARGUMENT

I. TERMINATING PLAINTIFFS' NJFC ASSISTANCE WILL CAUSE THEM IMMEDIATE AND IRREPARABLE HARM, THUS DEMONSTRATING THE NEED FOR EMERGENT RELIEF HERE.

A. The Denial of NJFC Assistance Will Leave Many Class Members Without Health Insurance.

According to the State regulation modifying NJFC enrollment, the Department of Human Services estimated that 12,000 legal permanent resident aliens would be terminated from the NJFC program as a result of the State's modification to the program's eligibility criteria.² The State's decision to target this particular group is troubling for many reasons, including that many class members are unlikely to be able to secure health insurance from another source. Indeed, social science suggests that members of immigrant communities already face significant barriers to obtaining health insurance, including language barriers, difficulties obtaining insurance at reasonable rates, and disproportionately lower access to employer-based coverage.³ As a result of those barriers to coverage, 44% of immigrants are uninsured nationwide, while only 13% of their American-born counterparts lack health insurance.⁴

Perhaps the greatest barrier to coverage is that immigrants have far less access to employer-provided health plans than their American-born counterparts.⁵ In fact, several recent

² 42 N.J.R. 1404(a) (2010).

³ Marsha Rosenthal, *State Practices in Health Coverage for Immigrants: A Report for New Jersey* x, 4-7 (Rutgers Center for State Health Policy, 2009); Report to Governor, Jon S. Corzine, by The Governor's Blue Ribbon Advisory Panel on Immigrant Policy 14-15 (Mar. 16, 2009); NJ Family Care Outreach, Enrollment and Retention Report 4 (May 2009).

⁴ Samantha Artiga & Karyn Schwartz, *Health Insurance Coverage and Access to Care for Low-Income Non-Citizen Adults* 2, Fig. 3 (Kaiser Commission on Medicaid and the Uninsured, Pub. No. 7651, 2007).

⁵ Thomas Buchmueller *et al.*, *Immigrants and Employer-Sponsored Health Insurance*, 42 Health Serv's Research 1, 286-87, 289, 300 (2007) (according to a 2007 study, 84.5% of native-born adults have employer-provided coverage, compared with only 66.1% of foreign-born adults).

studies have explored the difficulty that immigrant communities have in accessing employer-provided health insurance.⁶ The findings suggest that non-citizens—even those who are well-educated—have greater difficulty securing employment and, once employed, are less likely to work for employers that offer insurance.⁷ In 2007 alone, 88,572 college-educated immigrants in New Jersey worked unskilled jobs, such as dishwashers, security guards and housemaids, or were unemployed—a number that represents 21.6% of the state’s college-educated immigrant labor force.⁸ Moreover, at least one recent study concluded that some immigrants are prevented from accessing employer-provided insurance due to discrimination in the workplace.⁹

Those without government-based and employer-based insurance have, as a theoretical matter, two options: purchase insurance directly or forgo health insurance. Unfortunately, low-income immigrants typically have no real choice at all because the cost of private insurance is crippling. The average cost of a private insurance premium for a New Jersey family was \$11,966 in 2005, the fourth highest in the nation and more than the annual salary for a full-time, minimum wage job that same year.¹⁰ And, the cost goes up each year: between 2002 and 2007,

⁶ Buchmueller, *Immigrants and Employer-Sponsored Health Insurance* 291, 304; Rosenthal, *State Practices in Health Coverage for Immigrants*, at xi, 6; Gov. Blue Ribbon Panel Study, at 30-31, 33-34 (“immigrants are over-represented in low-wage industries”).

⁷ Buchmueller, *Immigrants and Employer-Sponsored Health Insurance*, at 286-87, 295, 300, 303; Rosenthal, *State Practices in Health Coverage for Immigrants*, at x, xi, 4.

⁸ Migration Policy Institute, Fact Sheet on Foreign Born Population: Income and Poverty Characteristics, available at <www.migrationinformation.org/datahub/state3.cfm?ID=NJ#2> (last visited Feb. 1, 2011).

⁹ Rosenthal, *State Practices in Health Coverage for Immigrants*, at 6; Gov. Blue Ribbon Panel Study, at 30.

¹⁰ Raymond J. Castro, *Falling Short: Time to Keep the Family Care Promise*, New Jersey Policy Perspective 4 (2007).

the cost of private insurance premiums in New Jersey increased by 80 percent, while average wages increased by only 8.7 percent.¹¹

These costs are high for any individual, but even more so for immigrants -- who typically earn less than native-born citizens and, therefore, have less to spend on costly private insurance.¹² Based on data from 2008, nearly ten percent of New Jersey's immigrants, including legal permanent residents here five years or less, lived below the poverty line, while 57.7 percent of full-time immigrant workers (those working more than 50 weeks a year and more than 35 hours per week) earned less than \$50,000.¹³

Having seen their NJFC assistance terminated, and lacking access to employer-provided or private insurance, the only "choice" for Plaintiff Class members is simply to live without health insurance. As discussed below, the consequences of becoming part of the uninsured population can be dire.

B. Many Class Members Will Suffer Adverse Health Consequences Because Of The State's Decision To Terminate Their Health Insurance.

For those who are uninsured—like many Class Members as a result of the State's decision to terminate their NJFC assistance—lack of health insurance often means lack of medical care.¹⁴ Indeed, from 2008 to 2009, roughly one-quarter of uninsured individuals went without necessary healthcare.¹⁵ Plaintiffs' brief speaks to the fact that loss of NJFC assistance

¹¹ *Id.*

¹² Gov. Blue Ribbon Panel Study, at 9 (noting that immigrants are more likely to be living in poverty than natives and that children in New Jersey immigrant families are more likely to live in poverty than native families); Migration Policy Institute, Fact Sheet, *supra*, n. 8.

¹³ Migration Policy Institute, Fact Sheet, *supra*, n. 8.

¹⁴ *The Uninsured: A Primer, Key Facts About Americans Without Health Insurance* 7 (Kaiser Commission on Medicaid and the Uninsured, Pub. No. 7451-05, Oct. 2009).

¹⁵ *Id.*

will result in loss of preventive medical care.¹⁶ *Amici* seek to amplify that discussion with information from studies that have identified the strong correlation between lack of health insurance and lack of access to important medical treatment of many kinds.

1. Uninsureds lack access to treatment for routine medical conditions:

Studies suggest that uninsured individuals have disproportionately less access to treatment for routine medical conditions. For example:

- From 2008 to 2009, more than one-quarter of uninsured individuals did not fill a prescription because they could not afford to pay for their medicine.¹⁷
- Available data suggests that the uninsured are less likely to receive timely diagnoses and treatment for common preventable conditions than their insured counterparts.¹⁸
- Asthma, a condition affecting 8% of New Jersey's adult population,¹⁹ is one specific example of a treatable disease for which some Class Members will be forced to forgo treatment due to lack of insurance. In fact, statistics show that uninsured adults (under age 65) are about half as likely to take daily medication needed to prevent asthma attacks as insured adults (under age 65).²⁰
- Research shows that uninsured individuals are hospitalized at least 50 percent more often than insured individuals for avoidable medical conditions, such as pneumonia and uncontrolled diabetes.²¹

2. Uninsureds lack access to follow-up care for accidental injuries.

Following an accidental injury, the uninsured population is less likely to receive doctor-recommended follow-up care: nearly 20 percent of uninsured individuals receive no such follow-

¹⁶ Pls.'s Br. Emergent Relief pp. 20-23.

¹⁷ *The Uninsured: A Primer*, at 7.

¹⁸ See Alison Stratton et al., Connecticut Dept. of Public Health, *The 2009 Connecticut Health Disparities Report* 123 (2009) (explaining that the federal government classified 19 "preventable" conditions for which timely, primary treatment will help to avoid hospitalization for most adults).

¹⁹ Eddy Bresnitz, *Asthma in New Jersey, Update 2006*, at 6 (2006).

²⁰ Frances M. Chevarly, *Asthma Preventive Medicine in 2006, Who takes them?* 2 (Agency for Healthcare Research and Quality, Statistical Brief #237, Mar. 2009).

²¹ Catherine Hoffman & Alan Schlobohm, *Uninsured in America: A Chart Book* 56 (2d ed.) (Kaiser Commission on Medicaid and the Uninsured, Pub. No. 1407, Mar. 2000); Bd. on Health Care Serv.'s, Inst. of Med., *America's Uninsured Crisis: Consequences for Health and Health Care* 58 (2009) (also discussing how a lack of coverage negatively affects insurance providers).

up care, versus only 9.2 percent of insured.²² Not surprisingly, uninsured individuals are, thus, more likely to report that they did not fully recover from an accidental injury.²³

3. Uninsureds lack access to treatment for chronic conditions.

The Centers for Disease Control reports that many complications from chronic conditions can be prevented with early detection, improved delivery of care and education on self-management; yet, uninsured individuals are 30 percent less likely than insured individuals to have had a medical check-up in the last year.²⁴ As a result, the uninsured are more likely to forego necessary preventive care,²⁵ are more likely to be diagnosed with life threatening diseases at an advanced stage,²⁶ and are less likely to obtain recommended follow-up services after being diagnosed with a chronic condition.²⁷

4. Uninsured populations suffer higher rates of poor health and premature death.

Because so many uninsured people must forgo medical care, this population suffers from disproportionately high rates of poor health and premature death.²⁸

²² Jack Hadley, *Insurance Coverage, Medical Care Use, and Short-term Health Changes Following an Unintentional Injury or the Onset of a Chronic Condition*, 297 JAMA 1073, 1073 (Mar. 14, 2007). A similar pattern held for those with a new chronic condition (9.4% vs 4.4%). *Id.*

²³ *Id.*

²⁴ *The Insured and Their Access to Healthcare 2* (Kaiser Commission on Medicaid and the Uninsured, Oct. 2006).

²⁵ Kurt Stange et al., *Policy Options in Support of High Value Preventive Care* 3 (Dec. 2008) (citing Centers for Disease Control and Prevention; Council of State and Territorial Epidemiologists; Association of State and Territorial Chronic Disease Program Directors. Indicators for chronic disease surveillance. MMWR Recomm. Rep. 2004 Sep 10; 53 (RR-11):1-6).

²⁶ Hoffman, *Uninsured in America*, at 56.

²⁷ Stange, *Policy Options in Support of High Value Preventive Care*, at 3.

²⁸ *America's Uninsured Crisis: Consequences for Health and Health Care*, at 58; Stan Dorn, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis the*

5. Children directly suffer when their parents lack health insurance.

Research indicates that when someone is uninsured, her family members—particularly any children—are less likely to receive timely healthcare.²⁹ Tragically, the mere relationship to an uninsured parent can have a negative, long-term effect on a child's physical and mental development.³⁰ For example, the data suggests that parents without health care coverage are less likely to ensure that their children get necessary immunizations and regular checkups from a primary care provider.³¹

* * *

Taken together, the studies and data discussed above paint a stark picture about the detrimental impact that termination of NJFC assistance will have on Plaintiff Class Members. Without access to health insurance, this already vulnerable population will have disproportionately less access to meaningful health care, which will cause serious and dangerous medical consequences.

C. The Experience of Being Discriminated Against Subjects Class Members To Irreparable Harm As An Independent Legal Matter.

As discussed above, it cannot be seriously disputed that the challenged State action will subject Plaintiffs to serious physical harm, such that emergent relief is warranted. Additionally,

Impact of Uninsurance on Mortality 2, 3 (Urban Institute, Jan. 2008) (22,000 deaths due to a lack of coverage were recorded in 2006).

²⁹ Committee on the Consequences of Uninsurance, *Health Insurance Is a Family Matter* 12 (Institute of Medicine, Sept. 2002).

³⁰ *Id.* at 8.

³¹ FamilyCare Health Coverage Act of 2000, *N.J.S.A.* 30:4J-1, P.L. 2000, ch. 71, § 2(b) (repealed 2005).

the act of discriminating against Class members itself constitutes an independent injury that constitutes “irreparable harm” as a matter of law.³²

Moreover, Class Members will likely be exposed to lasting emotional harm as a result of the State’s decision to discriminate against them. Indeed, courts routinely recognize that state action which denies individuals the equal protection of the law based solely on their membership in a protected group results in “social stigma” that can have serious and lasting emotional harm. For example, in *Heckler v. Matthews*, the United States Supreme Court cautioned that “discrimination itself, by perpetuating archaic and stereotypical notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons”³³

³² See, e.g., *Brewer v. West Irondequoit Cent. School Dist.* 212 F. 3d 738 (2d Cir. 2000) (plaintiffs asserting equal protection claim were irreparably harmed as a legal matter); *Overstreet v. Lexington-Fayette Urban County Gov’t.*, 305 F.3d 566, 578 (6th Cir. 2002) (“[c]ourts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff’s constitutional rights”); *Appel v. Spiridon*, No. 3:06-cv-1177, 2006 WL 3825027, *4 (D. Conn. Dec. 21, 2006) (finding that irreparable harm existed based solely on threatened violation of equal protection rights); *Killebrew v. City of Greenwood, Miss.*, 988 F.Supp. 1014, 1016 (N.D. Miss. 1997) (“It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.”); *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Pa. 1997) (“Plaintiffs can demonstrate irreparable harm based on the sole fact that they will be deprived of their constitutional right to the equal protection of law in the absence of an injunction.”).

³³ 465 U.S. 728, 739-40 (1984); accord *Strauder v. West Virginia*, 100 U.S. 303, 308 (1979) (excluding African-Americans from juries ‘is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant....to [] prejudice.”); *Lewis v. Harris*, 188 N.J. 415 (2006) (denying same-sex couples equal rights and benefits is “directly related to any reasonable conception of basic human dignity”); *Romeo v. Seton Hall Univer.*, 378 N.J. Super. 384, 391 (App. Div. 2005) (recognizing that legislative prohibitions against discrimination are intended to prevent individuals from being deprived of “basic human dignity”); *Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc.*, 360 N.J. Super. 265, 280-81 (App. Div. 2003), *aff’d*, 181 N.J. 70 (2004) (recognizing that the Supreme Court has held that the harm arising from discrimination includes ‘embarrassment, humiliation, and other intangible injuries.’”).

Amici agree that the physical harm that Class Members will experience as a result of the State's decision to terminate their health insurance constitutes irreparable harm sufficient for emergent relief. However, the caselaw discussed above demonstrates that the harm that flows from the discrimination itself offers an independent basis for the emergent relief that the Plaintiff Class seeks.

II. DEFENDANTS' ECONOMIC JUSTIFICATION FOR DENYING NJFC ASSISTANCE TO CLASS MEMBERS IS CONTRADICTED BY THE FINANCIAL BURDENS THAT FLOW TO THE NEW JERSEY HEALTH CARE SYSTEM AS A RESULT OF THE CORRESPONDING INCREASE IN UNINSURED RESIDENTS.

The equal protection analysis required under both the New Jersey and federal Constitutions involve consideration of the State's reason for taking the challenged action. New Jersey law requires consideration of the "public need for the restriction," while federal law evaluates whether the State's interest in taking the action is "compelling."³⁴ Here, it is undisputed that the State terminated Plaintiffs' NJFC assistance to reduce spending on health care.³⁵ But that justification ignores the fact that costs associated with Plaintiffs' medical needs will not simply vanish. Rather, those costs will be shifted to already overburdened New Jersey hospitals and, ultimately, back to the State itself. Since the challenged state action thus undermines the public interest—rather than serving it—the decision to terminate Plaintiffs' NJFC assistance cannot be justified under equal protection principles.

³⁴ *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

³⁵ 42 N.J.R. 1404(a). The State estimates that it will save \$2.5 million through the remainder of State Fiscal Year 2010 and an additional \$10 million as a result of the disenrollment of legal permanent residents. If all of the remaining population were to be disenrolled, savings may be upwards of an additional \$20 million in State Fiscal Year 2011. The State also estimates it will save \$733,000 in State Fiscal Year 2010 and an additional \$24.6 million in State Fiscal Year 2011 due to nonenrollment of previously eligible legal permanent residents. *Id.*

In New Jersey, hospitals are required to provide necessary medical care to uninsureds who cannot pay for their care through a system referred to as “Charity Care.”³⁶ The result is that hospitals become direct providers of primary care to low-income uninsured patients who do not have access to any other form of care.³⁷ Available data from New Jersey hospitals demonstrate that charity care is commonly provided for an array of medical conditions that would otherwise be provided in non-hospital settings, including chronic care (*e.g.*, for hypertension, HIV, diabetes, chronic kidney conditions), preventative care (*e.g.*, gynecological, dental, routine medical examinations), mental health care (*i.e.*, for depression, bipolar disorder), and substance abuse treatment.³⁸ In fact, a significant portion of this hospital-based care could be avoided entirely if the uninsured population were to have access to timely and effective primary or preventive care.³⁹ Unfortunately, these charity care obligations place a serious burden on New Jersey hospitals, and questions have been raised as to whether hospitals can meet the growing demand for uncompensated care.⁴⁰ At the very least, the increase in uninsured patients at issue here will undoubtedly raise the demand for uncompensated charity care, thereby increasing the financial burden on New Jersey hospitals.⁴¹ Further, this increased burden comes at a time when

³⁶ Health Care Facilities Planning Act of 1971, *N.J.S.A. 26:2H-1 et seq.* (2011).

³⁷ Derek DeLia, *Evaluation of the Hospital Charity Care Program in New Jersey* 1, 34 (Rutgers Center for State Health Policy, Jan. 2007).

³⁸ DeLia, *Evaluation of the Hospital Charity Care Program in New Jersey*, at 17-21, 32-33.

³⁹ *Id.* at 10.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 1, 11.

charity care is already an expensive proposition, as it costs New Jersey hospitals nearly \$1.5 billion annually.⁴²

New Jersey hospitals, however, will not be alone in shouldering the added financial burden. To the contrary, a significant portion of the costs associated with terminating Plaintiffs' NJFC assistance will ultimately be passed to the State because many hospitals will likely become insolvent without state subsidization of charity care.⁴³ State subsidies for charity care is derived through two programs: the Hospital Subsidy Fund and the Hospital Relief Subsidy Fund for Mentally Ill and Developmentally Disabled.⁴⁴ While the amount that the State spends varies annually, these charity care subsidies constitute a "major expenditure from the state treasury."⁴⁵

Given this cost-shifting arrangement, it is, therefore, disingenuous for the State to contend that it can avoid paying for Class Members' health care costs simply by terminating their government-based insurance. To the contrary, the State will subsidize charitable care to uninsureds to the tune of \$665 million in SFY 2011—a \$60 million dollar increase over last year's budget.⁴⁶ As such, the decision to terminate Plaintiffs' NJFC assistance simply places the State in the middle of something not unlike a "shell game," in which it simply spends money it purports to save under a different line item in the budget: charity care subsidies rather than Plaintiffs' health insurance. Since the decision to terminate Plaintiffs' health insurance will

⁴² New Jersey Hospital Association, *New Jersey Hospitals 2009 Economic Impact Report*, 2009, available at <<http://www.njha.com/press/pdf/EconomicImpactReport2009.pdf>> (last visited Feb. 1, 2011).

⁴³ DeLia, *Evaluation of the Hospital Charity Care Program in New Jersey*, at 27-29.

⁴⁴ *Id.* at vii, , 1, 4 - 5.

⁴⁵ *Id.* at 1-2.

⁴⁶ NJ Department of Health and Senior Services, SFY2011 Charity Care Subsidy Allocation, available at <<http://www.nj.gov/health/charitycare/documents/sfy2011ccs.pdf>> (last visited Feb. 1, 2011).

burden the New Jersey health care system, the State's decision to discriminate against the Class is unsupportable because it simply is not in the public interest.⁴⁷

CONCLUSION

As explained above, the regulations terminating Plaintiffs' NJFC assistance will cause irreparable harm to the Plaintiff Class Members. Yet, the State's decision to discriminate against twelve thousand lawful New Jersey residents does not ultimately serve the public interest; rather, it will serve to further burden the New Jersey health care system. Moreover, the unfairness of the challenged action is further illustrated by the State's decision to pursue a policymaking process that left no room whatsoever for public involvement and criticism, leaving *amici* powerless to advocate for the rights of the affected communities in the ordinary course.

Accordingly, *amici* respectfully submit that the Court should grant Plaintiffs' application for emergent relief and order the State to restore the Class Members' NJFC assistance with all due haste.

Respectfully submitted,

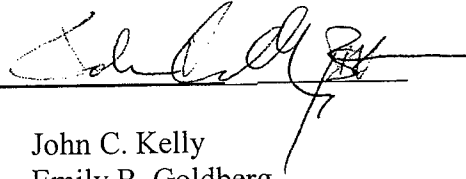
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⁴⁷ See, e.g., *Caviglia v. Royal Tours of Amer.*, 178 N.J. 460, 472-73 (2004) (recognizing that the means used to achieve a permissible goal offend equal protection principles if they do not "bear a real and substantial relationship to a permissible legislative purpose."); *WHS Realty Co. v. Town of Morristown*, 323 N.J. Super. 553 (App. Div. 1999) (striking discriminatory legislation "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.") (internal citations omitted).

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Plaintiffs,

v.

JENNIFER VELEZ, COMMISSIONER OF
NEW JERSEY DEPARTMENT OF
HUMAN SERVICES; JOHN GUHL,
DIRECTOR OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001870-10

Transferred from the Superior Court, Law Division,
Mercer County

Civil Docket No. L-1608-10

Sat Below:

Hon. Linda R. Feinberg, J.S.C.

Civil Action

CLASS ACTION

CERTIFICATION OF SERVICE

Brett D. Kahn, Esq. of full age, hereby certifies as follows:

1. I am an attorney-at-law in the State of New Jersey and an associate of the firm of
McCarter & English, LLP.

2. On February 7, 2011, I caused to be served an original and four (4) copies of: (1)
Notice of Motion, (2) Certification of John C. Kelly in support thereof, (3) Amicus Brief in
Support of Plaintiffs' Motion for Emergent Relief, and (3) this Certification of Service upon the
following by Hand Delivery:

Joseph H. Orlando
Appellate Division Clerk
Superior Court of New Jersey, Appellate Division
Hughes Justice Complex, 25 W. Market Street
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Trenton, New Jersey 08625

3. On February 7, 2011, I caused to be served two (2) copies of the aforementioned documents upon the following by Hand Delivery:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



BRETT D. KAHN

Dated: February 7, 2011