

COURT OF APPEALS
STATE OF NEW YORK

----- X
MARY McKINNEY and MECHLER HALL :
COMMUNITY SERVICES, INC., :
 :
 :
 Plaintiffs-Appellants, :
 : Bronx County
 - against - : Index No. 6034/07
 :
 :
 THE COMMISSIONER OF THE NEW YORK :
 STATE DEPARTMENT OF HEALTH; THE :
 NEW YORK STATE DEPARTMENT OF :
 HEALTH; and THE STATE OF NEW YORK, :
 :
 :
 Defendants-Respondents. :
----- X

**PROPOSED AMICUS CURIAE’S BRIEF IN SUPPORT OF
PLAINTIFF-APPELLANTS’ MOTION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE	3
DISCUSSION.....	10
POINT I THE NEW YORK STATE CONSTITUTION AND SETTLED PRINCIPLES OF REPRESENTATIVE DEMOCRACY DEMAND THAT THE LEGISLATURE, NOT AN UNELECTED COMMISSION, ESTABLISH HEALTH CARE POLICY AND BE HELD POLITICALLY ACCOUNTABLE TO THE VOTING PUBLIC	12
A. Delegation of Legislative Lawmaking Authority Is Prohibited Under New York’s Constitution.....	12
B. Revocation of a Hospital’s Operating Certificate Under N.Y. Public Health Law, Art. 28.....	16
C. Department of Health Rulemaking Under the N.Y. State Administrative Procedure Act.....	18
D. Delegation of Legislative Drafting to Commission	21
POINT II THE STRUCTURE AND AUTHORITY OF THE BERGER COMMISSION, FORMULATED BY THE ENABLING LEGISLATION, IS AN UNCONSTITUTIONAL DEPARTURE FROM PERMISSIBLE FORMS OF LEGISLATIVE DELEGATIONS	23
A. The Legislature Did Not Articulate a Policy in the Enabling Legislation that Could be Implemented without Additional Policy Determinations Standards	25
B. The Absence of Legislative Accountability for the Berger Commission’s Recommendations	28

C. Federal Law is Inapplicable to the Issue of Whether the Enabling Legislation is Permissible Under the New York State Constitution 32

D. Implications of the Enabling Legislation on the Democratic Process and the Development of State Health Care Policy..... 34

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

	PAGE
241 East 22 nd St. Corp. v. City Rent Agency, 33 N.Y.2d 134, 350 N.Y.S.2d 631 (1973).....	14
Boreali v. Axelrod, 71 N.Y.2d 1, 523 N.Y.S.2d 464 (1987)	13, 14, 28
Campagna v. Shaffer, 73 N.Y.2d 237, 538 N.Y.S.2d 933 (1989)	13
City of Utica v. Water Pollut. Control Bd., 5 N.Y.2d 164, 182 N.Y.S.2d 584 (1959).....	14, 19
Dorst v. Pataki, 90 N.Y.2d 696, 665 N.Y.S.2d 65 (1997)	14
Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906 (1991).....	33
Levine v. Whalen, 39 N.Y.2d 510, 384 N.Y.S.2d 721 (1976).....	12, 15, 17
Martin v. State Liquor Auth., 15 N.Y.2d 707, 256 N.Y.S.2d 336 (1965)	15
Med. Soc'y of New York v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).....	12, 19, 21
Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990).....	32, 33
Nicholas v. Kahn, 47 N.Y.2d 24, 416 N.Y.S.2d 565 (1979)	12, 15
Noyes v. Erie & Wyoming Farmers Co-op. Corp., 281 N.Y. 187 (1939).....	14, 16, 19
In re Oswald N. v. Commission of New York State Office of Mental Health, 87 N.Y.2d 98, 637 N.Y.S.2d 949 (1995).....	31
Packer Collegiate Inst. v. University of State of New York, 298 N.Y. 184 (1948).....	27

People ex rel. Dudley v. West, 87 Misc. 2d 967, 386 N.Y.S.2d 555 (Sup. Ct. Kings Co. 1976)	23, 32
People v. P.J. Video, Inc., 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986).....	33
People v. Parker, 41 N.Y.2d 21, 390 N.Y.S.2d 837 (1976).....	11
People v. Velazquez, 68 N.Y.2d 533, 510 N.Y.S.2d 833 (1986)	33
People v. Vilardi, 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990)	32
Small v. Moss, 279 N.Y. 288 (1938)	13
St. Joseph’s Hosp. v. Novello, 840 N.Y.S.2d 263, 2007 WL 2044870 (4 th Dep’t 2007).....	31
Sullivan City Harness Racing Ass’n v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622 (1972).....	15

FEDERAL LEGISLATIVE MATERIAL

135 Cong. Rec. H. 1294 (daily ed. Apr. 18, 1989)	33
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STATE CONSTITUTION

N.Y. Const. art. III, § 1	1, 24
N.Y. Const. art. III, § 12	31
N.Y. Const. art. III, § 13	31
N.Y. Const. art. IV, § 7	31

STATUTES

Ch. 1030, 1965 N.Y. Laws 1529 (McKinney).....	22
Ch. 1031, 1965 N.Y. Laws 1749 (McKinney).....	22

Ch. 346, § 2, 1961 N.Y. Laws 518 (McKinney).....	22
Ch. 346, § 7, 1961 N.Y. Laws 519 (McKinney).....	22
N.Y. A.P.A. § 202(1)(f) (McKinney 2007).....	20
N.Y. A.P.A. § 202(8) (McKinney 2007).....	20
N.Y. A.P.A. § 207(3) (McKinney 2007)	20
N.Y. A.P.A. §§ 201-207 (McKinney 2007).....	19
N.Y. Comp. Codes R. & Regs. tit. 10, § 51.1-.17 (2007)	18
N.Y. Comp. Codes R. & Regs. tit. 10, § 51.11(c)(2) (2007)	18
N.Y. Comp. Codes R. & Regs. tit. 10, § 51.11(d)(3) (2007).....	18
N.Y. Comp. Codes R. & Regs. tit. 10, § 51.12 (2007)	18
N.Y. Comp. Codes R. & Regs. tit. 10, § 51.9(a)-(b) (2007).....	18
N.Y. Comp. Codes R. & Regs. tit. 10, § 710 (2007)	20
N.Y. Comp. Codes R. & Regs. tit. 10, § 760 (2007)	20
N.Y. Comp. Codes R. & Regs. tit. 10, § 762 (2007)	20
N.Y. Comp. Codes R. & Regs. tit. 10, § 790 (2007)	20
N.Y. Comp. Codes R. & Regs. tit. 10, § 791 (2007)	20
N.Y. Pub. Health Law § 2801-a(10)(b) (McKinney 2007).....	20
N.Y. Pub. Health Law § 2806 (McKinney 2007)	16, 17
N.Y. Pub. Health Law § 2806(2) (McKinney 2007).....	17, 20
N.Y. Pub. Health Law § 2806(3) (McKinney 2007).....	17
N.Y. Pub. Health Law § 2806(4) (McKinney 2007).....	18
N.Y. Pub. Health Law § 2806(5)(f) (McKinney 2007).....	17
N.Y. Pub. Health Law § 2806(6)(b) (McKinney 2007).....	17

N.Y. Pub. Health Law § 2806(6)(c) (McKinney 2007)	17
N.Y. Pub. Health Law § 2806(6)(e) (McKinney 2007)	18
N.Y. Pub. Off. Law §§ 100-111 (McKinney 2007)	7

MISCELLANEOUS

American Heritage Dictionary of the English Language, 4 th Ed. (2006), <i>available at</i> http://dictionary.reference.com/browse/policy	15
Introducer’s Memorandum in Support of Bill Number S4271, N.Y. Spons. Memo., 2005 S.B. S4271	4
Introduction to the CON Process, <i>available at</i> http://www.health.state.ny.us/nysdoh/cons/cons_application/ page_00_intro_to_con_process.htm	20
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William C. Thompson, Jr., <i>Emergency Room Care: Will it Be There? Assessing the Impact of Closing Five Emergency Rooms in New York City (2006)</i> , <i>available at</i> http://www.comptroller.nyc.gov/bureaus/opm/ reports/hospital-06/dec-21-06_hospital-report.pdf	35

INTRODUCTION

The Association of the Bar of the City of New York (the “Association”) respectfully submits this *amicus curiae* memorandum of law in support of Plaintiffs-Appellants Mary McKinney and Mechler Hall Community Services, Inc.’s (“Appellants”) motion for leave to appeal the June 19, 2007 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, unanimously affirming the March 8, 2007 Order of the Supreme Court of New York, Bronx County. Appellants seek review of the following question: Does the Enabling Legislation, L. 2005 ch. 63, Part E (the “Enabling Legislation”), which created the unelected Commission on Health Care Facilities in the 21st Century (the “Berger Commission”) and delegated to it the responsibility for making fundamental policy choices concerning the redistribution of statewide health care resources, violate Article III, Section 1 of New York State Constitution, which mandates that “the legislative power of this state shall be vested in the senate and the assembly”?¹ This question merits review by this Court because, as detailed herein, it raises novel issues of both constitutional and public import. This memorandum of law is intended to draw the Court’s attention to legal arguments which might otherwise escape its consideration, and to provide the

¹ The Enabling Legislation is contained in the Record on Appeal pages 92 through 98. The Record on Appeal is hereinafter referred to as “(R. __).”

Association's unique perspective on the pressing constitutional and public health issues raised by this case.

In late November 2006, the Berger Commission issued recommendations for the closing, downsizing or restructuring of approximately one-quarter of New York State's hospitals in A Plan to Stabilize and Strengthen New York's Health Care System (the "Final Report"). Neither the recommendations nor crucial facts upon which they were allegedly based were ever revealed to the public prior to the Final Report's issuance. By the Enabling Legislation's design, the recommendations automatically became law on January 1, 2007, without any affirmative approval by the Legislature. Enabling Legis. § 9(b) (R. 97).

In rejecting Appellants' requested equitable relief, the Appellate Division erred in two distinct ways. First, its summary analysis mistakenly concluded that the Enabling Legislation articulated the legislative policy choices required to pass muster under the State Constitution's non-delegation doctrine. In fact, no policy choices are found anywhere in the Enabling Legislation. Second, the court did not address the constitutional infirmity in the Enabling Legislation's *sui generis* "self-executing" mechanism by which fundamental policy choices, rather than being legislatively made, were made by an unelected commission with no accountability to New York's voters.

These significant constitutional flaws are particularly alarming in this case given the magnitude of health care as an area of public concern affecting all New Yorkers. To permit such an extraordinary lawmaking process to stand will not only run afoul of established separation-of-powers principles under this State's Constitution, but will allow important public policy to be made in this area without accountability to the voters who will most certainly be impacted by that policy. This harms not only the State's health care policy, but also the very functioning of representative government as mandated by the State Constitution.

STATEMENT OF THE CASE

The Association presumes the Court's familiarity with the facts pertaining to the Enabling Legislation and the particular allegations relating to Westchester Square Medical Center located in the Bronx ("WSMC"), as detailed in the Record on Appeal and the Appellants' brief.

Especially relevant to this *amicus curiae* brief are the facts concerning the creation, structure, and functioning of the Berger Commission, as well as the import of its recommendations on New York State's health care policy:

1. On April 13, 2005, the State of New York enacted the Enabling Legislation, which created a commission charged with "examining the system of general hospitals and nursing homes," and recommending changes that will "result

