COURT OF APPEALS
STATE OF NEW YORK

MARY McKINNEY and MECHLER HALL COMMUNITY SERVICES, INC.,	:	
Plaintiffs-Appellants,	:	
- against -	:	Bronx County 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.	:	

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

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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

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[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

in a more coherent, streamlined health care system in the state of New York." Enabling Legis. §§ 1-2(a) (R. 92).

2. The Legislature voted on and passed the Enabling Legislation without substantive hearings. No official legislative history is available to provide information about the Legislature's specific legislative purpose in enacting the Enabling Legislation, or its anticipated effect on New York's health care system.[2]

3. None of the statewide Commission members were elected, and the Enabling Legislation did not provide any criteria for members' qualifications. Twelve of the eighteen statewide commission members were appointed by Governor George Pataki, who left office prior to the implementation of the Berger Commission's recommendations. Enabling Legis. § 2(b) (R. 92). The remaining six members were appointed by Assembly and Senate leaders. *Id.*

4. The Enabling Legislation made no legislative finding of excess capacity in New York's system of hospitals and nursing homes, and did not articulate what would constitute excess capacity (R. 92-98).

5. The Enabling Legislation provided no general mandate to close and/or downsize a target number or percentage of hospitals and nursing homes in New York (R. 92-98).

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[2] The most extensive discussion of the Berger Commission's "mission" occurred in a New York Senate Sponsor's Memorandum, which noted the commission would review and "rightsize" New York's Health Care System. Introducer's Memorandum in Support of Bill Number S4271, N.Y. Spons. Memo., 2005 S.B. S4271.

6. The Enabling Legislation did not provide target costs or savings to result from the Berger Commission's recommendations as a whole (R. 92-98).

7. The Enabling Legislation enumerated nine factors to be considered by the Berger Commission.[3] The Enabling Legislation did not provide guidelines as to the weight of each factor or financial targets for each factor, or provide for the resolution of any conflicts among the factors. Moreover, the Berger Commission was given full discretion to adopt other factors submitted by the Commissioner of Health and the Director of the Dormitory Authority of the

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[3] These factors include:

> (i) The need for capacity in the hospital and nursing home systems in each region of the state;
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> (ii) the capacity currently existing in such systems in each region of the state;
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> (iii) the economic impact of right sizing actions on the state, regional and local economies, including the capacity of the health care system to provide employment or training to health care workers affected by such actions;
>
> (iv) the amount of capital debt being carried by general hospitals and nursing homes, and the nature of the bonding and credit enhancement, if any, supporting such debt, and the financial status of general hospitals and nursing homes, including revenues from medicare, Medicaid, other government funds, and private third-party payors;
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> (v) the availability of alternative sources of funding with regard to the capital debt of affected facilities and a plan for paying or retiring any outstanding bonds in accordance with the contract with bondholders;
>
> (vi) the existence of other health care services in the affected region, including the availability of services for the uninsured and underinsured, and including services provided other than by general hospitals and nursing homes;
>
> (vii) the potential conversion of facilities or current facility capacity for uses other than as inpatient or residential health care facilities;
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> (viii) the extent to which a facility serves the health care needs of the region, including serving medicaid recipients, the uninsured, and underserved communities; and
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> (ix) the potential for improved quality of care and the redirection of resources from supporting excess capacity toward reinvestment into productive health care purposes, and the extent to which the actions recommended by the commission would result in greater stability and efficiency in the delivery of needed health care services for the community.

Enabling Legis. § 5 (R. 93-94).

State of New York, and to add additional factors of its own during its deliberations. Enabling Legis. § 5(a) (R. 94).

8. The Enabling Legislation required the Berger Commission to establish Regional Advisory Committees ("RACs") to "develop recommendations for reconfiguring its region's general hospital and nursing home bed supply to align bed supply with regional and local needs." Enabling Legis. § 7(d) (R. 95).

9. The Berger Commission was not required to accept the RACs' recommendations, and did not in the case of WSMC (R. 92-98).

10. The Enabling Legislation provided no guidelines as to the standards for the Berger Commission's consideration of RAC recommendations in its deliberations (R. 92-98).

11. As part of its functions under Section 7(d) of the Enabling Legislation, the New York City RAC ("NYC RAC") conducted public hearings in each borough to provide an opportunity for the public to voice its concerns and interests with respect to the Berger Commission's work (R. 193).

12. On or about November 10, 2006, the NYC RAC transmitted the Commission on Health Care Facilities in the 21st Century, New York City Regional Advisory Committee Recommendations ("RAC Report") to the Berger Commission (R. 357). The RAC Report specifically found that "bed capacity is about right for current utilization in New York City" (R. 366) (capitalizations

modified). As such, the NYC RAC recommended closing approximately 3,000 certified—but unstaffed—beds, thereby reducing "paper" beds that were not being used by New York City hospitals. *Id.*

13. With respect to WSMC, the NYC RAC did not recommend closure (R. 369). The NYC RAC specifically noted that WSMC (i) "is the lowest cost hospital in the Bronx;" (ii) "appears to be the number one choice of Throgs Neck/Pelham community residents;" (iii) has "over 23,000 emergency room patients;" (iv) "is financially sound" and "generates a small surplus each year;" (v) is a "high quality provider;" (vi) has a primary service area that includes parts of neighborhoods "which are 'stressed' and 'serious shortage areas' for primary care;" and (vii) has "strong bonds between the patients and the physicians . . . ." *Id.* The NYC RAC expressly stated that "[c]losure could significantly disrupt access." *Id.*

14. The Enabling Legislation undermined the State's Open Meetings Law, N.Y. Pub. Off. Law §§ 100-111 (McKinney 2007), as the Berger Commission, and its committees, were authorized to conduct business in executive session "notwithstanding section 105 of the public officers law." Enabling Legis. § 6 (R. 94). Accordingly, all discussions by the Berger Commission of specific hospitals at risk of closure or downsizing took place in executive session, and there

was no public record alerting the hospitals that would be affected, prior to publication of the Final Report.

15. The Enabling Legislation specifically provided that nonpublic records submitted to the Berger Commission "shall not be subject to disclosure pursuant to Article 6 of the public officers law. . . ." Enabling Legis. § 5(b) (R. 94). Thus, many of the crucial facts that informed the Berger Commission recommendations were not revealed to the public prior to the issuance of the Final Report.

16. On November 28, 2006, the Berger Commission submitted its Final Report to former Governor Pataki (R. 108), and ordered that WSMC be closed, contrary to the NYC RAC recommendations (R. 139). This Final Report contained recommendations for the closing, downsizing or restructuring of 57 hospitals, thereby impacting approximately one-quarter of the hospitals in New York's health care system (R. 135-42).

17. The Final Report provides no discretion to the Department of Health ("DOH") in implementing the Berger Commission's recommendations. It expressly states that the Commissioner of Health "*shall* revoke the operating certificate" of hospitals slated for closure and "*shall* implement each recommendation as expeditiously as possible, but in no event later than June 30, 2008" (R. 211-15) (emphasis added).

18. The Final Report did not explain why the Berger Commission diverged from the recommendations of the NYC RAC (R. 284-85).

19. Unlike typical administrative procedures, the Enabling Legislation provided no process by which interested parties would be afforded an opportunity to correct any inaccuracies relied upon by the Berger Commission or to challenge the efficacy of the recommendations before they became law (R. 92-98).

20. On or about November 30, 2006 (one month before leaving office), Governor Pataki approved the Berger Commission's recommendations. Within days, this approval was communicated to the Legislature (R. 420).

21. Under the Enabling Legislation, the Berger Commission's recommendations automatically become law as of January 1, 2007, unless "a majority of members of each house of the Legislature vote to adopt a concurrent resolution rejecting the recommendations of the commission . . . in their entirety by December 31, 2006." Enabling Legis. § 9(b)(ii) (R. 97). Accordingly, the Legislature had one month after Governor Pataki's approval of the recommendations — and only 33 days from the date of the Final Report's release — to debate, review, draft, vote on and adopt a concurrent resolution in both legislative houses to reject the recommendations in their entirety.

22. The Enabling Legislation did not require the Legislature to hold hearings or to otherwise familiarize itself and the public with the Berger Commission's recommendations before they automatically became law (R. 92-98).

23. The Senate and Assembly Health Committees held public hearings to discuss the Final Report (R. 705). However, no vote or other legislative action regarding the Final Report was taken by the Senate or Assembly following these hearings.

24. The Berger Commission's recommendations consequently attained the force of law on January 1, 2007, without further vote by the Legislature. Enabling Legis. § 9(b) (R. 97).

25. By the Berger Commission's own estimate, its recommendations will cost $1.2 billion (R. 354).

DISCUSSION

The Enabling Legislation presents a question that goes to the heart of representative democracy and the proper functioning of State government as dictated by the New York State Constitution: namely, whether the Legislature unconstitutionally delegated its exclusive lawmaking authority to an unelected commission, which in turn used this power to create significant health care policy changes.

Point I of the Association's argument summarizes the non-delegation doctrine in general, and as historically applied to the public health field. Point II compares the Enabling Legislation and the resulting Commission process to this precedent. As this analysis will show, two key areas in which the Enabling Legislation fails to pass constitutional muster are (i) the requirement that legislative delegations be accompanied by clear policies and standards; and (ii) the requirement that the Legislature actually enact a law, rather than allow it to take effect by inaction.

By rejecting Appellants' claims, the courts below failed to appreciate the extraordinarily broad lawmaking powers that were granted to the Berger Commission in this area of immense public concern, and created dangerous precedent that allows legislators to relinquish their constitutional responsibility to enact laws and institute policies on behalf of the voters to whom they must be politically accountable. Accordingly, in order to preserve "a representative form of government in this state," *People v. Parker*, 41 N.Y.2d 21, 28, 390 N.Y.S.2d 837, 842 (1976), the Association urges this Court to grant Appellants' motion for leave to appeal the lower courts' rulings.

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

A. Delegation of Legislative Lawmaking Authority Is Prohibited Under New York's Constitution

Numerous precedents of this Court establish that the State Constitution requires that, before the Legislature may delegate to an administrative body the task of effectuating its legislative goals, it must first articulate a legislative "policy" and set forth cognizable legislative "standards" to guide the agency's actions. *Levine v. Whalen*, 39 N.Y.2d 510, 515, 384 N.Y.S.2d 721, 723 (1976) ("Because of the constitutional provision that the legislative power of this State shall be vested in the Senate and Assembly, the Legislature cannot pass on its law-making functions to other bodies.") (internal citation omitted); *Med. Soc'y of New York v. Serio*, 100 N.Y.2d 854, 864, 768 N.Y.S.2d 423, 429 (2003) ("While the Legislature may endow administrative agencies with the power to adopt regulations to implement a legislative mandate, the legislative branch may not constitutionally cede its fundamental policy-making responsibility to a regulatory agency."); *Nicholas v. Kahn*, 47 N.Y.2d 24, 31, 416 N.Y.S.2d 565, 569 (1979) ("That the Legislature cannot delegate its lawmaking power to an administrative agency is a principle firmly rooted in the system of government ordained by our

Constitution."); *Campagna v. Shaffer*, 73 N.Y.2d 237, 242-43, 538 N.Y.S.2d 933, 935 (1989) ("An agency cannot by its regulations effect its vision of societal policy choices . . . and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer."); *Small v. Moss*, 279 N.Y. 288, 295 (1938) ("[T]hough the law-making body may confer a measure of discretion, it must at the same time define the limits of that discretion and fix the rules or standards which must govern its exercise.").

These requirements stem from the very nature of representative democracy itself. It is axiomatic that the most important social issues facing New York should be decided by the Legislature because its members are the ones who are directly responsible to the electorate.[4]

That the issues are difficult or controversial makes it even more crucial to keep them in the legislative sphere—they are likely so because the voting public cares deeply about them and will be affected greatly by them. It is "[m]anifestly . . . the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali v. Axelrod*, 71 N.Y.2d 1, 13, 523 N.Y.S.2d 464, 471 (1987). No subject is of more public concern than the State's health care

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[4] The infirmity of this process is all the more clear where Governor Pataki, the only elected official to affirmatively approve the Berger Commission recommendations, is no longer in office and, thus, no longer accountable to New York voters.

system. Indeed, this Court has recognized that "[s]triking the proper balance among *health* concerns, *cost* and privacy interests . . . *is a uniquely legislative function*." *Boreali*, 71 N.Y.2d at 12, 523 N.Y.S.2d at 470 (emphasis added).

Thus, for any legislative delegation of authority to pass constitutional muster, the first requirement is that it must incorporate the *basic policy choices* of the State "made and articulated by the Legislature." *Dorst v. Pataki*, 90 N.Y.2d 696, 699, 665 N.Y.S.2d 65, 66 (1997); *see also 241 East 22nd St. Corp. v. City Rent Agency*, 33 N.Y.2d 134, 142, 350 N.Y.S.2d 631, 637 (1973); *City of Utica v. Water Pollut. Control Bd.*, 5 N.Y.2d 164, 167, 182 N.Y.S.2d 584, 586 (1959); *Levine*, 39 N.Y.2d at 516, 384 N.Y.S.2d at 723; *Noyes v. Erie & Wyoming Farmers Co-op. Corp.*, 281 N.Y. 187, 193 (1939). This explicit statement of legislative intent is essential in order to preclude an unelected body from taking license to draft "a code embodying its own assessment of what policy ought to be." *Boreali*, 71 N.Y.2d at 9, 523 N.Y.S.2d at 468. In implementing legislative policy, non-elected bodies must not enact their own social policy, but instead must follow the Legislature's lead "for determining how competing concerns . . . are to be weighed." *Id.* at 12, 523 N.Y.S.2d at 470. A policy thus must be more than a

"reason" or a "consideration" — it must be a *"plan* or *course of action* . . . intended to influence and determine decisions, actions or other matters."[5]

A second *sine qua non* of any permissible delegation is the presence of *standards* to effectuate the legislative will. Indeed, "[t]he cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and *after fixing a primary standard*, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Kahn,* 47 N.Y.2d at 31, 416 N.Y.S.2d at 569 (emphasis added). Although the standards need not be "precise or specific," they must nevertheless be sufficiently clear that the boundaries of the delegated authority can be ascertained in the "particular area to be regulated." *Levine*, 39 N.Y.2d at 515, 384 N.Y.S.2d at 723. Examples of constitutionally permissible legislative guidance include: (1) "the protection and promotion of the health of the inhabitants of the state," *id.*, at 516, 384 N.Y.S.2d at 724; (2) "whether public convenience and advantage will be promoted by the issuance of [liquor] licences," *Martin v. State Liquor Auth.*, 15 N.Y.2d 707, 707, 256 N.Y.S.2d 336, 336 (1965); (3) whether "the public interest, convenience or necessity will be served" by the issuance of harness racing licenses, *Sullivan City. Harness Racing Ass'n v. Glasser*, 30 N.Y.2d 269, 276, 332 N.Y.S.2d 622, 626

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[5] *American Heritage Dictionary of the English Language*, 4th Ed. (2006) *available at* http://dictionary.reference.com/browse/policy. (emphasis added).

(1972); and (4) "such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state," *Noyes*, 281 N.Y. at 193.

Unlike the Enabling Legislation's open list of diverse and conflicting factors, these standards, while broad, offer clear guidance as to the implementation of legislative policy by providing unitary ends to be pursued in agency rulemaking. Additionally, these standards provide a touchstone by which the constitutionality of an administrative implementation of legislative policy can be judicially reviewed.

B. Revocation of a Hospital's Operating Certificate Under N.Y. Public Health Law, Art. 28

Existing administrative procedures in the health care area show that laws can be enacted that comply with the foregoing constitutional delegation requirements. In fact, there already exists appropriately structured legislation on the very issue unconstitutionally delegated to the Berger Commission--hospital and nursing home closures--in the form of New York Public Health Law § 2806. As that statute demonstrates, the Legislature has long understood the significant public interests at stake when a hospital is permanently closed by government mandate, and (notwithstanding the time and inconvenience it might entail for government officials) the public and private needs and rights that must be considered before

doing so. Indeed, the severity of a government-mandated closure requires the DOH to examine each facility individually to determine the impact on the communities involved.

Section 2806 complies with the constitutional requirement that legislation contain "reasonable safeguards" to protect against arbitrary agency action, *Levine*, 29 N.Y.2d at 515, 384 N.Y.S.2d at 723, by outlining the *process* by which operating certificate revocations can occur. Thus, to ensure that the DOH is fully knowledgeable about the public impact of a hospital closure, Section 2806 requires a pre-revocation hearing with ample advance notice. *See* N.Y. Pub. Health L. § 2806(2), (3), (5)(f), (6)(c) (McKinney 2007). And for revocations due to decreased beds or service level, Section 2806 contains a further check on injudicious action by requiring the DOH to announce by general publication "that such a finding is under consideration and an address to which interested parties can write to make their views known." N.Y. Pub. Health L. § 2806(6)(b) (McKinney 2007). Additionally, the DOH must "take all public comments into consideration" before reaching its finding. *Id.* These protections demonstrate the importance of the comments and opinions of individuals and organizations affected by a revocation.

Going further, the DOH itself, drawing on its voluminous experience in applying the State's health policies, has published Uniform Hearing Procedures,

N.Y. Comp. Codes R. & Regs. tit. 10, §§ 51.1-.17 (2007), applicable to Section 2806, which further ensure that those affected by its adjudicatory proceedings will have the opportunity to participate. These procedures contain, among other protections, provision for intervention by petitioners having an "interest in the matter at issue," N. Y. Comp. Codes R. & Regs. tit. 10, § 51.11(c)(2) (2007); the right to "a fair and impartial" hearing before a hearing officer free of bias, N. Y. Comp. Codes R. & Regs. tit. 10, § 51.9(a)-(b) (2007); the opportunity to submit evidence, N. Y. Comp. Codes R. & Regs. tit. 10, § 51.11(d)(3) (2007); and the opportunity to receive a transcript of the hearing and a copy of the hearing officer's report, N. Y. Comp. Codes R. & Regs. tit. 10, § 51.12 (2007). There is no provision in these rules for closed hearings or other secretive means of collecting evidence.

Moreover, by explicitly subjecting revocation determinations to appellate or Article 78 judicial review, the Legislature provided additional opportunities for a revocation to be examined and challenged by interested parties. N.Y. Pub. Health L. § 2806(4), (6)(e) (McKinney 2007).

C. Department of Health Rulemaking Under the N.Y. State Administrative Procedure Act

The DOH rulemaking process for regulations of general applicability provides further insight into how non-delegation principles are honored in the

administrative context. This Court has instructed that when an administrative agency engages in this form of activity, it must take care not to "promulgate regulations on a blank slate without legislative guidance" nor "effectuate a profound change in social and economic policy." *Med. Soc.*, 100 N.Y.2d at 865, 768 N.Y.S2d at 429.

To ensure that it remains within these boundaries, the DOH conducts its rulemaking in accordance with Article 2 of the State Administrative Procedure Act ("SAPA"), which requires notice and public comment prior to the issuance of its final rules. *See* N.Y. A.P.A. §§ 201-207 (McKinney 2007). These key components of agency rulemaking allow for a pre-publication dialogue that enables the agency to educate itself on the full range of interests affected by the rule, reintroduces a representative public voice into the agency's workings, and provides a public forum in which to check misguided agency action or decisions based on favoritism or political bias. *See, e.g., Utica*, 5 N.Y.2d at 168, 182 N.Y.S.2d at 587; *Noyes*, 281 N.Y. at 194 (both noting, in upholding a challenged delegation, that the enabling legislation in question provided for hearings upon notice). Agency rules created in this way are thus subject to public criticism before they are chiseled into bureaucratic stone, providing a key element of fairness to affected parties.

Moreover, SAPA mandates that the agency "cite the statutory authority, including particular sections and subdivisions, under which the rule is adopted," thus requiring the administrative rule to track back to clarification of existing laws or regulations. N.Y. A.P.A. § 202(1)(f) (McKinney 2007). Finally, SAPA does not foreclose alternate courses of action or conclusively affect rights of private parties. *See* N.Y. A.P.A. §§ 202(8), 207(3) (McKinney 2007).

Consistent with these principles, the DOH and other agencies subject to the Public Health Law conduct extensive reviews based on published regulatory criteria, with notice and opportunity for public hearing, in order to close or expand hospitals and nursing home facilities.[6] *See, e.g.*, N.Y. Pub. Health L. § 2801-a(10)(b) (McKinney 2007), § 2806(2) (McKinney 2007); N.Y. Comp. Codes R. & Regs. tit. 10, §§ 710, 760, 762, 790, 791 (2007). DOH regulations are thus subject to the cleansing air of public scrutiny. Before they are applied in an individual case, the public is afforded an opportunity to educate the agency on how to refine the policies to make them more balanced, and the likelihood that the agency will engage in sweeping policy decisions in excess of its authority are, therefore, minimized.

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6 *See* Introduction to the CON Process, *available at* http://www.health.state.ny.us/nysdoh/cons/cons_application/page_00_intro_to_con_process.htm (outlining the Certificate of Need process).

Additionally, the DOH has longstanding expertise in administering New York's health care policies. Like the Department of Insurance, another permanent State agency, the DOH has a "special competence and expertise" that entitles its rulemaking to a degree of deference. *See Med. Soc.*, 100 N.Y.2d at 864, 768 N.Y.S.2d at 428. In contrast, temporary state commissions are not subject to continuing judicial or legislative oversight, and have no established history of implementing legislative policy. Accordingly, there is no reason to treat a commission's conclusions with the same degree of deference generally granted to specialized agencies.

D. Delegation of Legislative Drafting to Commission

While the Legislature is free to modify an existing regulatory framework by enacting a new law, the alternative framework must be within the constraints of the State Constitution. The Enabling Legislation is not within those constraints because the Legislature cannot constitutionally delegate the task of legislating. If, however, the Legislature prefers to delegate to the administrative body or commission the task of constructing a vision of policy reform, there must be a condition that the Legislature affirmatively approve the resulting recommendations before they become law. The Legislature simply cannot abdicate its responsibility for enacting lawmaking policy.

The "Bartlett Commission," created in 1961 to study the "existing provisions of the penal law," Ch. 346, §2, 1961 N.Y. Laws 518 (McKinney), is an example of the latter form which has withstood constitutional challenge. The Bartlett Commission was charged with the authority to propose to the Legislature a "revised, simplified body of substantive laws relating to crimes and offenses." *Id.* Significantly, its recommendations were affirmatively voted upon by the Legislature before becoming law, as opposed to the instant case where the Legislature failed to take any action before the Final Report became law.

Much like the Berger Commission, the Bartlett Commission was given wide discretion to formulate policy not of the Legislature's creation. For example, one of the tasks of this commission was to "reappraise, in *light of current knowledge and thinking*, existing substantive provisions relating to sentencing, the imposing of penalties and the theory of punishment relating to crime." *Id.* (emphasis added).

However, unlike the Berger Commission's "recommendations," the Bartlett Commission's recommendations became law only *after they were passed by the Legislature and approved by the Governor*. *See* Ch. 346, § 7, 1961 N.Y. Laws 519 (requiring commission to deliver its "proposed revision of the penal law and the code of criminal procedure" to the Governor and Legislature); Chs. 1030, 1031, 1965 N.Y. Laws 1529, 1749 (enacting the Bartlett Commission's proposed

Revised Penal Law). Moreover, the Legislature was free to alter the Bartlett Commission's recommendations according to its own legislative judgment, as opposed to the Enabling Legislation's prohibition against modifying the Berger Commission's recommendations in any way. Enabling Legis. § (9)(b) (R. 97).

In rejecting a constitutional challenge to the Bartlett Commission, the court emphasized the crucial fact that the Bartlett Commission "*merely proposed* legislation to the Legislature, it did not *enact the new law*." *See People ex rel. Dudley v. West*, 87 Misc. 2d 967, 969, 386 N.Y.S.2d 555, 556 (Sup. Ct. Kings Co. 1976) (emphasis added). Because the Legislature actually voted to enact the Bartlett Commission's recommendations, "the Legislature did not delegate its legislative authority," and thus the revised Penal Law "as proposed by the commission and enacted by the Legislature" survived constitutional challenge. *Id.*

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

When analyzed in light of the foregoing established precedent, the Berger Commission's structure and authority are impermissible departures from traditional delegations to administrative bodies and are in direct contravention of

the State Constitution's unequivocal mandate that "[t]he legislative power of this state shall be vested in the senate and the assembly." N.Y. Const. art. III, § 1.

It is no coincidence that the parties have been unable to cite to New York precedent that analyzes delegations of legislative authority in a form similar to the Berger Commission. The truth is that the Enabling Legislation created a process of lawmaking never before seen in the State of New York, whereby an unelected commission was granted broad discretion to restructure the state's delivery of services to its constituents, and whose final recommendations have been thrust upon state residents with the force of law without legislative review, approval or accountability. In effect, the Berger Commission was empowered to decide the highly-charged political issue of which hospitals will stand or fall—indeed, determining the form, size and functioning of New York's statewide hospital system—while insulating the Legislature from the political fallout of these difficult, yet important, decisions.

This novel form of legislation is in direct conflict with representative democracy and cannot withstand constitutional scrutiny. By failing to appreciate the breadth of authority granted to the Berger Commission, especially when compared to traditional forms of delegations as articulated above, the courts below ignored New York's established non-delegation doctrine. If this legislation is allowed to stand, it will mean that lawmaking can be shielded from public scrutiny

and state policy can be set without accountability to New Yorkers. It is, therefore, imperative that this Court grant Appellant's motion for leave to appeal so that it can intervene to prevent this gross violation of the State Constitution's separation-of-powers and to uphold the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State's laws.

A. The Legislature Did Not Articulate a Policy in the Enabling Legislation that Could be Implemented without Additional Policy Determinations Standards

The court below concluded that the Legislature had "made [a] basic policy choice" to close and reconfigure hospitals and nursing homes (R. 888). In this it was wrong. There is, in fact, no statement of any legislative policy choice in this law.

When it enacted the Enabling Legislation, the Legislature could have stated an intention to close or downsize a certain number of hospitals and nursing homes, or to reach a certain target amount of cost savings. It could have made a legislative finding of excess capacity and mandated its elimination. Yet the Legislature did none of these things. The absence of any such guidance makes it impossible to evaluate whether the Berger Commission's recommendations comply (or fail to comply) with the Enabling Legislation. Indeed, the Berger Commission could have reached almost *any* conclusion and still have remained within the confines of the Enabling Legislation.

Unlike permissible delegations, which provide clear guidance as to the specific legislative goal to be implemented, the Enabling Legislation lists nine factors for consideration with wide-ranging interests, without specifying how to weigh each factor or resolve conflicts among these factors. For example, there is no indication how "the amount of capital debt being carried by general hospitals and nursing homes," Enabling Legis. § 5(a)(iv) (R. 93), should be reconciled with "the extent to which a facility serves the health care needs of the region," Enabling Legis. § 5(a)(viii) (R. 94). The situation is made even more untenable by the Berger Commission's authority to adopt additional factors for consideration that were not identified by the Legislature. Enabling Legis. § 5 (R. 94). In effect, the Legislature expressed no direction at all for the Berger Commission's work: was it to stabilize the financial condition of the hospital system, or guarantee sufficient capacity for hospitals to respond to community needs? Or was it simply to decrease the size of the hospital system by eliminating certified beds? The lack of any policy choices in the Enabling Legislation leaves these questions unanswered.

Because the Berger Commission was free to weigh these factors as it saw fit, and even to incorporate its own "additional factors," any recommendation of the Berger Commission could be justified by pointing to any one of the enumerated factors or a factor of the Berger Commission's own choosing. Indeed, the "factors" listed in the Enabling Legislation fail to constrain the Berger

Commission's decision making process. The Legislature effectively provided the Berger Commission with "no standards or limitations of any sort," *Packer Collegiate Inst. v. University of State of New York*, 298 N.Y. 184, 189 (1948). Thus, the Legislature's delegation to the Commission fails to provide an "effective restraint upon unfair discrimination or other arbitrary action." *Id.*

The inability of these factors to provide constitutionally sufficient guidance is illustrated by the fact that the recommendations of the NYC RAC, which held public hearings and was presumably most familiar with the details of New York City's hospitals, diverged significantly from the Berger Commission's final recommendations, despite ostensibly being subject to the same "factors." (*Compare* R. 274-300 *with* R. 369-79). In the end, the Commission recommended closure of WSMC (R. 284), even though the NYC RAC had, on the same facts, reached precisely the opposite conclusion (R. 369). Had judicial review of these recommendations been permitted, as in an Article 28 proceeding under the Public Health Law, the court would not have the guidelines necessary to discern whether the Berger Commission or the NYC RAC adhered to the Legislature's purpose.

As there was no further attempt to reconcile these competing policy considerations in the Enabling Legislation, or to provide guidance as to how they may be reconciled, the Berger Commission was ultimately left to its own devices to craft a core element of this State's health care policy. As this Court has clearly

stated, striking the proper balance between competing economic and health concerns is a policy choice which must be made by the Legislature. *See Boreali*, 71 N.Y.2d at 12, 523 N.Y.S.2d at 470 (holding that "[s]triking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function").

In its vagueness, the Enabling Legislation stands in striking contrast to Section 2806 of the Public Health Law, which articulates in detail the specific grounds upon which the DOH is authorized to revoke a hospital's operating certificate. Here, by contrast, no one can know if an operating certificate was revoked because of a policy choice to close hospitals with high capital debt, or because the hospital was in a certain area of the State, or because the Commission was applying some cost-saving goal that remains undeclared to this day.

B. The Absence of Legislative Accountability for the Berger Commission's Recommendations

One of the most unusual features of the Enabling Legislation—not acknowledged by the courts below—is the "self-executing" mechanism by which the recommendations formulated by an unelected commission automatically became law within a month's time without any legislative action. The significance of this aspect of the Enabling Legislation cannot be overstated. As it currently stands, the Berger Commission—not the Legislature—is accountable for the

restructuring of one-quarter of New York's hospitals. Inevitably, someone will be disadvantaged by or question the wisdom of these decisions. Yet, because the Legislature has insulated itself from the specific decisions made by the Berger Commission, the general public has diminished political recourse to express its discontent with these new laws.[7]

Not only did the Appellate Division fail to identify this key difference between the Enabling Legislation and any other known law, but it also erred when it summarily characterized the Enabling Legislation as less broad than the Legislature's prior delegations of authority to the DOH. Compared side by side, the Commission's structure and process afforded it much more discretion and power than are allocated to the DOH or other state agencies that implement the State's health policies. Because the Legislature rejected the DOH for this role, and also discarded virtually all of the procedural protections that the Public Health Law contains to protect individuals and the public from arbitrary administrative action, it rendered inapposite any precedent upholding legislative delegations to that agency.[8] For example, the Commission was not required to, and did not, develop

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[7] In fact, the Berger Commission, which is solely responsible for this sweeping reform of the State's hospital system, is not even currently in existence.

[8] Respondents, by their own admission, acknowledge that the Berger Commission's authority to close hospitals exceeded that of the DOH when they argue that the DOH would be unable to close WSMC after June 30, 2008, pursuant to the Enabling Legislation. Brief for

enacted except by bill." N.Y. Const., art. III, §§ 12-13. The lawmaking procedure created by the Enabling Legislation—whereby New York law originates in an administrative body, is approved by the Governor, and then attains the force of law by virtue of legislative inaction—turns the Constitution on its head. This is especially true because, under New York law, legislative inaction does not constitute an affirmative statement of legislative will. *See, e.g., In re Oswald N. v. Comm'n of New York State Office of Mental Health*, 87 N.Y.2d 98, 103 n.1, 637 N.Y.S.2d 949, 951 n.1 (1995) (stating that "legislative inaction . . . affords the most dubious foundation for drawing positive inferences").

Even if one assumes, *arguendo*, that the legislature could pass a bill through legislative inaction, the Berger Commission recommendations would violate the presentment clause of the State Constitution, which provides that "[e]very bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor." N.Y. Const. art. IV, § 7. As explained recently in *St. Joseph Hosp. v. Novello*, the Enabling Legislation "inverts the usual [legislative] procedure" because it "creates a process that allows the recommendations of the Commission to become law without ever being presented to the Governor after the action of the Legislature." *St. Joseph's Hosp. v. Novello*, 840 N.Y.S.2d 263, 273, 2007 WL 2044870, at*8 (4th Dep't 2007) (Fahey, J., dissenting).

The example of the Bartlett Commission stands in stark contrast to the Berger Commission. Like the Berger Commission, the Bartlett Commission was composed of unelected members who were not politically accountable to New York voters. And like the Berger Commission, the Bartlett Commission was given wide discretion in reforming the State's penal law. However, the defining characteristic that distinguishes the Bartlett Commission, and ensures its conformity with the State Constitution, is that the recommendations were, in fact, genuine "recommendations" subject to possible revision, and which had to be affirmatively enacted as law by the Legislature. Unlike the Berger Commission, the Legislature "did not delegate its legislative authority" to the Bartlett Commission because the legislation was ultimately "enacted by the Legislature," and thereby survived constitutional challenge. *Dudley*, 87 Misc. 2d at 969, 386 N.Y.S.2d at 556.

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

Although it ultimately reached the wrong conclusion, the lower courts were correct not to rely upon federal constitutional precedent, as expressed in *Nat'l Fed'n of Fed. Employees. v. United States,* 905 F.2d 400 (D.C. Cir. 1990), when examining Appellants' claims. New York courts are not bound by federal decisions interpreting federal constitutional provisions. *See People v. Vilardi*, 76

N.Y.2d 67, 80, 556 N.Y.S.2d 518, 525 (1990). Moreover, as New York courts have held on several occasions, the State Constitution can be interpreted to "supplement or expand" federal counterparts. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 911 (1986); *see also People v. Velazquez*, 68 N.Y.2d 533, 536, 510 N.Y.S.2d 833, 835 (1986); *Immuno AG v. J. Moor-Jankowski*, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913 (1991); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1196 (1999) (noting that New York follows a "strong" non-delegation doctrine more restrictive than its federal counterpart).

Leaving aside the fact that *Nat'l Fed'n* and the closure of federal military bases are not relevant to the instant matter because they occurred under the auspices of the federal constitution, there are also critical factual distinctions that further demonstrate its inapplicability: (1) *Nat'l Fed'n* involved the President's inherent authority over the military, not the health care system, which is hardly the province of the State executive; (2) *Nat'l Fed'n* involved the closure of federally owned and operated military bases, whereas this case concerns the closure of a privately-owned hospital; and (3) a joint resolution rejecting the recommendations of the Commission on Base Realignment and Closure was voted on and overwhelmingly rejected, *see* 135 Cong. Rec. H. 1294 (daily ed. Apr. 18, 1989),

whereas there was never any vote concerning the final recommendations of the Berger Commission. Accordingly, *Nat'l Fed'n* has no persuasive value in determining whether the Enabling Legislation is permissible under the New York State Constitution.

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

In noting the constitutional flaws of the Enabling Legislation and the work of the Berger Commission, the Association does not minimize the difficulty of bringing the State's health care spending under control. As indicated by this year's State budget, the costs involved in the delivery of care to New Yorkers are significant. The State will provide over $32 billion in All Funds support for the Medicaid program this year, which represents over 25 percent of the State's $120.9 billion All Funds budget.[9] But these stark facts make the integrity of the process all the more essential. In financial terms, closing hospitals is a costly affair. By the Berger Commission's own estimate, the overall cost of its recommendations will be $1.2 billion (R. 354). Reopening hospitals that have been precipitously closed, or opening others to replace the services lost, is more costly still.

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[9] *See* New York State Senate Finance Committee, *Staff Report on the SFY 2007-08 Adopted Budget*, at 7, 66 (2007), *available at* http://www.senate.state.ny.us/sws/2007-08%20Staff%20Report.pdf.

Nevertheless, it is simply unconstitutional to delegate to an unelected body *carte blanche* authority to determine the criteria by which taxpayer resources are to be allocated for the State's health care system, without any opportunity for public voice. By doing just that, the Enabling Legislation exposes New Yorkers to the philosophies, proclivities and loyalties of Berger Commission appointees, rather than the legislators to whom they have entrusted their interests and welfare, including the important area of public health.

The Enabling Legislation, and the Final Report issued pursuant to the Enabling Legislation, will have significant and potentially arbitrary adverse implications for people across the State. By mandating the simultaneous closure and downsizing of one-quarter of New York's hospitals, the Berger Commission instituted sweeping changes to New York's health care system with far-reaching effects statewide. One cannot overstate the policymaking nature of the Berger Commission's recommendations, which will impact crucial public health issues such as the availability of emergency care services,[10] the allocation of health care resources within a given region, and the ability to handle the patient overflow from

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[10] The New York City Comptroller raised grave concerns about the impact of the Berger Commission's recommendations on emergency care services throughout New York City. *See* William C. Thompson, Jr., *Emergency Room Care: Will it Be There? Assessing the Impact of Closing Five Emergency Rooms in New York City* (2006) *available at* http://www.comptroller.nyc.gov/bureaus/opm/reports/hospital-06/dec-21-06_hospital-report.pdf. Notably, the Final Report does not even address this important issue.

a natural disaster or terrorist attack. That these hard policy choices were made by an unelected commission is simply untenable.

Even more importantly, the Enabling Legislation will also serve as a blueprint by which the Legislature can avoid political responsibility whenever it is faced with difficult decisions concerning the allocation of scarce tax dollars in health care or any other costly area of public concern.[11] Thus, should this Court deny Appellants' motion for leave to appeal, and thereby permit the Enabling Legislation and the Berger Commission's Final Report to stand, it will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to public scrutiny or accountability.

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[11] As the Berger Commission ominously noted in the Final Report, "[t]he work of the Commission is a start, not an end, to the facility rightsizing process. . . . Issues of the uninsured, mental health and primary care development should be at the forefront of an ongoing reform agenda." (R. 127).

CONCLUSION

For the foregoing reasons, the Association respectfully requests that the Court grant Appellants' motion for leave to appeal from the June 19, 2007 Order and Decision of the New York Appellate Division, First Department so that it can examine the constitutionality of the Enabling Legislation with the degree of care and precision that this important case warrants.

Dated: New York, New York
October 3, 2007

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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 8160.

Dated: New York, New York
October 3, 2007

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