COURT OF APPEALS OF THE STATE OF NEW YORK

MARY McKINNEY and MECHLER HALL COMMUNITY SERVICES, INC.,

Plaintiffs-Appellants,

-against-

THE COMMISSIONER OF THE NEW YORK DEPARTMENT OF HEALTH; THE NEW YORK STATE DEPARTMENT OF HEALTH; and THE STATE OF NEW YORK,

Defendants-Respondents.

Bronx County Clerk's Index No. 6034/07

NOTICE OF MOTION

PLEASE TAKE NOTICE that for the reasons set forth in the accompanying papers, including Plaintiffs-Appellants' Brief in Support of Motion for Leave to Appeal to the Court of Appeals, dated September 20, 2007, and the exhibits thereto, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a term to be held at the Courthouse, Court of Appeals Hall, 20 Eagle Street, Albany, New York, on the 1st day of October, 2007, at 10 o'clock in the forenoon or as soon thereafter as counsel can heard, for an Order pursuant to CPLR §§ 5514(a) and 5602(a) and this Court's Rules of Practice § 500.22, granting leave to appeal from only those portions of the Order of the Appellate Division, First Department, entered on June 19, 2007, that upheld the

constitutionality of the legislation establishing the Commission on Health Care Facilities in the 21st Century (L. 2005, ch. 63, part E, § 31).

Dated: New York, New York
September 20, 2007

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BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

Plaintiffs-Appellants Mary McKinney and Mechler Hall Community Services, Inc., by their attorneys, New York Lawyers for the Public Interest, Inc. and Chadbourne & Parke LLP, respectfully submit this brief in support of their motion for leave to appeal from those portions of the June 19, 2007 order by the Appellate Division, First Department, which upheld the constitutionality of the legislation establishing the Commission on Health Care Facilities in the 21st Century (L. 2005, ch. 63, part E, § 31) (the "Enabling Legislation").

PRELIMINARY STATEMENT

The non-delegation doctrine embodied in Article III, Section 1 of the Constitution of the State of New York — which declares that "the legislative power of this state shall be vested in the senate and assembly" — prohibits the New York State Legislature from delegating its fundamental *policymaking* authority to any other entity. As this Court stated in Boreali v. Axelrod, 71 N.Y.2d 1, 13, 517 N.E.2d 1350, 1356, 523 N.Y.S.2d 464, 470 (1987), "Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, *to resolve difficult social problems by making choices among competing ends.*" (emphasis added). In particular, this Court noted 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, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470. This constitutional imperative is one of the basic pillars of representative democracy in New York State.

The legislation at issue in this appeal strikes at the very heart of these constitutional principles set down by this Court. In a type of legislative delegation never before seen in this State, the New York Legislature created a temporary commission (known as the "Berger Commission") and

empowered it to make laws affecting the distribution of healthcare throughout the State, at the expense of hundreds of millions of dollars of State funds. The Berger Commission's mandate included the closure of certain hospitals, without a further vote of approval by the Legislature, based on its unguided balancing of conflicting policy interests, such as community healthcare needs versus the costs of running a hospital and the economic impact of closings on state and local economies.

Though temporary commissions have occasionally been used in the past to develop recommendations for consideration by the Legislature, never before has a temporary commission been empowered with the authority to make determinations that take on the force and effect of law without any action taken by the Legislature. This departure from established precedent undermines any claim that the Berger Commission's "recommendations" represent the policy choice of the Legislature, and distinguishes the Enabling Legislation from other "broad" delegations which have been saved through the imposition of a limiting construction that confines the statute's applications to those that are constitutionally permissible. See Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 (providing a limiting construction to conform Public Health Law § 225(a) to the separation of

powers doctrine where the "language [that statute], literally construed, confers virtually unfettered discretion upon the PHC to regulate public health matters").

Moreover, unlike those "broad" delegations that have previously been found to be constitutionally sufficient because the Legislature had articulated a primary, guiding interest (e.g., to promote public health), the Enabling Legislation merely provided for the Berger Commission's "consideration" of a list of the competing policy interests inevitably implicated by a statewide plan providing for hospital closings and restructurings. Foremost among those considerations is the need to balance health concerns (e.g., the need to protect access to healthcare) versus costs (both cost savings and the potential cost impact of hospital closings). Nowhere in the Enabling Legislation, however, is there any evidence of the Legislature having made a choice as to how these competing policy interests should be balanced, or even as to which competing end or societal interest should be the primary driver in its deliberations. Instead, the Enabling Legislation explicitly delegated the Berger Commission unfettered discretion to determine the socially acceptable impact of such closing on healthcare access as compared to resulting cost savings, thereby shaping its own vision of health policy

throughout the State See Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 ("to the extent that [an] agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and [the associated costs], it was 'acting solely on [its] own ideas of sound public policy' and was therefore operating outside of its proper sphere of authority.") (citation omitted).

The Enabling Legislation thus represents a type of legislative delegation unprecedented in both its vesting of lawmaking authority in a temporary commission and the complete absence of constraint on the authority granted to that commission. By leaving it entirely to the Berger Commission to balance the competing interests implicated in a statewide health care realignment however it saw fit, the Enabling Legislation stands in clear violation of this Court's clearly articulated separation of powers jurisprudence. This Court should not permit this unprecedented and unconstitutional delegation, which will affect the healthcare access of hundreds of thousands of New Yorkers and require the expenditure of hundreds of millions of dollars of State funds, to go unreviewed.

STATEMENT OF THE QUESTION PRESENTED

1. Did the New York State Legislature violate Article III, Section 1 of the Constitution of the State of New York by delegating to an unelected commission the responsibility for making the fundamental policy choices implicated in a statewide healthcare redistribution plan that became law without any vote by the Legislature?

The question was answered in the negative by the Appellate Division and the IAS court.

PROCEDURAL HISTORY

On January 3, 2007, Plaintiffs-Appellants Mary McKinney and Mechler Hall Community Services, Inc. commenced this action by order to show cause for a preliminary injunction and temporary restraining order in the Supreme Court of Bronx County. On March 8, 2007, Justice Brigantti-Hughes issued an order granting Defendants-Respondents' motion for summary judgment and dismissed the complaint.

On March 14, 2007, Plaintiffs-Appellants appealed the decision of the Supreme Court to the Appellate Division, First Department. In an order entered on June 19, 2007 (the "June 19 Order"), the Appellate Division affirmed the decision of the lower court.

On June 22, 2007, Plaintiffs-Appellants served Defendants-Respondents with a Notice of Appeal to the Court of Appeals from the June 19 Order, along with Notice of Entry of the same. The Notice of Appeal stated that Plaintiffs-Appellants were taking an appeal to the Court of Appeals pursuant to CPLR § 5601(b)(1) on the grounds that the June 19 Order finally determined a substantial constitutional issue. Plaintiffs-Appellants served copies of the Preliminary Appeal Statement and Notice Pursuant to 22 NYCRR § 500.9(b) on June 27, 2007. On July 3, 2007, Plaintiffs-Appellants sent a letter to the Court requesting a calendar preference in the hearing of this appeal.

Attorneys for Plaintiffs-Appellants subsequently received a letter from the Clerk of the Court, dated July 9, 2007, requesting that Plaintiffs address this Court's subject matter jurisdiction and why this appeal presents a substantial constitutional issue giving rise to an appeal as of right under CPLR § 5601(b)(2). The July 9 letter stated that any briefing would be held in abeyance until a determination was made regarding whether Plaintiffs-Appellants were entitled to an appeal as of right. On July 16, 2007, Plaintiffs-Appellants responded to the Court's July 9 request. On September

6, 2007, Plaintiffs-Appellants were informed that the Court had dismissed Plaintiffs' appeal as of right.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Plaintiffs-Appellants' motion for permission to appeal from the June 19 Order under CPLR § 5602(a)(1)(i), which provides that permission by the Court of Appeals for leave to appeal may be taken "in an action originating in the supreme court . . . from an order of the appellate division which finally determines the action and which is not appealable as of right." As noted above, the action giving rise to this appeal was commenced in the Supreme Court of Bronx County on January 3, 2007. Plaintiffs-Appellants seek permission to appeal from the June 19 Order, which finally determined the action by upholding the Supreme Court's dismissal of Plaintiffs-Appellants' Complaint. See N.Y. C.P.L.R. § 5611 (McKinney 2007) ("If the appellate division disposes of all issues in the action its order shall be considered a final one."). Although the Court has determined that there is no appeal as of right and there was no dissent by two justices on an issue of law, Plaintiffs-Appellants respectfully seek permission to appeal, and to present their arguments on an expedited basis in light of the significant constitutional issues raised.

STATEMENT OF FACTS

A. The Legislature's Delegation of Lawmaking Authority Through the Enabling Legislation

On April 13, 2005, the State of New York enacted the Enabling Legislation creating the Berger Commission, an unelected body charged with "examining the supply of general hospitals and nursing home facilities and recommending changes that will result in a more coherent, streamlined health care system in the state of New York." Enabling Legis. § 2(a) (R. 92). As part of this broad delegation of policymaking authority, the Enabling Legislation authorized the Berger Commission to make "specific recommendations for facilities to be closed and facilities to be resized, consolidated, converted, or restructured." Enabling Legis. § 8 (R. 96).

The Enabling Legislation did not place any limits on the Berger Commission's authority to shut down hospitals and reshape healthcare in New York. Instead of setting forth guidelines, the Enabling Legislation merely provided a list of *competing* public policy interests for the Berger Commission's consideration (e.g., reducing capacity, the economic impact of closure, the amount of capital debt carried by a facility, providing accessible care, and caring care for underserved communities) without any indication of how these factors should be weighed or reconciled. Enabling

Legis. § 5 (R. 94). The Enabling Legislation, moreover, gave the Berger Commission free reign to fashion "additional factors" to supplement the list of competing factors listed in Section 5. Enabling Legis. § 2(a) (R. 92). As the Berger Commission acknowledged in its report,[1] the factors and criteria listed in Section 5 were only a "starting point" for its policy considerations and did not dictate the outcome of the "difficult choices" that the Commission was forced to make. (R. 109, 193).

B. The Implementation of the Berger Commission's "Recommendations" Commenced on January 1, 2007

On November 28, 2006, the Berger Commission submitted to Governor Pataki its Final Report containing its "recommendations." (R. 108). The Final Report called for the closure, downsizing, or restructuring of 57 hospitals across the State. Nine hospitals were selected for outright closure, including New York Westchester Square Medical Center ("WSMC"), the medical facility on which Plaintiffs-Appellants rely. (R. 284-85). The Final Report also called for the expenditure of more than

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[1] Commission on Health Care Facilities in the 21st Century, Final Report (Dec. 2006) (the "Final Report") (R. 117-356).

one billion dollars to implement its recommendations. (R. 142). According to the Final Report, implementation of these recommendations will reduce statewide inpatient capacity by 4,200 beds, seven percent of the total State supply. (R. 136). In 2004, the nine hospitals selected for closure alone had over 47,000 discharges and over 156,000 emergency room visits. (R. 240-318). On December 4, 2006, Governor Pataki approved the Berger Commission's recommendations and communicated his approval to the Legislature. (R. 419-20).

The Enabling Legislation provided that the Berger Commission's recommendations would have the mandatory force of 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," or approximately one month after its release. Enabling Legis. § 9(b) (R. 97). The Enabling Legislation did not require that the Legislature review and approve the Berger Commission's recommendations in any way. Indeed, as noted in the affidavits of State Senator Jeffrey D. Klein and Assemblyman Peter M. Rivera, both the Assembly and the Senate declined to hold a vote on the Berger Commission's recommendations. (R. 705, 707).

As a result of the Legislature's inaction, the Commissioner of Health and the Department of Health ("DOH") have begun the mandatory process of implementing the Berger Commission's recommendations. As noted by Neil Benjamin, Assistant Director of the Division of Health Facility Planning at the DOH, the DOH has already imposed a series of benchmarks on those facilities selected for closure by the Berger Commission, which they must meet in order to comply with the final implementation of the Berger Commission recommendations by June 30, 2008. (R. 530). In the case of WSMC, the DOH requested to meet with the hospital to discuss its closure plan by June 30, 2007, and required a closure plan by September 30, 2007, which must be approved by the Commissioner of Health no later than December 31, 2007. (R. 817-18).[2]

The Final Report makes clear that the Commissioner of Health has no discretion with respect to implementing these recommendations. The Final Report states that the Commissioner of Health "*shall* revoke the operating

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[2] Counsel for Defendants-Respondents orally disclosed to Plaintiffs-Appellants' counsel on March 30, 2007, that the letter requiring these scheduled dates has been sent to WSMC.

certificate" of any facility selected for closure or conversion, "*shall* limit and/or modify the operating certificate" of any facility where the Berger Commission has determined services should be discontinued, and "*shall* eliminate the approximate number of enumerated beds from the operating certificate" of any facility selected for downsizing. (R. 211-12) (emphasis added). The Commissioner of Health "*shall* implement each recommendation *as expeditiously as possible*, but in no event later than June 30, 2008." (R. 215) (emphasis added). In carrying out its newly mandated tasks, the DOH must look to the Final Report, not to an act of the Legislature. The Final Report has the policy, substance, and function of a statute, without actually being one.

ARGUMENT

I

THE ENABLING LEGISLATION REPRESENTS A FORM OF LEGISLATIVE DELEGATION THAT HAS NEVER BEFORE BEEN ATTEMPTED IN NEW YORK AND WHOSE CONSTITUTIONALITY HAS NEVER BEEN CONSIDERED BY THIS COURT

Article III, Section 1 of the Constitution of the State of New York declares that "the legislative power of this state shall be vested in the senate and assembly." N.Y. Const. art. III, § 1. This provision embodies a

fundamental principle of non-delegation which prohibits the Legislature from delegating its lawmaking authority to any other entity. Levine v. Whalen, 39 N.Y.2d 510, 515, 349 N.E.2d 820, 822, 384 N.Y.S.2d 721, 723 (1976). As this Court has explained, this prohibition is designed "to insure a representative form of government in this state." People v. Parker, 41 N.Y.2d 21, 28, 359 N.E.2d 348, 352, 390 N.Y.S.2d 837, 842 (1976); see also Stanton v. Bd. of Supervisors of County of Essex, 191 N.Y. 428, 432, 84 N.E. 380, 380-81 (1908) ("[T]he people, who have entrusted [the Legislature] with this legislative power, have the right to demand the exercise of their knowledge, judgment and discretion in the framing and in the enactment of laws."). Ignoring this constitutional principle, the Legislature assigned to the Berger Commission the responsibility for drafting a law which would, without any review or vote by the Legislature, make fundamental policy choices and mandate the DOH to drastically alter the provision of healthcare in New York.

The Appellate Division erroneously upheld the constitutionality of the Enabling Legislation on the basis of two related findings: (1) that enabling statutes "broader" than the Enabling Legislation have been upheld and (2) that the Enabling Legislation articulates a meaningful *policy choice* (which

guided the Berger Commission's subsidiary policy choices). Both of these erroneous findings are addressed infra in Part II. The first one, however, merits brief discussion at the outset, because it echoes the deeply misleading contention, repeated by Defendants-Respondents throughout this litigation, that the Enabling Legislation is an unremarkable, run-of-the-mill administrative delegation, of the type routinely engaged in by the Legislature.

To the contrary, the Enabling Legislation represents a type of legislative action that has never before been attempted in this State and has never been endorsed by this Court. In addition, the unprecedented scope of this delegation — the Berger Commission's plan will affect access to needed healthcare for hundreds of thousands of New York citizens and direct the expenditure of hundreds of millions of dollars of State funds to implement the mandatory "recommendations" contained in the plan — and the utter lack of legislative guidance for the use of this authority, see infra Part II, the Enabling Legislation is extraordinary in that it vests a temporary commission with the power to enact law. In creating this novel type of delegation, the Legislature departed radically from the well-established role

of temporary commissions in this State — that of presenting genuine recommendations to the Legislature for debate and approval.

Prior to the Enabling Legislation, unelected, temporary commissions in this State had uniformly been empowered only to present their "recommendations" to the Legislature for a vote. See, e.g., L. 1987, ch. 813, § 94(9)(l) (creating the New York State Ethics Commission, a body charged with, *inter alia*, preparing "an annual report to the governor and the legislature summarizing the activities of the commission and recommending changes in the laws governing the conduct of statewide elected officials, state officers and employees and political party chairmen"); Executive Order (Cuomo) No. 88.1 (1987) (creating the Commission on Government Integrity, a body charged with, *inter alia*, making "recommendations for action to strengthen and improve [] laws, regulations and procedures [relating to government integrity]"); L. 1983, ch. 711, § 3(1) (creating the New York State Committee on Sentencing Guidelines, a body charged with, *inter alia*, "transmit[ting] sentencing guidelines and recommend[ing] statutory amendments required for their implementation to the governor and legislature . . . . Such guidelines shall have no force and effect unless enacted into law").

Even subsequent to the Enabling Legislation, temporary commissions in this State have been tasked with making recommendations, not enacting mandatory laws. See, e.g., Executive Order (Spitzer) No. 10, § 6 (2007) (creating the New York State Commission on Sentencing Reform, a body charged with, *inter alia*, making "recommendations for amendments to state law that will maximize uniformity, certainty, consistency and adequacy of a sentence structure"); Executive Order (Spitzer) No. 11, § 6 (2007) (creating the Commission on Local Government Efficiency and Competitiveness, a body charged with, *inter alia*, making "recommendations on ways to consolidate and eliminate taxing jurisdictions, special districts, and other local government entities where doing so would improve the effectiveness and efficiency of local government"); L. 2006, ch. 59, Part U, § 7 (creating the Temporary Commission on the Future of New York State Power Programs for Economic Development, a body charged with, *inter alia*, "making recommendations to the governor and legislature on whether to continue, modify, expand or replace the state's economic development power programs . . . and [recommending] legislative language necessary to implement its recommendations").

The Bartlett Commission, for instance, was created in 1961 by Governor Rockefeller to revise and simplify the Penal Law and the Code of Criminal Procedure and was challenged on constitutional grounds in People ex rel. Dudley v. West, 87 Misc. 2d 967, 968, 386 N.Y.S.2d 555, 556 (Sup. Ct. Kings Co. 1976). Though the Dudley court characterized the revision of these laws as a "monumental undertaking," it nevertheless found that the commission passed constitutional muster because the Legislature ultimately had to vote to adopt the Bartlett Commission's proposed recommendations. Id. (holding that delegating legislative power to a temporary commission, subject to legislative vote and approval, was consistent with the "long continued custom in this State").

The Enabling Legislation turns this democratic tradition on its head, granting the Berger Commission the unprecedented authority to issue a Final Report with the force and effect of law without any review of its "recommendations," let alone a vote, by the Legislature. Enabling Legis. § 9(b) (R. 97); Klein Aff. ¶¶ 2-7 (R. 704-05); Rivera Aff. ¶¶ 4-5 (R. 706-

07).[3] By striking down the Enabling Legislation, this Court would return temporary commissions to their traditional role of offering guidance to the Legislature, and would transform the Final Report into a set of recommendations for the Legislature to consider.

The mechanism by which the Berger Commission's "recommendations" became law was also without precedent. The Enabling Legislation provided that the Berger Commission's recommendations would have the mandatory force of 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," or approximately one month after its release. Enabling Legis. § 9(b) (R. 97). It is well settled that the Legislature's inaction during this period provides no basis to conclude that these "recommendations" were even tacitly approved by the Legislature. See Clark v. Cuomo, 66 N.Y.2d 185, 190-91, 486 N.E.2d 794, 798, 495 N.Y.S.2d 936, 940 (1985) ("Legislative inaction, because of its inherent

ambiguity, 'affords the most dubious foundation for drawing positive inferences.'") (internal citation omitted); see also N.Y. Const. art III, § 13 ("no law shall be enacted except by bill").

Recognizing that the Enabling Legislation is a type of legislative act never before seen in New York, Defendants-Respondents have relied on a federal commission — created pursuant to a federal statute and found to be constitutional under the United States Constitution — as the sole precedent for their assertion that the Enabling Legislation is a routine delegation. See Nat'l Fed'n of Fed. Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990). However, this misguided comparison is not only irrelevant to a separation of powers analysis under the New York Constitution[4] — it also

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[4] See, e.g., Tucker v. Toia, 54 A.D.2d 322, 325, 388 N.Y.S.2d 475, 477 (4th Dep't 1976) (preliminarily enjoining implementation of a statute despite a federal decision upholding the same statute because a federal decision upholding a statute solely under federal constitutional law is not controlling in a challenge brought under provisions of the New York State Constitution); 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 the federal approach).

Nat'l Fed'n of Fed. Employees v. United States is inapposite for reasons besides its reliance entirely on federal non-delegation principles and precedent. For instance, the Base Closing Act ("BCA") implicated the President's independent constitutional authority over the military. Furthermore, unlike the instant case, Nat'l Fed'n concerned a situation where the results of a commission's activities were debated and

(Cont'd on following page)

underscores the complete lack of precedent in this State for the vesting of lawmaking authority in a temporary commission. This Court has never addressed or considered the constitutionality of this type of legislative action.

If the Enabling Legislation is permitted to stand unreviewed by this Court, it will create a new template by which the Legislature can avoid accountability for politically difficult decisions affecting fundamental policy questions in the State. Using this type of legislation, the Legislature will be able to outsource its policymaking responsibilities to a temporary commission, answerable to no one, but with final authority over difficult policy issues, and in so doing, divest itself of responsibility for the commission's "recommendations." Article III, Section 1 of the Constitution of the State of New York, however, demands that the Legislature bear the ultimate responsibility for making the policy decisions implicated in a statewide healthcare redistribution plan. Boreali, 71 N.Y.2d at 13, 517

(Cont'd from preceding page)

voted on by a legislative body. Specifically, on April 18, 1989, the U.S. House of Representatives voted overwhelmingly not to adopt a joint resolution of disapproval, fulfilling the final requirement of implementation under the BCA. 135 Cong. Rec. H. 1294 (Apr. 18, 1989).

N.E.2d at 1356, 523 N.Y.S.2d at 468-70 ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."); Patrick J. Borchers & David L. Markell, New York State Administrative Procedure and Practice (2d ed. 1998) ("Borchers & Markell") at 145 § 5.3 (noting that Boreali stands for a rejection of the view that the Legislature may simply delegate the responsibility for "dealing with problems too sensitive to be entrusted to the political process"). Given the Berger Commission's balancing of economic and health interests, the pervasive effect that the Berger Commission's plan will have on access to healthcare and caregiver-patient relationships, the hundreds of millions of dollars of State funds marked for implementation of the "recommendations," and above all, the absence of any policy choice in the Enabling Legislation to guide or constrain the policy decisions made by the Berger Commission, see infra Part II, the "recommendations" of the Berger Commission, like those of other temporary commissions in this State, must be subjected to approval and adoption by the Legislature before they become law.

II

THE APPELLATE DIVISION'S RULING ABROGATES THE NON-DELEGATION DOCTRINE, AS ARTICULATED BY THIS COURT IN *BOREALI*, AND THE DOCTRINE'S WELL-ESTABLISHED PROHIBITION ON THE BALANCING OF COMPETING SOCIAL, ECONOMIC, AND HEALTH INTERESTS IN THE ABSENCE OF ANY LEGISLATIVE GUIDANCE

Though administrative agencies are permitted to make rules and regulations to administer laws enacted by the Legislature, they are precluded under the separation of powers doctrine from exercising lawmaking functions, such as the authority to legislate policy. See Boreali, 71 N.Y.2d at 10, 517 N.E.2d at 1354, 523 N.Y.S.2d at 468-69. Correspondingly, it is equally true under the separation of powers doctrine that the Legislature cannot *delegate* to an agency its authority to legislate policy. See Mooney v. Cohen, 272 N.Y. 33, 37, 4 N.E.2d 73, 74 (1936) ("[T]he Legislature cannot delegate its authority and pass on its law-making functions to other bodies or communities. It cannot abdicate its constitutional powers and duties."); New York Pub. Interest Research Group, Inc. v. Carey, 86 Misc. 2d 329, 332, 383 N.Y.S.2d 197, 199 (Sup. Ct. Albany Co. 1976) ("[T]he constitutional function of legislating which belongs exclusively to the Legislature cannot be delegated even to its own committees or committee chairmen."), order aff'd, 55 A.D.2d 274, 390 N.Y.S.2d 236 (3d Dep't 1976).

The Court of Appeals has made clear that the touchstone of a constitutionally sufficient policy statement is not the mere expression of a purpose or goal, but is rather the inclusion of some meaningful guidance or constraint with respect to the underlying policy choices that were identified by the Legislature. See Levine, 39 N.Y.2d at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723. Otherwise, the Legislature could delegate all of its lawmaking powers simply by articulating a worthy aspiration or problem needing a solution.

On this ground alone, the Enabling Legislation fails. Although the Appellate Division held that the Legislature had "made the basic policy choice that some hospitals and nursing homes needed to be closed and others needed to be resized, consolidated, converted, or restructured," this "choice" does not in fact constitute a *policy* precisely because it is not a choice among competing social ends. It is, at most, part of an aspirational articulation of the quandary faced by the Legislature in view of its inability to reconcile the fundamental underlying policy interests that are in conflict here — namely, how to "provide quality care and be responsive to community health care needs" while at the same time "achieve maximum return from valued resources that have been invested in the health care system" with the goal of

creating "a more coherent, streamlined health care system in the state of New York." Enabling Legis. § 1 (R. 92). What is important to recognize is that, however lofty the goal, this effort at reform is in many respects a zero-sum game – certain societal interests will of necessity have to give way to other societal interests when hospitals are closed or downsized, and *how* those choices are made (in terms of the weight or significance that should be assigned to any particular societal interest) is at essence the *policy* choice that remained unaddressed in the Enabling Legislation.

Indeed, "excess capacity" — the linchpin of the Enabling Legislation's purported policy choice — is nowhere defined in the Enabling Legislation. Instead, it is left entirely to the Berger Commission to decide when and whether a hospital's services constituted "excess" capacity. Such a determination by its very nature implicates fundamental policy choices regarding what weight to give to a community's healthcare needs and access to health services, and what level of burden on such need and access we are willing to accept as a society in the name of eliminating "excess" capacity. And as this Court in Boreali has already held, determining the proper balance between health and costs (i.e., when "excess" capacity exists) is a uniquely policymaking, legislative function that cannot be delegated.

A. This Court Has Established That the Legislature May Not Delegate Its Policymaking Authority to Balance Social, Economic, and Public Health Interests

The Appellate Division's opinion was premised on its view that "[e]nabling statutes even broader than this one have been found constitutional." (R. 888) (citing Med. Soc'y v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003) and Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987)). However, the Appellate Division's reliance on these cases merely underscores its misunderstanding of the separation of power's doctrine and this Court's jurisprudence. In fact, this Court's holding in Boreali confirms that the Enabling Legislation at issue in this case goes well beyond any prior delegation that has been held to be constitutional.

In Boreali, this Court held that the Public Health Council (the "PHC") had engaged in legislative policymaking in violation of the separation of powers where, pursuant to its legislative mandate to deal with "*any matters* affecting the security of life or health or the preservation and improvement of public health in the state of New York," it had promulgated a regulation that effectively banned smoking in public indoor areas. 71 N.Y.2d at 10, 517 N.E.2d at 1354, 523 N.Y.S.2d at 468-69 (emphasis added). In so

holding, the Court of Appeals emphasized that the PHC had impermissibly exercised policymaking authority by balancing health, social and economic interests without any legislative guidance on how this balancing was to be done. Id., 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469. Making a choice from among these competing social interests, the Court asserted, was fundamentally legislative in nature, and accordingly, it was clear that the "line between administrative rule-making and legislative policy-making ha[d] been transgressed." Id., 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469. As the Court stated,

> Striking the proper balance among health concerns, cost and privacy interests . . . *is a uniquely legislative function*. [Here, the PHC] . . . has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed. Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was 'acting solely on [its] own ideas of sound public policy' and was therefore operating outside of its proper sphere of authority.

Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 (citations omitted) (emphasis added). Thus, even though the regulations promulgated by the PHC may have fallen within the literal scope of the enabling statute, the Court held the statute could not be construed to confer

on the PHC the authority to promulgate the anti-smoking regulations at issue, because the promulgation of these regulations, without "any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed," required the agency to reach "its own conclusions about the appropriate balance of trade-offs between health and cost." Id. The separation of powers doctrine precluded the Legislature from delegating that authority, for "manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." Id., 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470. By empowering the Berger Commission to balance public health and cost considerations in any manner it saw fit, without any legislative guidance, the Enabling Legislation constitutes a brazen affront to the separation of powers principles clearly articulated in Boreali. See infra Part II.B.

The Appellate Division ignored these constitutional principles, and, seizing only upon the fact that the broad enabling statute in Boreali *was not completely struck down*, used Boreali as support for its conclusion that enabling statutes "even broader" than the Enabling Legislation have

purportedly been found constitutional. (R. 888). This superficial reading of Boreali simply disregards the fact that while the "language of Public Health Law § 225(a), literally construed, confers virtually unfettered discretion upon the PHC to regulate public health matters" this Court explicitly chose to limit, rather than strike down the enabling statute, because it had numerous constitutional applications that had been in operation for decades. Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470; see also Borchers & Markell, supra, at 143-44 § 5.3 (noting that the Boreali court provided a limiting construction to conform the statute to the separation of powers doctrine, "recognizing that striking down the delegation would take down not only this, but every other, set of PHC regulations"). As one treatise has observed, this limiting instruction was necessary to save a statute which otherwise would have allowed the PHC to engage in an unconstitutional exercise of legislative authority:

> As a matter of interpretation, it seems clear that the PHC regulations regarded matters "affecting the public health." But the Boreali majority made clear that constitutional considerations were at the heart of its decision to declare the PHC regulations *ultra vires*. The Court reasoned "that the agency stretched [the enabling statute] *beyond its constitutionally valid reach* when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be."

Id. at 144 § 5.3 (quoting Boreali, 71 N.Y.2d at 9, 517 N.E.2d at 1353, 523 N.Y.S.2d at 468) (emphasis added).

In Boreali, this Court found that the balancing of social, economic, and public health interests was a legislative function that could not be delegated. Accordingly, the Court saved the enabling statute from unconstitutionality by construing it *not to have delegated* that function and finding, therefore, that the PHC's unguided balancing of "health concerns, cost and privacy interests" *usurped* a "uniquely legislative function." Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470.

In the Enabling Legislation, however, the Legislature specifically delegated what the Court of Appeals in Boreali found could not be constitutionally delegated. The function that was usurped in Boreali was delegated in this case, and just as a legislative responsibility may not be usurped, it may not be delegated. The Enabling Legislation is thus no more constitutional than the regulation struck down in Boreali, because an improper use of legislative power is unconstitutional *whether usurped or given*. Boreali v. Axelrod, 130 A.D.2d 107, 111, 518 N.Y.S.2d 440, 443 (3d Dep't 1987) ("The PHC, solely responsible to the Commissioner and not the electorate, does not have the authority to unilaterally assume the lawmaking

function of the Legislature, *nor may the Legislature confer such authority upon the PHC.*"), aff'd 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987) (emphasis added); see also Med. Soc'y, 100 N.Y.2d at 864; 800 N.E.2d at 734, 768 N.Y.S.2d at 429 (holding that the "the legislative branch may not constitutionally cede its fundamental policymaking responsibility to a regulatory agency"); Levine, 39 N.Y.2d at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723 ("Because of the constitutional provision that '[the] legislative power of this State shall be vested in the Senate and the Assembly' *the Legislature cannot pass on its law-making functions to other bodies.*") (citing Article III, Section 1) (emphasis added).[5] This fundamental tenet of the separation of powers doctrine guarantees representative democracy and upholds the promise in Article III, Section 1 of the Constitution of the State of New York that the Legislature will be

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[5] See also Darweger v. Staats, 267 N.Y. 290, 308, 196 N.E. 61, 67 (1935) (striking down a statute which delegated to a federal body the authority to decide whether to institute price regulations because determining whether an industry should be regulated is a non-delegable legislative function); Levine v. O'Connell, 275 A.D. 217, 223-25, 88 N.Y.S.2d 672, 676-79 (1st Dep't 1949) (striking down a statute which authorized the State Liquor Authority to develop and enforce a price-fixing regulation because price-fixing is a non-delegable legislative function), order aff'd, 300 N.Y. 658, 91 N.E.2d 322 (1950).

responsible for the exercise of legislative power and answerable to the electorate for that exercise of power.

Unlike the statute at issue in Boreali, there is no constitutionally permissible part of the Enabling Legislation that can be salvaged through a limiting construction, because its sole act was to create the Berger Commission, a temporary commission no longer in existence that was charged with a single task — to decide the proper balance between societal interests, such as access to healthcare and economic cost in order to effect a one-time, $1.5 billion makeover of the State's healthcare distribution. The Enabling Legislation provided for a specific, temporal grant of authority, and as such, it has had no constitutional prior uses and has no "constitutionally valid reach."[6]

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[6] The Appellate Division below also erred by concluding that the delegation given to the Insurance Superintendent in Med. Soc'y v. Serio was "even broader" than that set forth in the Enabling Legislation. Whereas the authority delegated in Serio was explicitly circumscribed by the other provisions and policies expressed by the Legislature in the Insurance Law generally, no limitations were placed on the Berger Commission's authority to define and eliminate "excess capacity" in New York's healthcare system. Compare, e.g., N.Y. Ins. Law § 301 (McKinney 2006) ("The superintendent shall have the power to prescribe and from time to time withdraw or amend, in writing, regulations, *not inconsistent with the provisions of*" the Insurance Law.) with Enabling Legis. § 9 ("*Notwithstanding any contrary provision of law, rule or regulation* . . . the commissioner of health shall take all actions necessary to

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Thus, although this Court did not strike down the entirety of the enabling statute in Boreali, that decision reaffirmed the well-established law of this State that legislative authority vested outside of the Legislature must be limited. Boreali, 71 N.Y.2d at 8, 517 N.E.2d at 1352, 523 N.Y.S.2d at 1352 (acknowledging this Court's obligation to "constitutionally 'limit the field' of authority delegated"); Multiple Intervenors v. Pub. Service Comm'n, 147 Misc. 2d 757, 759, 557 N.Y.S.2d 250, 251 (Sup. Ct. Albany Co. 1990) ("Boreali proclaimed that the legislative branch may not delegate all of its lawmaking powers to the executive branch (administrative agency)."). As discussed in greater detail below, the Enabling Legislation violates this fundamental aspect of the separation of powers doctrine because it solely tasked the Berger Commission with the job of balancing economic and public health considerations as it saw fit.

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implement . . . [the Berger Commisison's] recommendations.") (emphasis added); see also infra Part II.B.

B. The Enabling Legislation Delegates the Very Balancing Authority Found to be Non-Delegable Policymaking Authority in *Boreali*

The Court of Appeals in Boreali established that legislative policymaking is distinguishable from administrative rulemaking because the former requires deciding how competing health, economic, and social interests should be balanced to resolve issues of fundamental statewide importance. Boreali, 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470 ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems *by making choices among competing ends*."). The protection of this demarcation, which ensures that the Legislature is accountable to the electorate for such policy choices, is vital to the preservation of representative democracy in this State. Thus, in order to ensure that the authority granted to an agency is administrative rather than legislative, and thus comports with the requirements of Article III, Section 1 of the State Constitution, New York courts require that the Legislature properly "limit the field" of the agency's discretion and "provide standards to govern its exercise." Levine, 39 N.Y.2d at 515, 349 N.E.2d at 822, 384 N.Y.S.2d at 723. Though the Legislature need not provide precise or specific formulas,

at the very least, the Legislature must provide some meaningful limitation to administrative discretion. See Meit v. P. S. & M. Catering Corp., 285 A.D.2d 506, 510, 138 N.Y.S.2d 378, 382-83 (3d Dep't 1955) ("The legislative body cannot grant to any administrative body the power to make substantive rules, unlimited and unrestricted by statutory qualification.").

The Appellate Division below held that the Enabling Legislation "made the basic policy choice that some hospitals and nursing homes needed to be closed and others needed to be resized, consolidated, converted, or restructured" and therefore the Berger Commission was purportedly only filling in the "details and interstices" and making "subsidiary policy choices." (R. 888). However, the Appellate Division did not, and could not, explain how the Enabling Legislation's purported "policy" constrained or guided the Berger Commission's "recommendations" so as to avoid having the Berger Commission effectively make "its own policy choice" in choosing which and how many hospitals to close or resize. In fact, only in filling in the so-called "details" and making the "subsidiary policy choices"

did the Berger Commission itself give expression to a policy choice from among competing social interests.[7]

In contrast, far from setting forth a coherent *policy choice* to be implemented, the Enabling Legislation merely expressed an aspiration of creating a "more streamlined" healthcare system by, among other things, minimizing "excess" capacity (which would likely include closing or resizing certain hospitals), but without providing any meaningful guidance as to what a "streamlined" system was, what constituted "excess" capacity, or when the health needs of an underserved community should take precedence over considerations of cost savings (the real *policy* choice at issue here). Enabling Legis. § 1 (R. 92).

Instead, the only "guidance" offered by the Enabling Legislation regarding how to achieve this goal was a list of conflicting criteria offered in Section 5, which in no way constrained the Berger Commission's choices.

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[7] Similarly, the trial court below acknowledged that the Berger Commission engaged in a "balancing of competing social and economic interests" (R. 24) but failed to address the fact that this is a uniquely legislative function. See Boreali, 71 N.Y.2d at 13 ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."); id. at 12 ("Striking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function.").

Far from embodying a meaningful policy choice, the Enabling Legislation's standardless approach merely delegated the selection and weighing of various policy interests to an unelected commission, thus constituting an unconstitutional delegation of policymaking authority (i.e., the authority and responsibility to choose from among the competing social interests and ends implicated by a hospital closing/reorganization plan).

1. The Enabling Legislation Expressed a Problem Facing the Legislature, Not a Policy Choice

The Enabling Legislation simply did not provide a "primary standard" to guide the Berger Commission's activities, because it did nothing more than describe a problem requiring a policy solution — the need to reconfigure the State's healthcare system — without providing any guidance as to how the hard choices should be made to solve that problem.[8] Section 1 of the Enabling Legislation, which contains the purported "policy" underlying the Berger Commission's mandate, merely describes the basic

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[8] As discussed below, the lack of a standard in the Enabling Legislation makes it impossible to determine (or challenge) whether the Berger Commission appropriately fulfilled its mandate under the Enabling Legislation. See infra Part II.B.4.

tension between public health and economic interests central and inherent to the statewide hospital closure/reorganization effort:

> The legislature hereby finds and declares that the health care system in the state must *first and foremost provide quality care and be responsive to community health care needs.* To do so, the health care system must have the capacity to provide this quality care in multiple settings within regions throughout the state. In order to achieve maximum return from valued resources that have been invested in the health care system, those resources must be aligned so that excess capacity is minimized.

Enabling Legis. § 1 (R. 92) (emphasis added). The finding that the healthcare system must "first and foremost" provide *quality* healthcare and be *responsive* to community healthcare needs is clearly a very different value than merely achieving "maximum return" by minimizing "excess capacity." The Enabling Legislation fails to draw even the most basic contours of a policy solution for resolving this tension, stating only that the healthcare system should be responsive to community needs and that "excess" capacity (however defined by the Berger Commission) should be minimized. By failing to address *how* the problem (i.e., the hard choices) they identified should be resolved, the Legislature impermissibly delegated the fundamental policymaking choices to the Berger Commission.

2. The Policy Choices Delegated to the Berger Commission in Section 5 of the Enabling Legislation Were Fundamental, Not Subsidiary

If the Enabling Legislation's purported policy statement is to be given any meaning at all, it must come from Section 5, which sets forth the "factors" to guide the Berger Commission's deliberations. These factors, however, provide nothing more than a list of some of the most significant policy considerations implicated by a massive statewide redistribution of healthcare resources.[9] Compare Enabling Legis. § 5 (iii) (R. 93) (stating that

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[9] Section 5 of the Enabling Legislation provides the following list of factors for the Berger Commission's consideration: "(i) the need for capacity in the hospital and nursing home systems in each region of the state; (ii) the capacity currently existing in such systems in each region of the state; (iii) the economic impact of right sizing actions on the state, regional and local economies . . . (iv) the amount of capital debt being carried by general hospitals and nursing homes . . . and the financial status of general hospitals and nursing homes, including revenues from medicare, medicaid, other government funds, and private third-party payors; (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 . . . (vi) the existence of other health care services in the affected region, including the availability of services for the uninsured and underinsured . . . (vii) the potential conversion of facilities or current facility capacity for uses other than as inpatient or residential health care facilities; (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 (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 a community." Enabling Legis. § 5 (R. 93-94) Section 5 further states

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one criterion for the Commission's consideration was "the economic impact of right sizing actions on the state, regional and local economies") with § 5 (viii) (R. 94) (stating another criterion was "the extent to which a facility serves the health care needs of the region, including serving Medicaid recipients, the uninsured, and underserved communities"). Significantly, Section 5 fails to provide any guidance or constraint regarding how the Berger Commission is to weigh these disparate factors, which concern important economic, social, and health interests. The balancing of such interests (which is itself a policy choice) was determinative of the conclusions reached by the Berger Commission. See infra Part II.B.4 (describing divergent outcomes between the weighing of the Section 5 factors by RACs and the Berger Commission). Thus, like the Enabling Legislation's broad aspirational "purpose," Section 5's unweighted list of various "factors" to be considered by the Berger Commission does not articulate any policy choice made by the Legislature. The Enabling

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that "the commission may also adopt additional factors to be considered in its deliberations." Id.

Legislation does not even articulate a complete list of "factors" for consideration but abdicated that to the Berger Commission, allowing it to consider any factors of its own choosing. Enabling Legis. §§ 2, 9 (R. 92, 94).

By presenting the Berger Commission with an array of policy choices that were necessarily competing, and permitting the Berger Commission to select and/or weigh any of these competing factors in any manner it saw fit (in addition to empowering it to create additional factors), the Enabling Legislation effectively expressed no policy at all. See Meit, 285 A.D.2d at 510, 138 N.Y.S.2d at 382-83 ("The legislative body cannot grant to any administrative body the power to make substantive rules, unlimited and unrestricted by statutory qualification."). Rather, the Legislature unconstitutionally empowered the Berger Commission to select among any number of several competing policy choices, thereby arriving at its own policy choice as to what constitutes "streamlining" and "excess capacity," and thus consequently what societal interests would take paramount importance in resolving the inevitable conflict and tension among those interests. See Boreali, 71 N.Y.2d at 13, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470 (observing that the Legislature's failure to "reach agreement on the

goals *and methods* that should govern" supported a finding that the agency's regulation was in violation of the separation of powers"); id. 71 N.Y.2d at 11, 517 N.E.2d at 1355, 523 N.Y.S.2d at 469 (noting that the circumstances surrounding promulgation of the PHC's anti-smoking regulation "paint a portrait of an agency that has improperly assumed for itself '[t]he open-ended discretion to choose ends,' which characterizes the elected Legislature's role in our system of government") (citation omitted); Campagna v. Schaffer, 73 N.Y.2d 237, 242-43, 536 N.E.2d 368, 370, 538 N.Y.S.2d 933, 935 (1989) (observing that a "key feature [of Boreali] was that the Legislature had never articulated a policy regarding the public smoking controversy," and "an agency cannot by its regulations effect its vision of societal policy choices"); Packer Collegiate Inst. v. Univ. of the State of New York, 298 N.Y. 184, 189-90, 81 N.E.2d 80, 21 (1948) ("The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field . . . . The Legislature may, of course, leave 'execution and details' to the

administrators, but the Legislature must at least furnish those administrators with 'rules and principles' for guidance.").[10]

The Appellate Division below declined to address the fundamental choices delegated to the Berger Commission and instead relied on case law which stands for the unremarkable proposition that an agency may "fill in details and interstices" and make "subsidiary policy choices" consistent with the enabling legislation. (R. 888-89) (citing Citizens for Orderly Energy Policy, Inc. v. Cuomo, 78 N.Y.2d 398, 410, 582 N.E.2d 568, 572, 576 N.Y.S.2d 185, 189 (1991) and Dorst v. Pataki, 90 N.Y.2d 696, 687 N.E.2d 1348, 665 N.Y.S.2d 65 (1997)). These cases, however, concerned delegations that were far narrower than that at issue in the Enabling Legislation, and in any event, fail to address the basic point that where an enabling statute delegates *all* policy choices to a temporary commission, the commission's "subsidiary choices" cannot possibly be "consistent" with any legislative policy.

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[10] Tellingly, in its implementation of the Berger Commission's recommendations, the Department of Health will take its instructions on how to "streamline" the New York State health care system from the Berger Commission Final Report, not the Enabling Legislation or the Legislature. See (R. 212-14).

The legislative policy statement at issue in Citizens expressed a clear and coherent policy choice which left only the implementation of minor details to the Long Island Power Authority ("LIPA"). Citizens, 78 N.Y.2d at 410-11, 582 N.E.2d at 573, 576 N.Y.S.2d at 190. In Citizens, the Court of Appeals held that LIPA had not exercised policymaking authority by entering into a settlement to purchase the Shoreham nuclear facility where the legislation at issue "expressly declared its legislative policy that LIPA's acquisition, closure and decommissioning of Shoreham would accomplish an objective of the Act." Id. Not only is this considerably more circumscribed than the purported "policy" statement identified by the Appellate Division (which did *not identify the hospitals to be shut down*, or explain *how* to identify them or determine when the "need" for healthcare did not exist), but the Court in Citizens also held that the separation of powers doctrine had not been transgressed because this objective was not in tension with any other objective in the statute. See id. This rationale is patently violated in the instant case, where *any* decision by the Berger Commission to give primacy to one societal interest is necessarily going be in "tension" with one of the other societal interests set forth in the statute. The very goal of insuring quality healthcare for all, while at the same time

saving costs, is necessarily going to require a balancing of competing interests and purposes.

The Appellate Division's reliance on Dorst also provides no support for its contention that the Berger Commission was engaged solely in making "subsidiary" policy choices. In Dorst, the plaintiff asserted that Correction Law § 852(1) was unconstitutional because it "delegates directly to the Governor the power to make the policy choices of adding additional classes of inmates to those statutorily ineligible for participation in one or more temporary release programs." Dorst, 90 N.Y.2d 696, 699, 687 N.E.2d 1348, 1349, 665 N.Y.S.2d 65, 66. Plaintiffs never alleged, however, that the addition of these classes implicated the balancing of policy interests which this Court has deemed "fundamental" — i.e., the balancing of health, economic and social costs. Indeed, they could make no such allegation, because the statute at issue in Dorst merely authorized the Commissioner of Correctional Services to consider public safety and the welfare of the inmate in promulgating parole regulations, a determination which in no way involved the balancing of interests, as in this case, as disparate as reducing the State's Medicaid budget and at the same time ensuring healthcare access for underserved communities.

In sum, this Court has clearly distinguished "subsidiary policy choices" and "interstices of legislation" from a delegation that empowers an agency (or temporary commission) with unfettered discretion to choose from among a menu of competing policy ends (which concern health, social and economic costs), free from any legislative guidance.[11] See Boreali, 71 N.Y.2d at 13 ("Manifestly, it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."); Campagna, 73 N.Y.2d at 242-43, 536 N.E.2d at 370, 538 N.Y.S.2d at 935 ("An agency cannot by its regulations effect its vision of societal policy choices and may only adopt rules and regulations which are in harmony with the statutory responsibilities it has been given to administer.") (citation omitted). If such

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[11] The Final Report is replete with the Berger Commission's acknowledgements of its policymaking role. (R. 126) ("The Commission on Health Care Facilities in the 21st Century was created to review and strengthen New York State's acute and long term care delivery systems."); (R. 127) ("It has been a privilege to examine New York State's health care system and develop immediate and long-term agendas for change."); (R. 134) ("Summary of Policy Recommendations: The Commission's direct mandate to rightsize and reconfigure facilities was a vast and necessary endeavor."); (R. 198) ("Policy Recommendations: The Commission's direct mandate and authority to rightsize and reconfigure the states' hospital and nursing home industries was a vast and complicated endeavor.").

fundamental value decisions may simply be handed off to an unelected temporary commission, without any meaningful legislative guidance whatsoever, then there is, in fact, nothing left of the non-delegation doctrine under the New York Constitution and there are no fundamental policy choices that the Legislature is required to make.

Without trying to draw a distinction between primary and subsidiary choices, the trial court below simply concluded that "Boreali does not require that the legislature promulgate specific guidelines as to how competing interests and costs are to be weighed" and quoted part of a sentence from Boreali to the effect that "many regulatory decisions involve weighing economic and social concerns against specific values that the regulatory agency is mandated to promote." (R. 24) (citing Boreali 71 N.Y.2d at 12). The trial court, however, ignored the fact that Boreali made very clear that, where an agency engages is such balancing of economic and social concerns, the Legislature must provide guidelines as to *how* such balancing of competing societal interests is to take place. As the full quote in Boreali reads:

> While it is true that many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote, the agency in this case has not been

> authorized to structure its decision making in a "cost benefit" model and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed. Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was "acting solely on [its] own ideas of sound public policy" and was therefore operating outside of its proper sphere.

Boreali, 71 N.Y.2d at 12. The Enabling Legislation does not provide any guidance whatsoever as to the appropriate balance of trade-offs between health and cost in the area of healthcare. Thus, when engaging in a balancing of competing social interests, the Berger Commission was in effect unlawfully making the primary policy choice which should have been made initially by the Legislature.

3. The Berger Commission's Final Report Evidences That it Was Engaged in Legislative Policymaking

As described above, Section 5 of the Enabling Legislation requires the Berger Commission to "consider" various conflicting policy interests. This section clearly evidences the Legislature's recognition that the effort to reshape New York's healthcare system, including closing certain hospitals, could not be done without making hard choices about the acceptable social

costs and burdens on patients served by the existing healthcare system. But significantly, nowhere does the Legislature provide guidelines "for determining *how* the competing concerns of public health and economic cost are *to be weighed*." Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 (emphasis added).

Neither the Appellate Division below nor Defendants-Respondents have pointed to any provision of the Enabling Legislation that imposes any actual constraint on the Berger Commission's activities. The Berger Commission itself frankly acknowledges this lack of constraint, stating at the very outset of its Final Report that these "difficult choices" — involving the weighing of competing social policy interests — were left to its discretion:

> In fulfilling its mandate, the Commission had to face *difficult choices*. Decisions to reconfigure or close health care institutions are never simple or without controversy. Even when closure will have no adverse impact on health care delivery and makes enormous economic sense, history has shown that opposition may arise . . . . The Commission *carefully considered community issues* in its deliberations. The Commission also recognizes that our current predicament is in part a result of past failure to make honest and hard choices. We will not get to a better place until we confront our problems head-on and take action that *is in the best interests of the entire system and its patients* . . . . The Commission made responsible choices given *real world constraints*.

(R. 127) (emphasis added); see also (R. 109) (Executive Director Sandman stating that the Berger Commission's methodology included consideration of "service to vulnerable populations, availability of services, quality of care, utilization, viability and economic impact").

Defendants-Respondents have during the course of this litigation nevertheless sought to characterize the Berger Commission's mandate as a "discrete task," practically "mathematical" in nature, as if there were no "hard choices" to be made. Defendants' sole basis for these mischaracterizations has been the Berger Commission's purported reliance on an "analytic framework" informed by the Section 5 factors. Even a cursory examination of this analytic framework, however, reveals that it can hardly be described as "mathematical," and it certainly does not explain how the Berger Commission made its hard choices about which hospitals to close. The framework purported to break down the nine statutory factors into six key criteria, each of which were then assessed according to several different metrics. (R. 194). For instance, to assess the key criterion "service to vulnerable populations," the Berger Commission collected data regarding nine separate metrics, and then, by a process that has never been defined or described, boiled these metrics down into a score of 1, 0, or -1. (R. 194-95).

The Commission would repeat this process for each key criterion, and then added up the scores to determine whether a facility was allegedly high, low, or medium priority for rightsizing.

The Berger Commission, however, has frankly acknowledged that this process was not itself determinative of which facilities to rightsize. (R. 195) ("[T]hese categories were not determinative. High priority institutions were not necessarily subject to Commission recommendations nor were low priority institutions necessarily immune."); (R. 108) ("The Commission, which operated independently of any existing state agency, used an approach that was both quantitative and qualitative — it balanced 'science' and 'art.'"). The Berger Commission unequivocally states in its Final Report that its analytic framework, which was "[d]erived from the nine legislated factors," was a "starting point . . . and was not final determinations of which institutions to rightsize." (R. 193-94). Thus, apart from the fact that this self-created "framework" has nothing to do with any policy choices made by the Legislature, the Berger Commission itself openly concedes that it departed from that framework to exercise its own policy judgments at the end of the day. Indeed, nowhere in the Final Report does the Berger

Commission even identify hospitals' scores or whether those scores diverged from its recommendations for closure or restructuring.

The "hard choices" delegated to the Berger Commission went well beyond merely identifying hospitals based on a clearly defined formula, and involved the fundamental problem of striking a balance among competing real-world community interests. That the Berger Commission, rather than the Legislature, was given the responsibility for resolving these "difficult choices" and "confront our problems head on" is illustrative of the manner in which the Enabling Legislation has turned the democratic process on its head and accomplished a wholesale outsourcing of legislative discretion. If the non-delegation language of this Court in Boreali is to be accorded any meaning, these kinds of "hard choices" must be deemed "uniquely legislative" in nature and therefore could not be lawfully delegated to an unelected commission without providing some guidance as to how the proper balance should be struck. See Boreali, 71 N.Y.2d at 12, 517 N.E.2d at 1355, 523 N.Y.S.2d at 470 ("[s]triking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function" and finding that regulations necessarily fail in the absence of "any legislative guidelines at all for determining how the competing concerns of public

health and economic cost are to be weighed"); see also Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 823, 798 N.E.2d 1047, 1060, 766 N.Y.S.2d 654, 667 (2003) ("Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure.").

4. The Berger Commission's Final Report, and its Divergence from the Regional Advisory Committee Recommendations, Demonstrate That the Enabling Legislation Provided No Policy or Standard by Which the Commission's "Recommendations" Could be Challenged

Without any guidance from the Legislature as to what weight to give any factor in Section 5 of the Enabling Legislation, the Berger Commission was free to prioritize these conflicting social and economic policy interests in any manner it saw fit. This freedom meant that there was no standard by which the Berger Commission's Final Report could be measured and therefore no means of determining whether the Berger Commission was implementing the Legislature's will (i.e., making "subsidiary policy choices"). The Appellate Division's articulation of an open-ended "policy" in the Enabling Legislation thus produces the perverse result in which the Commission's "recommendations" are entirely insulated from judicial

review as to whether the Commission did, in fact, implement the legislative will. See Packer Collegiate Inst., 298 N.Y. at 189-90, 81 N.E.2d at 82 (striking down delegation where it was impossible to tell if administrator was implementing the legislative will because no policy was articulated in the statute).

This fundamental flaw is readily apparent in the divergence between the recommendations of the Berger Commission and the New York City Regional Advisory Committee ("NYC RAC"). Acting pursuant to the Enabling Legislation's mandate, the Berger Commission recommended closure of WSMC, whereas the RAC, considering the very same conflicting policy interests, determined that WSMC should not be closed because it is "a number one choice" of community residents and "[c]losure could significantly disrupt access." (R. 284-85, 369). Each of these conclusions is equally valid under the terms of the Enabling Legislation — they merely reflect the two bodies' different balancing of the social and economic considerations set forth in Section 5, which they were merely obligated to "consider." Enabling Legis. § 5 (R. 93-94). The result is two disparate "policy" visions as to when a hospital is "needed," without any guidance in the Enabling Legislation as to which one is consistent with the Legislature's

purported policy choice, *for the simple reason that the Legislature never made one.*

In the case of WSMC, the Berger Commission exercised the authority granted to it by the Enabling Legislation to apparently give greater weight to cost considerations and profitability over the interests of preserving access to healthcare for communities in an underserved area, the interests of the 23,000 patients who rely on WSMC's emergency services annually, or the interests of patient choice to go to WSMC rather than to be compelled to go to a less convenient hospital. See (R. 284-85) (recommending that WSMC be closed after concluding that its "patients could be absorbed by surrounding hospitals" and because it operated at "near-break even operating margin"). The NYC RAC, however, recognized the very same facts identified by the Berger Commission and reached the exact opposite conclusion on the basis of the weight it placed on the Enabling Legislation factor relating to the provision of healthcare in underserved communities. See (R. 369) (recommending that WSMC survive, noting the "strong bonds" between patients and physicians, that the communities served by WSMC were "stressed" and "serious shortage areas," and that "closure could significantly disrupt access").

This divergence is especially notable in light of the Enabling Legislation's directive that the NYC RAC become familiar with the specific issues facing New York City hospitals. Enabling Legis. § 7 (R. 94-95). Yet, nowhere does the Enabling Legislation explain under what circumstances the Berger Commission can reject the NYC RAC's recommendations and reach a contrary conclusion. Nor did the Berger Commission feel it was necessary to justify such rejection against any articulated standard whatsoever. Cf. Boreali, 130 A.D.2d at 113-14, 518 N.Y.S.2d at 444 (limiting the breadth of authority conferred under legislation to prevent a separation of powers violation where the text of such legislation "confers virtually unfettered discretion upon the PHC to regulate public health matters").

This Court has long stood as a bulwark against the erosion of basic democratic principles enshrined in the Constitution of the State of New York. The Enabling Legislation at issue in this case represents an unprecedented assault on these principles, for once this Court turns a blind eye to this unprecedented legislative abdication, it will signal that the Legislature may permanently outsource the responsibility for making hard policy choices to temporary commissions simply by describing a societal

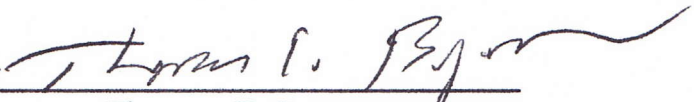
problem and listing the various interests implicated in the conflict therein. This would constitute a devastating blow to core democratic principles such as legislative accountability, and would mark a significant victory for the forces of legislative entrenchment and avoidance. The Constitution of the State of New York prohibits the Legislature from evading its responsibility in this manner and gives the citizens of this State a right to demand that the hard policy choices be made by the legislators elected by and accountable to them.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs-Appellants' motion for leave to appeal.

Respectfully submitted,

CHADBOURNE & PARKE LLP

By 

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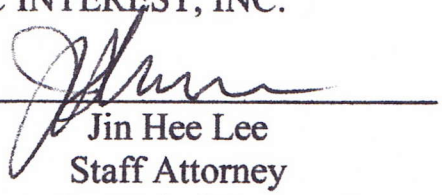
By 

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