STATE OF NEW YORK : COURT OF APPEALS

ST. JOSEPH HOSPITAL OF CHEEKTOWAGA, NEW YORK and CATHOLIC HEALTH SYSTEM, INC.

Plaintiffs-Appellants,

vs.

ANTONIA C. NOVELLO, as New York State Health Commissioner, NEW YORK STATE COMMISSION ON HEALTHCARE FACILITIES IN THE 21st CENTURY, and GEORGE E. PATAKI, as Governor of the State of New York and the STATE OF NEW YORK,

Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL

Erie County Index No. I-2006/11568

PLEASE TAKE NOTICE, that upon all the papers and proceedings 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 December 10, 2007, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR 5602(a) and 22 N.Y.C.R.R. § 500.22, granting Appellants leave to appeal the Opinion and Order of the Appellate Division, Fourth Department, entered on July 18, 2007. Such Opinion and Order:

(i) modified the Order and Judgment of the Supreme Court, County of Erie, granted by the Honorable Joseph D. Mintz on February 21, 2007 ("Order and Judgment"), and entered in the Office

of the Clerk of Erie County on February 21, 2007, by vacating the provision dismissing those causes of action seeking a declaratory judgment; and

(ii) otherwise affirmed, in all respects, the Order and Judgment insofar as it had: (a) declared that section 31 of Part E of Chapter 63 of the Laws of 2005 is constitutional; and (b) granted summary judgment to the Respondents as to all claims asserted by plaintiffs in their Amended Verified Complaint.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served on the undersigned no later than two (2) days before the return date of this motion.

DATED: Buffalo, New York
November 30, 2007

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INTRODUCTION

Plaintiffs-Appellants St. Joseph Hospital of Cheektowaga, New York ("St. Joseph") and the Catholic Health System, Inc. ("CHS") (collectively, "Appellants") respectfully submit these papers in support of their motion for leave to appeal to this Court the Opinion and Order entered by the Appellate Division, Fourth Department, on July 18, 2007 (the "Opinion"). In that Opinion, the Fourth Department affirmed the February 21, 2007 Order and Judgment of the Supreme Court, Erie County, that had granted summary judgment to Defendants-Respondents ("Respondents") and declared constitutional section 31 of Part E of Chapter 63 of the Laws of 2005 (the "Enabling Legislation") which had created the New York State Commission on Healthcare Facilities in the 21st Century (the "Commission" or "Berger Commission").

STATEMENT OF PROCEDURAL HISTORY

A. The Proceedings in the Supreme Court

Appellants commenced this action on November 28, 2006. In their Amended Verified Complaint, Appellants sought a declaratory judgment that the Enabling Legislation (described more fully, post) violated, inter alia: (i) their rights to Due Process under the Fourteenth Amendment; (ii) the Presentment Clause and Separation of Powers Doctrine under the New York State Constitution;

(iii) their rights to the Free Exercise of religion under the United States Constitution and New York Constitution; (iv) their rights under the Contracts Clause of the United State Constitution; and (v) their civil rights pursuant to 42 U.S.C. § 1983. (R. 51-65).

Following service of Respondents' Answers, Appellants moved for summary judgment on December 20, 2006; Respondents cross-moved for similar relief on December 29, 2006. (R. 31-33, 478-79). On February 1, 2007, the trial court issued its Memorandum Decision (the "Decision"), in which it denied Appellants' motion, granted Respondents' motion for summary judgment, and ordered that the Amended Verified Complaint be dismissed in its entirety. (R. 10-29). St. Joseph Hospital of Cheektowaga, N.Y. v. Novello, 15 Misc. 3d 333 (Sup. Ct. Erie County 2007). On February 21, 2007, the trial court entered an Order and Judgment dismissing the Amended Verified Complaint "in all respects." (R. 7-9).

B. The Proceedings in the Appellate Division

Appellants filed their notice of appeal from the Order and Judgment to the Appellate Division, Fourth Department, on March 1, 2007. (R. 3-4). On appeal, Appellants again argued the unconstitutionality of the Enabling Legislation as violative of: (i) the guarantees of procedural and substantive due process in the Fourteenth Amendment to the United States Constitution and in Article I, section 6, of the New York Constitution; (ii) the Presentment Clause of Article IV, section

7, of the New York Constitution; (iii) the Separation of Powers Doctrine inherent in the New York Constitution; (iv) the guarantee of free exercise of religion in Article I, section 3, of the New York Constitution; and (v) the contracts clause of Article I, section 10, of the United States Constitution.

On July 18, 2007, the Fourth Department issued an Opinion and Order vacating the Supreme Court's dismissal of the Plaintiffs' causes of action requesting a declaratory judgment, but otherwise affirming the Supreme Court's Order and Judgment as modified, and declaring the Enabling Legislation constitutional. St. Joseph Hospital of Cheektowaga, N.Y. v. Novello, 43 A.D.3d 139 (4th Dep't 2007). In his six page dissent (described more fully below), Justice Eugene Fahey stated that he "agree[d] with [Appellants] that [Respondent] New York State Commission on Healthcare Facilities in the 21st Century (Commission) violated their right to procedural due process, and I further agree with [Appellants] that the [Enabling] Legislation violates the Presentment Clause of the New York Constitution and the separation of powers doctrine." Id. at 148.

C. Appellants' Original Appeal to this Court

Appellants filed their Notice of Appeal to this Court on July 23, 2007, and their Preliminary Appeal Statement nine days later. As noted in that Statement, the issues raised on this appeal are those which were expressly raised,

and decided, below, viz., whether the Enabling Legislation is unconstitutional as a violation of:

1. procedural due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, section 6, of the New York Constitution;

2. substantive due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, section 6, of the New York Constitution;

3. the Presentment Clause of Article IV, section 7, of the New York Constitution, and the Separation of Powers doctrine inherent therein;

4. the Plaintiffs'-Appellants' right to free exercise of their religion, as guaranteed by Article I, section 3, of the New York Constitution; and/or

5. the Contracts Clause of Article I, section 10, of the United States Constitution.

By letter dated August 8, 2007, this Court requested the parties to address whether the appeal directly involved a substantial constitutional question to support an appeal as of right, and they did so. See CPLR 5601(b)(1). This Court thereafter dismissed Appellants' appeal as of right on November 27, 2007.

D. The Fourth Department's Stay Order

On March 2, 2007, Appellants moved by order to show cause for a stay of the Supreme Court's Order and Judgment, pending appeal. On March 28, 2007, the Fourth Department issued an Order granting that motion (the "Stay

Order"), and staying "all proceedings to enforce the judgment entered February 21, 2007" pending the determination of this appeal. Respondents subsequently moved for another order to clarify the Stay Order, particularly by requiring Appellants to file a closure plan for St. Joseph by their deadline of September 30, 2007. The Fourth Department denied Respondents' motion on May 31, 2007.

Because Appellants had filed their notice of appeal to this Court on July 23, 2007 (five days after the Fourth Department had issued its Opinion and Order), the Stay Order remains in effect, and has permitted St. Joseph Hospital to continue to operate. See CPLR 5519(e). Appellants have similarly filed this motion for leave to appeal within five days of this Court's dismissal of their original appeal as of right. As such, the Stay Order remains in effect.

E. The Related Article 78 Proceeding

This declaratory judgment action concerns the challenge to the facial constitutionality of the Enabling Legislation. As case law makes plain, such a challenge cannot be raised in the context of an Article 78 proceeding directed at the specific findings of the Commission with respect to St. Joseph.

On March 28, 2007, St. Joseph and CHS filed an Article 78 proceeding seeking to set aside the Commission's findings with respect to St. Joseph. St. Joseph Hospital of Cheektowaga, New York, et ano. v. New York State Commission on Healthcare Facilities in the 21st Century, et al., Index No.

2524-07 (Supreme Court, Albany County). On August 27, 2007, the Supreme Court denied the Commission's motion to dismiss that proceeding. That court has not yet ruled on the merits of the petition.

F. Timeliness of Appellants' Motion for Leave to Appeal

Ordinarily, a motion for permission to appeal must be made within thirty days from the date of service of a copy of the judgment or order appealed from. CPLR 5513(b). Thus, had Appellants initially sought leave to appeal from the Fourth Department's July 18, 2007 Opinion and Order, the time for it to have done so would have commenced on July 18, 2007 - - the date upon which Respondents served a notice of entry of that order.

Appellants did timely file a Notice of Appeal as of right from the Fourth Department's order on July 18, 2007, which this Court dismissed on November 27, 2007. In this regard, CPLR 5514(a) expressly provides that "[i]f an appeal is taken . . . [and] dismissed, . . . [and] some other method of taking an appeal or seeking permission to appeal is available," then the time for taking such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise." CPLR 5514(a). Because this Court has not ordered "otherwise," Appellants' appeal is timely.

JURISDICTIONAL STATEMENT

CPLR 5602(a)(1)(i) provides that this Court may grant leave to appeal in any action which originates in the Supreme Court and involves "an order of the appellate division which finally determines the action and which is not appealable as of right." Such is the case here.

In its Order and Judgment, the Supreme Court granted summary judgment to Respondents, and dismissed Appellants' Amended Complaint "in all respects." By its Opinion and Order, the Fourth Department affirmed the trial court's Decision granting summary judgment to the Respondents with respect to all claims asserted by Appellants in their Amended Verified Complaint. The Fourth Department did modify the trial court's Order and Judgment, but only to the extent of vacating the dismissal of those causes of action that had sought a declaratory judgment. This was done because, technically, "the court err[s] in dismissing the complaint" upon resolving any declaratory judgment action. Tumminello v. Tumminello, 204 A.D.2d 1067, 1067 (4th Dep't 1994); accord Boyd v. Allstate Life Insurance Co. of N.Y., 267 A.D.2d 1038, 1039 (4th Dep't 1999) (cited by the Opinion and Order). Apart from this technical "modification," the Fourth Department affirmed the trial court in all respects, and no aspect of the matter was remanded to the trial court. As such, the Fourth Department's Opinion and Order

rendered a final judgment reviewable by this Court. See Kiker v. Nassau County, 85 N.Y.2d 879 (1995); In re Bruce, 295 N.Y. 702 (1946).

STATEMENT OF QUESTIONS PRESENTED

1. Q. Did the Due Process Clause require Respondents to provide Appellants notice: (i) identifying which of Appellants' numerous health care facilities Respondents were determining to order closed; and (ii) setting forth the bases for such closure? (R. 22, 52).

2. Q. Did the Due Process Clause require Respondents, before ordering the closure of one of the Appellants' hospitals, to provide Appellants with an evidentiary hearing at which Appellants would: (i) be informed of the facts upon which Respondents were relying; and (ii) be given the opportunity to challenge and rebut those facts by offering testimony, cross-examining witnesses, inspecting documents, and offering evidence in rebuttal or explanation? (R. 22-24, 52).

3. Q. Does legislation suspending a hospital's right to notice and a hearing before its operating certificate can be revoked violate the Due Process Clause? (R. 20-24, 52).

4. Q. Does a provision in the Enabling Legislation allowing for the Legislature to "veto" a commission's findings, without subsequent submission to the Governor for approval or veto, violate the Presentment Clause of the New York Constitution? (R. 14, 51-52).

5. Q. Is the "legislative veto" provision of section 31 of Part E of Chapter 63 of the Laws of 2005 (the "Enabling Legislation") severable from the remainder of the legislation? (R. 16, 51-52).

6. Q. Do Appellants have standing to challenge a "legislative veto" provision when the veto was not exercised? (R. 17, 51-52).

7. Q. Does legislation delegating to a temporary ad hoc commission the responsibility for restructuring all hospitals, nursing homes, and other medical facilities across the State violate the Separation of Powers Doctrine? (R. 14, 51-52).

8. Q. Does an order closing Appellants' hospital violate their rights under the Free Exercise Clause of the New York Constitution to pursue their faith-based mission of healing the sick? (R. 25-26, 57).

9. Q. Does an order of closure that will impair hundreds of Appellants' contracts violate the Contracts Clause of the United States Constitution? (R. 27, 59).

THE QUESTIONS PRESENTED MERIT REVIEW BY THIS COURT

A. Preliminary Statement

St. Joseph and CHS seek leave to appeal the Fourth Department's July Opinion affirming the granting of summary judgment to Respondents, and declaring constitutional the Enabling Legislation that created the New York State Commission on Healthcare Facilities in the 21st Century.

This declaratory judgment action presents several novel and significant issues of immense public significance that, Appellants submit, will have ramifications expanding far beyond just this action. Two of these issues amply illustrate this point. First, as the courts below recognized, Appellants have a constitutionally protected property interest in St. Joseph's Operating Certificate. The Enabling Legislation, however, attempts to "suspend" Appellants' constitutionally (and statutorily) guaranteed rights to adequate notice and a reasonable opportunity to be heard before that Operating Certificate can be revoked. As the dissent below correctly observed: (i) Appellants were given no notice about which of its facilities might be closed - - or why; (ii) the Commission, itself, provided Appellants with no hearing; and (iii) the Commission's

deliberations about which hospitals were to be closed were conducted in secret with, apparently, no record having been made of them.

Second, the legislative veto portion of the Enabling Legislation clearly runs afoul of United States Supreme Court prohibitions on the use of such provisions.

The dissent below clearly understood the serious infirmities posed by the majority's opinion. Left unreviewed, under the majority's reasoning the State may empower an appointed commission, authorized to deliberate behind closed doors, to deprive a select few license holders of their property interests, without affording them either adequate notice or the opportunity for a meaningful hearing. The Fourth Department's majority opinion also validates the enactment of "legislative veto" provisions, notwithstanding the fact that the United States Supreme Court declared such provisions to be unconstitutional more than twenty years ago.

B. Statement of Facts

1. The Enabling Legislation

Prior to 2005, the New York Commissioner of Health had the sole authority to limit or revoke the operating certificates of hospitals. N.Y. PUB. HEALTH LAW § 2806(a). Moreover, section 2806(e) of the Public Health Law

granted those hospitals the statutory right to both notice and a hearing before the Commissioner could revoke their operating certificates.

In April 2005, New York State Legislature passed, and the Governor approved, section 31 of Part E of Chapter 63 of the Laws of 2005 (the "Enabling Legislation") that created Respondent "Commission on Healthcare Facilities in the 21st Century" (the "Commission"). The Enabling Legislation charged the Commission with reconfiguring the State's entire hospital and nursing home bed supply by targeting specific facilities for closure, consolidation, or downsizing. The Enabling Legislation also suspended - - until June 30, 2008 - - the statutory right of hospitals and other facilities to a hearing before their operating certificates could be revoked. (R. 41).

In addition, the Enabling Legislation created six regional advisory committees ("RACs") which were directed to make recommendations to the full Commission concerning closure and downsizing for facilities in their respective regions. (R. 39). The Commission, itself, however, was the body that was charged with the duty of making recommendations to the Governor about which facilities should actually be closed. If the Governor approved the Commission's recommendations, the Department of Health was required to carry them out unless both houses of the Legislature enacted a "concurrent resolution" rejecting the

Commission's recommendations in their entirety. That "concurrent resolution" was not reviewable thereafter by the Governor. (R. 40-41).

2. The Commission's Proceedings

The Enabling Legislation commanded the six RACs to "conduct formal public hearings with requisite public notice to solicit input from local stakeholder interests, including . . . healthcare providers." (R. 39). The Western Region RAC, however, solicited no information directly from CHS about any of its four hospitals (including St. Joseph) or its seven other facilities that were potential targets for closure. Rather, the Western Region RAC simply published certain data regarding all of CHS's facilities on its website, and allowed CHS to submit corrections to that data, which CHS did. (R. 137-41).

It was undisputed below that thereafter: (i) the Western Region RAC conducted only nine hours of "hearings" concerning all healthcare facilities in the eight counties covered by its mandate; (ii) Appellants were provided no notice as to which of its many facilities might be likely candidates for closure - - or why; and (iii) at the "hearing" before the Western Region RAC, Appellants were only given 10 minutes to address the potential closure of their 11 facilities. (R. 138-40).

On November 15, 2006, the Western Region RAC recommended that St. Joseph be decertified as an acute-care facility. (R-406). Thirteen days later, the Commission issued its "Final Report" which recommended that St. Joseph be

closed entirely. (R. 365). It was undisputed below that, in doing so, the Commission did not conduct any formal public hearings at which any healthcare providers - - including Appellants - - were given the opportunity to testify or challenge the evidence supporting Respondents' closure determination. (R. 605-06). It was also undisputed that all discussions by the Commission concerning which specific facilities were potential targets for closure were conducted in "executive session" - - viz., out of public scrutiny. (R. 609). No record of those secret discussions has been made available to the public, or to Appellants. Id.

The day after, the Governor announced his approval of the Commission's Final Report. The Legislature did not adopt a "concurrent resolution" rejecting the Commission's recommendations, and, pursuant to the Enabling Legislation, the Commissioner of Health must now carry them out.

3. St. Joseph

The following facts were undisputed below:

(i) St. Joseph is a growing, vibrant hospital which annually admits more than 6,000 patients for treatment, and more than 25,000 people are treated annually in its state-of-the-art Emergency Department; (ii) St. Joseph employs nearly 800 people and is a profitable hospital; (iii) just two years before the Commission ordered that St. Joseph be closed, Respondent Commissioner of Health had expressly authorized St. Joseph to complete a $9,000,000.00 capital

program to build that state-of-the-art facility; and (iv) it will cost Appellants nearly $68,000,000.00 to close St. Joseph. (R. 87- 90, 111, 157).

C. The Fourth Department's Majority Opinion Satisfies This Court's Guidelines for Review.

As the Rules of this Court provide, leave to appeal is to be granted in cases that raise "novel [issues] of public importance," or that create a "conflict with prior decisions of [the Court of Appeals]." 22 N.Y.C.R.R. § 500.22(b)(4). Appellants respectfully submit that this appeal presents both.

Because the novelty aspects are intertwined with an analysis of how the Fourth Department's majority opinion conflicts with controlling precedent, we will discuss both together.

1. Due Process

(a) Adequate Notice

The majority opinion correctly recognized that Appellants have a "substantial" property interest in St. Joseph's Operating Certificate. St. Joseph Hospital of Cheektowaga, 43 A.D.3d at 144. Such an interest, of course, triggers the requirements for procedural due process before it can be extinguished. The requirements of due process are a matter of federal law. Santosky v. Kramer, 455 U.S. 745, 755 (1982). In this regard, however, "the New York State Constitution's guarantee of . . . due process [is] virtually coextensive with th[at] of the U.S. Constitution." Coakley v. Jaffe, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1999); Central

Savings Bank v. City of New York, 280 N.Y. 9, 10 (1939) (per curiam).

In order to evaluate the procedural process that is due, courts must balance "three distinct factors," namely (i) "the private interest that will be affected by" implementation of the Commission's recommendations; (ii) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (iii) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Pursuant to these guidelines, due process requires the state to provide both adequate notice and a meaningful hearing before depriving an owner of his property interests. Id.; Brody v. Village of Port Chester, 434 F.3d 121, 135 (2d Cir. 2005).

As this Court has stated, notice is adequate when it is "reasonably calculated, under all the circumstances, to apprise interested parties of [a pending] action . . ." Matter of Harner v. Tioga, 5 N.Y.3d 136, 140 (2005). As noted, Appellants were given no notice as to which of its facilities might be closed, or the reason why any of those facilities was a potential target. The majority opinion, citing no case law, did not find this problematic, saying Appellants "were aware that the closing of a [Catholic Health System] hospital was a possibility." St. Joseph Hospital of Cheektowaga, 43 A.D.3d at 144. The mere enactment of a

statute can satisfy the requirement for adequate notice, but only for legislative decisions that apply universally to all members of a particular group. See Atkins v. Parker, 476 U.S. 115, 129-31 (1985); Matter of Tompkins County Support Collection Unit v. Chamberlin, 99 N.Y.2d 328, 338 (2003). In this case, however, the Enabling Legislation provided that the Commission would make adjudicative findings, which calls for enhanced notice requirements. See RR Village Ass'n, Inc. v. Denver Sewer Corp., 826 F.2d 1197, 1204-05 (2d Cir. 1987). Thus, the majority opinion failed to recognize that case law clearly establishes that Appellants did not receive reasonable notice. See Matter of Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005).

(b) Opportunity To Be Heard

The Enabling Legislation failed to provide for an evidentiary hearing for hospitals whose operating certificates the Commission would recommend for rescission. "[The] dimensions [of constitutional property interests] are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985). Prior to the Enabling Legislation's enactment, Public Health Law section 2806(6) required the opportunity for a "public hearing" before the Commissioner of Health could revoke a hospital's Operating Certificate for lack of "public need." With

respect to the procedure that such a "public hearing" would follow, section 12-a(6) of the Public Health Law is clear:

> At a hearing, the respondent may appear personally, shall have the right of counsel, and may cross-examine witnesses against him and produce evidence and witnesses in his behalf.

(Emphasis added.) The respondent hospital also could seek disclosure from the Department of Health concerning the reasons for its proposed closure. Matter of Neiman v. Axelrod, 79 A.D.2d 764, 765 (3d Dep't 1980). Once New York State defined a hospital's Operating Certificate as protected by these procedural mechanisms, therefore, the State could not take them away. As the United States Supreme Court stated in Cleveland Board of Education v. Loudermill:

> [m]inimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.

470 U.S. at 541 (emphasis added). See Hecht v. Monaghan, 307 N.Y. 461, 470 (1954) (declaring that a licensee who contests revocation of a state-issued license "must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal").

The majority opinion utterly ignored the fact that the Enabling

Legislation "suspended" these constitutional and statutory safeguards. The majority also ignored case law demonstrating that Appellants did not receive a reasonable opportunity to be heard. As noted, Appellants were given only ten minutes before the Western Region RAC (which was only empowered to make recommendations to the Commission) to address the potential closure of 11 of its facilities, and were not advised of (much less given the opportunity to rebut) the evidence on which Respondents would supposedly rely. More important, Appellants were given no hearing before the Commission itself.

The majority opinion did not find this problematic either, saying that affording Appellants a hearing before the Commission "would create an enormous fiscal and administrative burden." St. Joseph Hospital of Cheektowaga, 43 A.D.3d at 144. In this regard the majority noted that "[i]n the western region alone, the Commission recommended, inter alia, the closing of two hospitals, the downsizing of numerous hospitals and nursing homes" and the joinder of two other facilities.

Appellants respectfully suggest that the majority opinion's conclusion that a hearing would have created too great a "burden" for the Commission runs counter to long-established case law. Fuentes v. Shevin, 407 U.S. 67, 91 n.22 (1972) ("[a] prior hearing always imposes some costs in time, effort, and expense . . . But these rather ordinary costs cannot outweigh the constitutional right" to Due Process); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (noting, in finding a

hearing was mandated, that "the Constitution recognizes higher values than speed and efficiency"); Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999) (same); People v. David W., 95 N.Y.2d 130, 139 (2000) ("the fiscal and administrative burdens imposed by requiring notice and an opportunity to be heard are not prohibitive and are not so significant . . .").

In this regard, the very first factor that courts are to consider in determining the procedural process that is due is "the private interest that will be affected" by the state action. Mathews, 424 U.S. at 335. In this case, Appellants' interests were two-fold. The first was the decades-long commitment of St. Joseph and its personnel to the fulfillment of their faith-based mission of treating the sick. The second is the significant costs that Appellants will incur as a result of the closure order; indeed, it was undisputed below that these will total approximately $68,000,000.00. (R. 90). Such significant interests mandate, as case law makes clear, that Appellants be provided a meaningful hearing before those interests may be affected.

Indeed, under the view of the majority opinion, New York may: (i) enact legislation that finds that a given field or occupation subject to state licensure (e.g., doctors, attorneys, engineers, real estate brokers) has too many license holders; (ii) appoint a temporary ad hoc committee to select those individuals whose state-issued licenses shall be stripped away; (iii) provide that the individuals

whose licenses are in particular jeopardy are not to be so informed; and (iv) deny no license holders an evidentiary hearing before their licenses are, in fact, revoked. The majority's opinion, left unreviewed, therefore poses an immense peril to due process rights.

2. **The Legislative Veto**

As noted, the Enabling Legislation required the Commission to present its recommendations to the Governor by December 1, 2006. (R. 40). The Governor, thereupon, was to have four days to approve them, and forward them to the Legislature. (R. 41). The Legislature, then, had the right to enact a concurrent resolution rejecting the Commission's recommendations "in their entirety." If the Legislature did so, this legislature "veto" was not thereafter reviewable by the Governor. Id.

Section 7 of Article IV of the New York Constitution requires 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 (emphasis added). This Court has not hesitated to declare unconstitutional any attempt to circumvent the clear requirement of the Presentment Clause that legislative actions, to be effective, must be presented to the Governor for approval or veto. Campaign for Fiscal Equity, Inc. v. Marino, 87 N.Y.2d 235, 238-39 (1995) (declaring unconstitutional the legislative practice of withholding bills

approved by both houses from gubernatorial review pending further legislative negotiations); King v. Cuomo, 81 N.Y.2d 247 (1993) (same with respect to legislative "recall" practice).

In Campaign for Fiscal Equity v. Marino, supra, this Court noted that "Federal cases interpreting the parallel provision of the Presentment Clause of the United States Constitution underscore the Clause's implicit directive" that legislation be presented to the President for approval or veto. 87 N.Y.2d at 239, citing Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 946 (1983). Chadha, in turn, had involved a challenge to a provision in a federal statute which allowed for a legislative veto by either house of Congress, and did not provide for submission to the President for veto or approval. As the Supreme Court stated, "[p]resentment to the President and the Presidential veto were considered so imperative that the draftsmen [of the Constitution] took special pains to assure that these requirements could not be circumvented." Id. at 946-47. In striking down the statute, the Court stated that:

> the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - - or the hallmarks - - of democratic government[,] and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which

> delegate authority to executive and independent agencies . . . .

Id. at 944. As the Second Circuit has noted with respect to Chadha, "[i]n one broad stroke, the Supreme Court . . . invalidated every use of the legislative veto." E.E.O.C. v. CBS, Inc., 743 F.2d 969, 971 (2d Cir. 1984).

Notwithstanding this, the majority opinion declined to rule on the constitutionality of the legislative veto provision in the Enabling Legislation. It did so because that Legislation contains a severability clause which, the majority reasoned, would rescue the remainder of it. St. Joseph Hospital of Cheektowaga, 43 A.D.3d at 145-46.

In this regard, the majority opinion ignores well-established law holding that the mere presence of a severability clause is not dispositive of the question of whether a clearly unconstitutional provision may be severed in order to rescue the remainder of the legislation. United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) ("the ultimate determination of severability will rarely turn on the presence or absence of such a clause"). Rather, the inclusion of a severability clause simply creates a presumption that the legislature intended the act to be divisible. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987); National Advertising Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991).

Indeed, this Court and other New York courts have not hesitated to declare an entire statute to be unconstitutional, notwithstanding the presence of a severability clause. N.Y. State Superfund Coalition, Inc. v. N.Y. State Dep't of Environmental Conservation, 75 N.Y.2d 88, 94 (1989) (striking entire "Superfund" legislative scheme, notwithstanding severability clause). See National Advertising Co. v. Town of Niagara, 942 F.2d at 151 (striking Town's entire local law regarding outdoor advertising, notwithstanding severability clause); Dalton v. Pataki, 11 A.D.3d 62, 101-02 (3rd Dep't 2004) (striking entire statute authorizing the Governor to enter into compacts with Indian tribes concerning gambling, notwithstanding severability clause), rev'd on other grds., 5 N.Y.3d 243 (2005).

This Court has declared that the test courts are to apply in determining whether a severability provision will be enforced is to ascertain "'whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether.'" CWM Chemical Services, L.L.C. v. Roth, 6 N.Y.3d 410, 423 (2006) (emphasis added) (citation omitted); Hynes v. Tomei, 92 N.Y.S.2d 613, 627 (1998). As the Supreme Court has framed the issue in this regard:

> it is not only appropriate to evaluate the importance of the [legislative] veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a [legislative] veto. Some delegations of power to the Executive or to an independent

> agency may have been so controversial or so broad that Congress would not have been willing to make the delegation without a strong oversight mechanism.

Alaska Airlines, Inc. v. Brock, 480 U.S. at 685 (emphasis added).

In this case, the New York Legislature granted to a temporary ad hoc commission (which had a lifespan of 21 months, viz., from April 13, 2005 to December 31, 2006) the power to establish public policy and reconfigure all hospitals, nursing homes, and other medical facilities across the State. As the Affidavit of Paul A. Tokasz (who was the Majority Leader of the New York State Assembly when the Enabling Legislation was enacted - - and who oversaw its debate and voting) makes clear, the members of the Assembly would not have voted for the Enabling Legislation if it had not contained the legislative veto provision. (R. 602-03). The majority opinion simply ignored this unrefuted testimony below. As the dissent correctly observed, however, that testimony clearly demonstrates that the legislative veto is not severable from the Enabling Legislation. St. Joseph Hospital of Cheektowaga, 43 A.D.3d at 153 (Fahey, J., dissenting). (Indeed, if the legislative veto provision is severable, the Enabling Legislation would constitute an improper delegation of authority. See Boreali v. Axelrod, 71 N.Y.2d 1, 9-13 (1987); Levine v. Whalen, 39 N.Y.2d 510, 515 (1976).)

By reversing the Constitutional roles of the Governor and Legislature to allow for subsequent legislative veto of a Governor's action, the Enabling Legislation has turned the roles of those respective branches on its head. This, too, warrants review by this Court. See Boryszewski v. Brydges, 37 N.Y.2d 361, 364 (1975).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant their motion for leave to appeal from the Opinion and Order issued by the Fourth Department in this case on July 18, 2007.

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