

COURT OF APPEALS  
STATE OF NEW YORK

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

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

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## INTRODUCTION

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

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<sup>1</sup> The Enabling Legislation is contained in the Record on Appeal pages 92 through 98. The Record on Appeal is hereinafter referred to as “(R. \_\_).”

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

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

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

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

#### STATEMENT OF THE CASE

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

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

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

in a more coherent, streamlined health care system in the state of New York.”

Enabling Legis. §§ 1-2(a) (R. 92).

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

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

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

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

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<sup>2</sup> The most extensive discussion of the Berger Commission’s “mission” occurred in a New York Senate Sponsor’s Memorandum, which noted the commission would review and “rightsize” New York’s Health Care System. Introducer’s Memorandum in Support of Bill Number S4271, N.Y. Spons. Memo., 2005 S.B. S4271.

