

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

MARY McKINNEY and MECHLER HALL  
COMMUNITY SERVICES, INC.,

Plaintiffs-Appellants,

-against-

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.

Bronx County  
Index No. 6034/07

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that, upon the annexed affirmation of Thomas E. Bezanson and Jin Hee Lee dated March 29, 2007, and the exhibits thereto, and the accompanying memorandum of law, Plaintiffs-Appellants Mary McKinney and Mechler Hall Community Services, Inc. will move this Court at the Courthouse located at 27 Madison Avenue, New York, New York, at a date and time to be specified by the Court, for an order granting a preference pursuant to CPLR § 5521 and expediting the hearing of this appeal on the merits, and, pursuant to CPLR § 5518, granting a temporary restraining order and preliminary injunction to preserve the status quo, and granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
March 29, 2007

CHADBOURNE & PARKE LLP

By 

Thomas E. Bezanson  
A Member of the Firm

Attorneys for Plaintiffs-Appellants  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 408-5100

To: ANDREW M. CUOMO  
Attorney General of the State of New York  
SASHA SAMBERG-CHAMPION  
Assistant Solicitor General  
State of New York  
Office of the Attorney General  
Division of Appeals and Opinions  
Attorneys for Defendants-Appellants  
120 Broadway - 25th Floor  
New York, New York 10271  
(212) 416-6229

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**AFFIRMATION IN SUPPORT  
OF PLAINTIFFS-  
APPELLANTS' MOTION  
FOR A PREFERENCE AND  
EXPEDITED APPEAL, AND  
FOR A TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY  
INJUNCTION**

THOMAS E. BEZANSON and JIN HEE LEE, attorneys admitted to practice in the  
Courts of the State of New York, affirm under the penalties of perjury pursuant to CPLR § 2106  
as follows:

I, Thomas E. Bezanson, am a member of the law firm of Chadbourne & Parke LLP, and  
I, Jin Hee Lee, am a Staff Attorney for New York Lawyers for the Public Interest, Inc.  
Chadbourne & Parke LLP and New York Lawyers for the Public Interest, Inc. are attorneys for  
Plaintiffs-Appellants Mary McKinney and Mechler Hall Community Services, Inc. (together  
"Appellants") in the above-captioned matter. As such, we are fully familiar with the facts set  
forth herein. We make this affirmation in support of Appellants' motion for a preference and  
expedited appeal, and for a temporary restraining order and preliminary injunction. Such relief

is necessary to maintain the status quo until this Court has resolved the constitutional issues at the heart of this case.

1. Attached hereto as Exhibit 1 is a true and accurate copy of the Notice of Appeal with Pre-Argument Statement and supporting papers, served by mail on Defendants-Respondents (“Respondents”) on March 14, 2007.

2. Attached hereto as Exhibit 2 is a true and accurate copy of the Notice of Entry and the Order of Justice Mary Ann Brigantti-Hughes dated March 8, 2007 (“March 8 Order”), filed in the office of the County Clerk of the Supreme Court of Bronx County. The March 8 Order granted Respondents’ motion for summary judgment based on the legal conclusion that the Enabling Legislation does not violate the non-delegation doctrine. It also denied Appellants’ request for a preliminary injunction. The lower court also found that Appellant Mary McKinney lacked standing as a citizen taxpayer to challenge the Enabling Legislation, while finding that Appellants did have common law standing.

3. Attached hereto as Exhibit 3 is a true and accurate copy Appellants’ Summons and Verified Complaint, served on Respondents on January 4, 2007.<sup>1</sup> In the sole cause of action in their Verified Complaint, Appellants challenge the constitutionality of the Enabling Legislation that created the Commission on Health Care Facilities in the 21st Century, which

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<sup>1</sup> Appellants commenced this action on January 3, 2007, by order to show cause for a preliminary injunction and temporary restraining order in the Supreme Court of Bronx County, having given notice and draft papers to Respondents on December 28, 2006.

was chaired by Stephen Berger (the “Berger Commission”). By delegating the authority to create a statewide health care redistribution plan, which will affect access to health care for tens of thousands of New Yorkers, disrupt longstanding caregiver-patient relationship, and command the expenditure of hundreds of millions of dollars of State funds, without providing any meaningful guidance or constraint on the Berger Commission’s exercise of this authority, the Enabling Legislation represents an unconstitutional delegation under Article III, Section 1 of the Constitutional of the State of New York. Appellants seek a declaratory judgment that the Enabling Legislation is unconstitutional.

4. Attached hereto as Exhibit 4 is a true and accurate copy of the Order to Show Cause for a Temporary Restraining Order granted by Justice Mary Ann Brigantti-Hughes on January 3, 2007. The temporary restraining order entered by Justice Brigantti-Hughes prohibited Respondents from taking any action to close New York Westchester Square Medical Center (“WSMC”) until the court had ruled on the motion for a preliminary injunction. The Order stated that “the status quo is preserved and that there has been no finding on the issue of the constitutionality” of the Enabling Legislation. Prior to granting the temporary restraining order, the Court held a hearing at which an Assistant Attorney General represented Respondents and argued against the temporary restraining order.<sup>2</sup>

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<sup>2</sup> On January 19, 2007, Respondents filed their opposition to the motion for a preliminary injunction, and moved to dismiss the complaint. Appellants submitted their reply and

(Cont'd on following page)

5. Attached hereto as Exhibit 5 is the interim Order of Justice Brigantti-Hughes dated February 1, 2007. That order continued the temporary restraining order entered by Justice Brigantti-Hughes on January 3, 2007, prohibiting the state from taking any action to close WSMC.

6. Attached hereto as Exhibit 6 is the Enabling Legislation creating the Commission on Health Care Facilities in the 21st Century, enacted on April 13, 2005. L. 2005, ch. 63, Part E (hereinafter "Enabling Legis."). The Enabling Legislation authorized the Berger Commission to select hospitals and nursing homes across the State for downsizing and closure to create "a more coherent, streamlined health care system in the state of New York." The Enabling Legislation required the Berger Commission to transmit its rightsizing recommendations to the governor by December 1, 2006. Section 9(b) of the Enabling Legislation provided that once approved by the governor, the recommendations of the Berger Commission would become law unless "a majority of the 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." If the Legislature failed to act, the Enabling Legislation required the Commissioner of Health to "take all actions necessary" to implement the Berger Commission's recommendations. In addition, the Enabling Legislation authorized the Berger Commission to recommend the

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opposition on January 26. Having decided to forego further oral argument, Justice Brigantti-Hughes took the matter under submission.

“necessary investments” needed to implement its health care redistribution plan, and authorized the Commissioner of Health to expend funds available under the HEAL-NY capital grant program to implement the Berger Commission’s recommendations.

7. Attached hereto as Exhibit 7 are excerpts from the Commission on Health Care Facilities in the 21st Century, Final Report (Dec. 2006) (“Final Report”), submitted to Governor Pataki on November 28, 2006. The Final Report calls for the closure, downsizing, or restructuring of 57 hospitals across the State. Nine hospitals were selected for outright closure, including WSMC, the facility on which Appellants rely for access to needed health care. Implementation of these recommendations will reduce statewide inpatient capacity by 4,200 beds, seven percent of the total State supply. Final Report at 11. On or around December 5, 2007, Governor Pataki transmitted his approval of the Berger Commission’s Final Report to the Legislature. Because the Legislature declined to hold a vote on the recommendations contained in the Final Report, the Berger Commission’s health care redistribution plan now has the force of law.

8. Attached as Exhibit 8 are excerpts from the Commission on Health Care Facilities in the 21st Century, New York City Regional Advisory Committee: Recommendations (Nov. 2006).<sup>3</sup> The New York City Regional Advisory Committee (“NYC

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<sup>3</sup> Available at <http://www.nyhealthcarecommission.org/docs/final/appendix2-newyorkcityrac.pdf>.

RAC”) was one of six regional advisory committees created by the Enabling Legislation to gather data and develop recommendations for health care redistribution within a region of the State guided by the factors listed under Section 5 of the Enabling Legislation. In its analysis of health care capacity in the Bronx, the NYC RAC noted that WSMC serves neighborhoods in east Bronx and Pelham/Throgs Neck that are “stressed” and “serious shortage areas” for primary care. Over 23,000 emergency room patients a year reportedly rely on WSMC, and yet the hospital historically has been financially sound, generating a modest surplus each year. The NYC RAC reported that “there are strong bonds between the patients and the physicians” at WSMC and that “closure could *significantly disrupt access.*” Accordingly, the NYC RAC, after balancing the same factors that ostensibly guided Berger Commission’s conclusions, recommended that WSMC remain open.

9. Attached hereto as Exhibit 9 are excerpts of the policy report titled “Emergency Room Care: Will It Be There? Assessing the Impact of Closing Five Emergency Rooms in New York City” dated December 2006 and authored by William C. Thompson, Jr., Comptroller of the City of New York, the Office of the Comptroller of the City of New York, and the Office of Policy Management. The report notes that WSMC is “located in or adjacent to primary care ‘serious shortage’ and/or ‘stressed’ areas,” that the loss of WSMC will only further stress an already medically underserved community. The report notes that the added wait time for emergency services at surrounding hospitals that will result from closure of WSMC are “critical minutes that could mean the difference between life and death.”

10. Attached hereto as Exhibit 10 are true and accurate copies of the Affidavit of Mary McKinney, dated January 2, 2007 and the Supplemental Affidavit of Mary McKinney, dated January 24, 2007. Ms. McKinney describes in detail the severity of her illnesses and the close relationships she has forged with the physicians at WSMC who provide her needed treatment for these severe medical conditions. When these illnesses result in a medical crisis, Ms. McKinney's "trust in [her] doctors and WSMC helps alleviate [her] concerns as much as possible. Losing that level of comfort would undoubtedly worsen an already stressful situation."

11. Attached hereto as Exhibit 11 is a true and accurate copy of the Affidavit of Deacon Dhoel Canals, Executive Director of Mechler Hall Community Services, Inc., dated January 2, 2007. Mechler Hall is a not-for-profit corporation that has been dedicated to promoting the health and well-being of senior citizens in the Parkchester area of the Bronx since its founding in 1988. Mechler Hall provides a variety of services to its senior citizen members, including a hot and nutritious lunch every weekday, social events, aerobics activities, and nutritional counseling. As further noted by Deacon Canals, most of the members of Mechler Hall depend on WSMC to provide needed health care. Deacon Canals specifically identifies two members of Mechler Hall, Anthony Ortiz and Mary Principe, who rely on WSMC and whose access to health care will be significantly burdened once WSMC is closed.

12. Attached hereto as Exhibit 12 is a true and accurate copy of the Affidavit of Senator Jeffrey D. Klein, dated January 17, 2007. Senator Klein, Deputy Minority Leader of the New York State Senate, states that "no bill or resolution was voted upon in the Senate or the

Assembly regarding the recommendations of the Berger Commission between December 1 and December 31, 2006. Legislators had no opportunity to accept or reject the findings of the Berger Commission before they became law.”

13. Attached here as Exhibit 13 is a true and accurate copy of the Affidavit of Assemblyman Peter M. Rivera, dated January 24, 2007. Assemblyman Rivera, representing the 76th Assembly District in the Bronx and Chair of the Assembly Mental Health Committee and the Assembly Puerto Rican/Hispanic Task Force, states that “both houses had no opportunity to accept or reject the findings of the Berger Commission, as no bill or resolution was adopted by December 31st.”

14. Attached hereto as Exhibit 14 is a true and accurate copy of the Affidavit of Sister Patricia A. Thomas, O.P., M.D., dated January 24, 2007. Sister Thomas, of the St. Dominic Order, is a licensed physician who has worked in the health care field in New York City since 1954. She had privileges and admitted many patients at St. Joseph’s Hospital in Queens, New York, from 1995 to the time of its closure in 2004, and personally witnessed the DOH-managed hospital closure process. She states that “once the state enunciates the intent to close a hospital, staff will begin to leave, patients are no longer referred, equipment is removed, and the irreparable dismantling of the hospital happens in a matter of weeks.”

15. Attached hereto as Exhibit 15 is a true and accurate copy of the Affidavit of Winifred Kirby, R.N., dated January 25, 2007. Ms. Kirby, a registered nurse at WSMC, notes that if the WSMC staff felt confident that WSMC would stay permanently open, “many of us

who work at WSMC would be more certain about our jobs and not have to look elsewhere for employment” and three nurses who have already left WSMC “would return.”

16. Attached hereto as Exhibit 16 is a true and accurate copy of the Affidavit of Colleen Molloy, R.N., dated January 24, 2007. Ms. Molloy, a registered nurse at WSMC, states that because of WSMC’s relationships with the community, “patients feel comfortable because they are treated by someone they know and trust. They are more at ease to speak with doctors and nurses here, which improved quality of care.”

17. Attached hereto as Exhibit 17 is a true and accurate copy of the Affidavit of Jeanette Torres, R.N., dated January 25, 2007. Ms. Torres, a registered nurse at WSMC, states that “WSMC is an integral part of this community, and losing its services would be a terrible loss for everyone.” Describing the health care capacity in the surrounding community, Nurse Torres states that “as it currently stands, the emergency rooms at Jacobi Medical Center and Montefiore - Weiler Division . . . are usually so packed that they go into diversion (meaning they cannot take any more patients in the emergency room).”

18. Attached hereto as Exhibit 18 is a true and accurate copy of the Affidavit of George Stops, dated January 23, 2007. Mr. Stops is the licensed Administrator of Throgs Neck Extended Care Facility, a nursing home serving residents of the Bronx since 1994. He states that “Throgs Neck Extended Care Facility relies on WSMC for several life-threatening conditions that cannot be handled by our own medical staff . . . [d]riving to the next closest hospital, Montefiore-Weiler Division, would take 10-12 minutes longer — time that can be crucial in an emergency.” Mr. Stops also questions why WSMC has been singled out for

closure when “far from appearing as a dying facility, WSMC is a vibrant and energetic institution that has shown evidence of continuing improvement in its health care delivery.”

19. Attached hereto as Exhibit 19 is a true and accurate copy of the Affidavit of Alexander Stern, dated January 23, 2007. Mr. Stern is the Administrator of Kings Harbor Multicare Center, a 720-bed long-term care facility on Gun Hill Road. Mr. Stern states that “many of our clients, as well as their physicians, prefer WSMC over other hospitals due to its accessibility and its close relationship with the community.” He states that “the closure of WSMC would be an obvious disruption to this continuity of care, which will ultimately affect the medical services provided to our residents” and that “this is a particular concern for senior citizens — such as our clients — who rely upon the consistency and availability of their medical care.”

20. Attached hereto as Exhibit 20 is a true and accurate copy of Defendants’ Affirmation of Neil Benjamin, Director of the Division of Health Facility Planning in the Office of Health Systems Management, New York State Department of Health, dated January 18, 2007. In this affirmation, submitted with Defendants’ Motion to Dismiss the Complaint and in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, Mr. Benjamin notes that at the time of his affirmation, the DOH was “preparing letters to each of the facilities subject to Commission recommendations advising of actions they must take. But for the temporary restraining order of [the lower court], dated January 3, 2007, the Department would be sending Westchester Square a letter advising that the operators of Westchester Square should contact my

office to arrange a meeting to discuss implementation of the closure recommendation, prepare a closure plan and close no later than June 30, 2008.”

21. Attached hereto as Exhibit 21 is a true and accurate copy of Defendants’ Affidavit of David Sandman, Executive Director of the Berger Commission, dated January 18, 2007. In describing the process used by the Berger Commission to develop its recommendations for hospital closures and downsizing, Mr. Sandman notes that the Commission “used an approach that was both quantitative and qualitative — it balanced ‘science’ and ‘art.’”

22. Attached hereto as Exhibit 22 is a true and accurate copy of Defendants’ Affirmation of Assistant Attorney General John Gasior in Support of Defendants’ Motion to Modify the Temporary Restraining Order, dated February 15, 2007, submitted to the Supreme Court of Bronx County. Respondents moved before Justice Brigantti-Hughes for an order modifying the January 3 temporary restraining order to allow the DOH to impose a series of mandatory benchmarks that WSMC will be required to meet for the final and complete closure of the hospital by June 30, 2008.<sup>4</sup> Exhibit E to the Affirmation is a draft letter from David Wollner, Director, Office of Health Systems Management, to Alan Kopman, New York Westchester Square Medical Center (Jan. 31, 2007), directing the facility to meet with the DOH

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<sup>4</sup> Appellants served their opposition to this motion on February 20, 2007, and Respondents served their reply on February 26, 2007. No decision was rendered by the lower court on this motion, which was ultimately mooted by the lower court’s Order of March 9, 2007.

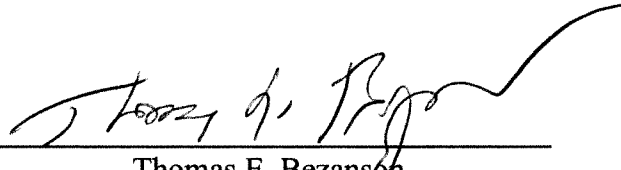
to discuss its closure plan by June 30, 2007, and submit its closure plan by September 30, 2007, which must be approved by the Commissioner of Health no later than December 31, 2007.<sup>5</sup>

23. All affidavits and affirmations referenced above have been signed by the deponent and will be included as part of the record prepared for this appeal.

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<sup>5</sup> All exhibits to the Affirmation of John Gasior other than Exhibit E have been omitted.

Dated: New York, New York  
March 29, 2007

By   
Thomas E. Bezanson

Attorney for Plaintiffs-Appellants  
Chadbourne & Parke LLP  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 408-5100

*Of Counsel:*  
C. Ian Anderson  
Robert E. Grossman

By   
Jin Hee Lee

Attorney for Plaintiffs-Appellants  
New York Lawyers for the Public Interest,  
Inc.  
151 West 30th Street  
11th Floor  
New York, New York 10001  
(212) 244-4664

*Of Counsel:*  
Amanda Masters