

COURT OF APPEALS
STATE OF NEW YORK

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MARY McKINNEY and MECHLER HALL :
COMMUNITY SERVICES, INC., : Bronx County
 : Index No. 6034/07
 :
 :
 Plaintiffs-Appellants, : NOTICE OF MOTION
 : FOR LEAVE FOR THE
 - against - : ASSOCIATION OF THE BAR
 : OF THE CITY OF NEW YORK
 : TO FILE AN *AMICUS CURIAE*
 THE COMMISSIONER OF THE NEW YORK : BRIEF IN SUPPORT OF
 STATE DEPARTMENT OF HEALTH; THE : PLAINTIFF-APPELLANTS'
 NEW YORK STATE DEPARTMENT OF : MOTION FOR LEAVE TO
 HEALTH; and THE STATE OF NEW YORK, : APPEAL
 :
 Defendants-Respondents. :
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PLEASE TAKE NOTICE that, upon the annexed affirmation of Joyce Tichy, the Chair of the Health Law Committee of The Association of the Bar of the City of New York, dated September 26, 2007, and the exhibit thereto, and the accompanying proposed *amicus curiae* brief, The Association of the Bar of the City of New York will move this Court at the Courthouse located at 20 Eagle Street, Albany, New York, on October 15, 2007 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order permitting The Association of the Bar of the City of New York to file an *amicus curiae* brief in support of Plaintiff-

Appellants' motion for leave to appeal, and granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
October 3, 2007

BRYAN CAVE LLP

*Attorneys for Proposed Amicus Curiae
The Association of the Bar of the City of
New York*

By: 

Suzanne M. Berger

1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

TO: CHADBOURNE & PARKE LLP

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

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

151 West 30th Street, 11th Floor
New York, New York 10001
Attorneys for Plaintiffs-Appellants

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
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-6229
Attorneys for Defendants-Respondents

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Plaintiffs-Appellants,	:	Bronx County
	:	Index No. 6034/07
- against -	:	
	:	
THE COMMISSIONER OF THE NEW YORK	:	AFFIRMATION IN SUPPORT
STATE DEPARTMENT OF HEALTH; THE NEW	:	OF LEAVE TO FILE AN <i>AMICUS</i>
YORK STATE DEPARTMENT OF HEALTH; and	:	<i>CURIAE</i> BRIEF IN SUPPORT OF
THE STATE OF NEW YORK,	:	PLAINTIFFS-APPELLANTS'
	:	<u>MOTION FOR LEAVE TO APPEAL</u>
Defendants-Respondents..	:	
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JOYCE TICHY, a member of the Bar of the State of New York, affirms
under penalties of perjury that:

1. I am the Chair of the Health Law Committee of The Association of the Bar of the City of New York (the "Association") and I submit this Affirmation in support of the Association's motion for leave to file the accompanying *amicus curiae* brief in connection with the plaintiffs-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 (attached as Exhibit A), which affirmed the March 8, 2007 Order of the Supreme Court of New York, Bronx County, denying plaintiffs-appellants' motion to preliminarily enjoin the defendants-respondents from implementing the recommendations of the Commission on Health Care Facilities in the 21st Century (the "Commission").

2. The Association has prepared the accompanying *amicus curiae* brief to provide this Court with an additional significant perspective on the important public health and constitutional issues raised by this case, and respectfully requests that this Court grant the Association's motion. The question for which plaintiffs-appellants seek leave to appeal, *i.e.*, whether the State Legislature may entirely delegate to the Commission the decision to close Westchester Square Medical Center, located at 2475 St. Raymond Avenue, Bronx, NY ("WSMC"), without either enacting a policy which is to guide the Commission's discretion or requiring a vote of the Legislature to adopt the policy choices and recommendations made by the Commission for WSMC, is an important one not only in the health care arena, but to our democratic institutions generally. The "legislation by inaction" model created by the Enabling Legislation L.2005, ch.63, Part E (the "Enabling Legislation"), and the embedded potential for error or abuse in that paradigm, should not be allowed to supplant constitutionally mandated decision making by the Legislature. The question for which plaintiffs-appellants seek leave to appeal must be carefully reviewed now because it will recur in other contexts if approved here.

THE PROPOSED *AMICUS CURIAE* - THE NEW YORK CITY BAR ASSOCIATION

3. The Association was founded in 1870. The Association is an independent organization of 23,000 lawyers, judges, and other professionals dedicated to improving the administration of justice. Through its more than 160 committees, the Association issues reports and policy statements, comments on pending legislation, and testifies at hearings on issues of public concern. The Association is dedicated to

maintaining the high ethical standards of the profession, promoting reform of the law and providing services to the profession and the public. The Association works for political, legal and social reform while implementing innovative means to help the disadvantaged. Protecting the public's welfare remains one of the Association's highest priorities.

4. Two of the Associations' standing committees are the Health Law Committee and the State Affairs Committee. The Health Law Committee addresses legal and policy issues affecting health care and public health. Its members include attorneys, physicians and other professionals who share an interest in promoting fairness in the distribution of public health resources. Health Law Committee members work in or for organizations that represent virtually all sectors of health care, including hospitals, health insurers, managed care organizations, medical professional organizations, public interest organizations and government health regulatory agencies, and as such the Health Law Committee has a unique but broad perspective on the issues presented by this appeal and the consequences of the determination made by the Appellate Division.

5. The State Affairs Committee addresses legislative and public policy issues concerning New York State and seeks to enrich the public debate and improve public governance. The Committee's membership includes attorneys and practitioners in government and public policy institutions. Their experience spans the spectrum of policy-making, advocacy and scholarship in the field of public policy and public administration. The State Affairs Committee offers a unique and critical analysis of the issues presented in this case, both in terms of the direct consequences and the far-reaching effects of the Appellate Division's decision.

6. The annexed *amicus curiae* brief is intended to provide the Association's unique perspectives on the public health and constitutional issues raised and in particular, on the manner in which they affect the health care industry and specific state legislative issues.

WHEREFORE, it is respectfully requested that The Association of the Bar of the City of New York's motion for leave to file the attached *amicus curiae* be granted in all respects.

Dated: New York, New York
September 26, 2007



JOYCE TICHY

Exhibit A

Medical Center (WSMC), on which the individual plaintiff allegedly depends for medical care but which chose not to participate in the action after being notified thereof, would be inequitably affected by a judgment or is otherwise a necessary party (CPLR 1001[a]; cf. *Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 125 [1969], *adhered to on rearg* 25 NY2d 692 [1969]; *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317 [2006]). In view of the foregoing, we need not address the issue of plaintiffs' standing under the common law. However, we also reject plaintiffs' argument that the subject legislation unconstitutionally delegated the Legislature's lawmaking power to the executive branch, and accordingly affirm dismissal of the action. Enabling statutes even broader than this one have been found constitutional (see e.g. *Matter of Medical Socy. v Serio*, 100 NY2d 854, 864-865 [2003]; *Boreali v Axelrod*, 71 NY2d 1, 9 [1987]). Having 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, the legislation permissibly authorized the Commission "to fill in details and interstices and to make subsidiary policy choices

consistent with the enabling legislation'" (*Dorst v Pataki*, 90 NY2d 696, 699 [1997], quoting *Matter of Citizens for an Orderly Energy Policy v Cuomo*, 78 NY2d 398, 410 [1991]; see also *Medical Socy.*, 100 NY2d at 865).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 19, 2007


DAVID SPOLONY
CLERK

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APPELLANTS' MOTION FOR LEAVE TO APPEAL**

BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000
*Attorneys for Proposed Amicus
Curiae The Association of the
Bar of the City of New York*