STATE OF NEW YORK
COURT OF APPEALS

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

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

Erie Co. Index No.
I-2006-11568

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone: (518) 473-4321
Facsimile: (518) 473-8963
OAG No. 06-050982

Dated: December 10, 2007

BARBARA D. UNDERWOOD
Solicitor General

ANDREA OSER
Deputy Solicitor General

VICTOR PALADINO
SASHA SAMBERG-CHAMPION
KATHLEEN M. TREASURE
Assistant Solicitors General

of Counsel

PRELIMINARY STATEMENT

Plaintiffs-appellants St. Joseph Hospital of Cheektowaga, New York ("St. Joseph" or "the hospital"), and Catholic Health System, Inc. ("CHS"), have moved for leave to appeal an opinion and order of the Appellate Division, Fourth Department entered on July 18, 2007. See St. Joseph Hospital of Cheektowaga v. Novello, 43 A.D.3d 139 (4th Dep't 2007). On November 27, 2007, this Court dismissed plaintiffs' appeal as of right, finding that it did not directly involve a substantial constitutional question. For the same reasons that plaintiffs' appeal involved no substantial constitutional questions, plaintiffs' motion presents no constitutional issues warranting leave. Nor does their motion present any other leave-worthy issues. It should therefore be denied.

STATEMENT OF THE CASE

In November 2006, plaintiffs commenced this action in Supreme Court, Erie County seeking a judgment declaring legislation ("the Enabling Act") unconstitutional and enjoining the State from revoking St. Joseph's operating certificate. The Enabling Act created the New York State Commission on Healthcare Facilities in the 21st Century ("Commission") and charged it with "examining the supply of general hospital 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 Act §§ 1, 2(a).

After holding public hearings and considering thousands of pages of documentary submissions from interested parties and the recommendations of its Regional Advisory Committees ("RACs"), the Commission issued a final report in November 2006. It recommended the closure of nine hospitals statewide - including St. Joseph - and the restructuring of forty-eight others. On November 30, 2006, the Governor approved the Commission's final report. Pursuant to section 9 of the Enabling Act, the Commission's recommendations became law when the Legislature did not disapprove the Commission's report by December 31, 2006.

In their amended complaint, plaintiffs alleged that the Enabling Act denied them procedural and substantive due process, violated the Presentment Clause of the New York Constitution as well as the separation of powers doctrine by authorizing the Legislature to veto the recommendations, denied them the free exercise of religion, and impaired their contracts with vendors and others. Supreme Court declared that the Enabling Act was constitutional and dismissed the amended complaint. See St. Joseph Hospital of Cheektowaga v. Novello, 15 Misc. 3d 333 (Sup. Ct. Erie Co. 2007). The Appellate Division affirmed, with one Justice dissenting, but vacated the dismissal of the request for a declaratory judgment. See St. Joseph Hospital, 43 A.D.3d at 148.

Although the Appellate Division found that St. Joseph had a property interest in its operating certificate, it concluded the procedures afforded by the Enabling Act satisfied procedural due process because they provided plaintiffs with adequate notice and a reasonable opportunity to be heard. In addition, the court held that plaintiffs were not deprived of substantive due process because the Commission's recommendation to close St. Joseph was neither without legal justification nor "outrageously arbitrary." The court rejected plaintiffs' challenge to the legislative veto provision without reaching the merits, concluding that the provision was severable. Thus, the court concluded that even if the legislative veto provision were unconstitutional, it would not nullify the remainder of the statute. Finally, the court held that the Enabling Act did not violate the Free Exercise or Contract Clauses.

Respondents submit this memorandum in opposition to plaintiffs' motion for leave. The facts and respondents' arguments in support of the dismissal of the complaint are set forth fully in their Appellate Division brief, a copy of which is submitted with this memorandum. We add only the following additional arguments showing why review by this Court is unwarranted.

ARGUMENT

POINT I

ANY STATEWIDE IMPORTANCE HAS SUBSTANTIALLY DIMINISHED IN LIGHT OF THE DWINDLING NUMBER OF FACILITIES STILL CHALLENGING THE COMMISSION'S RECOMMENDATIONS

In light of the unique nature of the statutory scheme, deciding the merits of plaintiffs' claims would have little, if any, impact on other cases. At this late stage, granting leave would not even affect many of the hospitals and nursing homes that are subject to the Commission's recommendations.[1] Most of the hospitals and nursing homes slated for right-sizing have decided to comply with the recommendations, and some of them have already closed, merged or downsized.[2] All but a handful of facilities have discontinued their legal challenges, opting instead to apply for federal and state funding to assist them in complying with the Commission's recommendations. Thus, the issues presented lack statewide importance.

---

[1] The Commission's recommendations must be implemented by June 30, 2008. See Enabling Act § 11.

[2] See "Health Department Reports Progress on Implementation of Berger Commission Mandates," http://www.health.state.ny.us/press/releases/2007/2007-11-30_berger_mandates_implementation_progress.htm (site visited Dec. 3, 2007). This press release contains a hyperlink to a Berger Commission status report.

POINT II

PLAINTIFFS' DUE PROCESS CLAIM IS NOT LEAVE-WORTHY

A. Plaintiffs' due process claim involves no substantial constitutional question.

Although the Appellate Division reached the merits of five of plaintiffs' constitutional claims, plaintiffs' motion presents only one of them -- the procedural due process claim -- as a ground for leave to appeal. That issue, however, like the other constitutional claims raised below, does not warrant this Court's review. Indeed, this Court's November 27, 2007 decision dismissing plaintiffs' prior appeal for lack of any substantial constitutional question counsels against granting leave on this issue. Because the Appellate Division reached the merits of the procedural due process claim, it was "directly involved" in that court's decision within the meaning of C.P.L.R. 5601(b)(1). This Court correctly viewed it as insubstantial. A claim is insubstantial when "the contention raised is 'so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance.'" Karger, The Powers of the New York Court of Appeals, § 7:5 at 226 (2005 revised 3d ed.), quoting Hamilton v. Regents of the University of Calif., 293 U.S. 245, 245 (1934). If, as this Court has determined, plaintiffs' due process claim does not meet this minimal standard for substantiality, it is not leave-worthy either.

B. **Plaintiffs' due process claim is controlled by settled law.**

In any event, leave should be denied because resolution of the procedural due process claim involves only the routine application of settled principles of law to a particular statutory scheme. The basic requirements of procedural due process are notice and an opportunity to be heard. Mitchell v. W.T. Grant Co., 416 U.S. 600, 634 (1974). Plaintiffs, by their own admissions, had both. The gravamen of plaintiffs' challenge in the courts below was that they should have been given an adversarial, evidentiary hearing before the Commission issued its recommendations. However, none of the factors identified in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), supports their argument that the Constitution required that procedure instead of the notice and opportunity to be heard that the Commission provided.

1. **The notice provided was adequate.**

There is no substantial question that plaintiffs received constitutionally adequate notice that the Commission might recommend that St. Joseph's operating certificate be revoked based on a lack of ongoing public need. This Court has held that constitutional notice requirements are satisfied where a statute notifies a party that there will be a proceeding, what issues will be reviewed at such a proceeding, and the possible outcomes. See Tompkins County Support Collection Unit v. Chamberlin, 99 N.Y.2d

328, 338 (2003); see also Dusenbery v. United States, 534 U.S. 161, 170 (2002); Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005).

Any contention by plaintiffs that the State failed to put them on notice of the pendency of the Commission's proceedings or the possible consequences to themselves is insubstantial. Long before the Enabling Act was enacted, New York law put all hospitals on notice that their continued operation was conditioned on an ongoing public need for their beds and services. See P.H.L. § 2806(6)(a). The enactment of the Enabling Act put every hospital and nursing home, including plaintiffs, on notice that the State would review its operations in order to eliminate excess bed capacity and duplicative services through hospital closures, consolidations and mergers. See Enabling Act §§ 1, 8, and 9. The statute also informed plaintiffs of the process that would be used to review public need. Plaintiffs fully participated in the statutory process. They attended the public hearings and made no fewer than five written submissions to the Commission arguing that none of the CHS facilities should be closed or downsized.

Plaintiffs' argument rests on the premise that the Commission was required to notify them of not only the pendency of the proceedings but also the likelihood that St. Joseph would be slated for closure. Though adopted by the dissent below, this argument is contrary to well-settled law. Moreover, plaintiffs submitted to the Commission a detailed analysis of the cost of closing St.

Joseph (R. 555-58), demonstrating that they were aware that St. Joseph was a candidate for closure. Plaintiffs did not suggest that their extensive written submissions to the Commission would have been different had they been notified that St. Joseph was considered a high priority for closure.

2. **<u>The opportunity to be heard was adequate.</u>**

There is also no substantial question that plaintiffs received a reasonable opportunity to be heard. The Commission first afforded plaintiffs the opportunity to comment on the analytic framework that the Commission adopted to identify those hospitals that would receive greater scrutiny, and to review and comment on the objective data that would form the basis for the Commission's recommendations. Plaintiffs and other hospitals submitted corrected data to the Commission, thereby minimizing the risk of error (R. 138, 141-142, 785).

Thereafter, as required by the Enabling Act, the Commission held public hearings and otherwise solicited input from interested parties and the public (R. 139, 143-145). With respect to the western region, the RAC conducted nine hours of public hearings on three separate days, receiving testimony from 43 different stakeholders (R. 488). Plaintiffs participated in two of these hearings, presenting testimony and comments on its facilities and the Commission's efforts to reconfigure the hospital industry (R. 139, 488-490). Several of plaintiffs' representatives also met informally with RAC members (R. 139, 488-491). Plaintiffs supplemented these appearances with five written submissions to the Commission and the RAC on a variety of issues, including the impact of possible right-sizing for their facilities (R. 489, 532-566). The Commission received all these submissions and considered them when rendering its recommendations (R. 487-489). Plaintiffs thus had -- and took advantage of -- many opportunities to oppose any down-sizing or closure of their facilities. The Constitution required nothing more.

Plaintiffs' assertion that due process required the Commission, after making recommendations that affected fifty-seven hospitals around the State, to afford each of the hospitals an individualized, evidentiary hearing, does not raise a leave-worthy issue. First, the Legislature's decision to institute such procedures under different circumstances, see Public Health Law § 2806(2), did not prescribe a constitutional mandate. Second, the Commission's inquiry was quite different from that contemplated by the Public Health Law. Under the Enabling Act, the Commission was required to evaluate public need and available supply on a regional basis and to make region-wide recommendations. The Enabling Act did not permit the Commission to consider individual hospitals in isolation. The process set forth in the Enabling Act did not provide for "charges" against specific hospitals such that an adjudicative hearing would have been useful in clarifying the relevant facts.

Because of the policy-oriented nature of the Commission's determination, the post-determination evidentiary hearings called for by plaintiffs and the dissenting justice below would have imposed on the State a massive administrative burden without reducing the risk of an erroneous determination. Determining how best to reconfigure hospital bed supply in a given region was essentially a matter of evaluating the undisputed, historical facts in light of the statutory factors and making what were essentially discretionary policy choices. Indeed, plaintiffs have not identified any way in which the post-determination hearing they claim was constitutionally required could have changed the outcome in any way.

Finally, there is no merit to the objection of the dissenting justice below that, although the RACs held took testimony from stakeholders and interested parties, the "actual decision-making body, the Commission, did not hear testimony from any of the affected health care providers or conduct any public hearings." St. Joseph Hospital, 42 A.D.3d at 149. The fact that the Commission, as specifically authorized by the Enabling Act, relied in part upon materials gathered by the RACs, has no constitutional significance. An administrative decision-maker may, consistent with due process, rely upon the factual findings and analysis prepared by subordinates. See Keeler v. Joy, 641 F.2d 1044, 1054 (2d Cir.), cert. denied, 454 U.S. 893 (1981); Yaretsky v. Blum, 629 F.2d 817, 822-25 (2d Cir. 1980), rev'd on other grounds, sub. nom. Blum v. Yaretsky, 457 U.S. 991 (1982); Fields v. Blum, 629 F.2d 825 (2d Cir. 1980).

POINT III

PLAINTIFFS' REMAINING CLAIMS ARE SIMILARLY NOT LEAVE-WORTHY

The Appellate Division held that the Enabling Act's legislative veto provision is severable, and thus did not address plaintiffs' arguments that the provision violates the Presentment Clause and the separation of powers doctrine. Plaintiffs now suggest (Motion at 21-26) that the severability issue is worthy of leave, but neither that issue nor the constitutional challenges to the legislative veto provision itself warrant review by this Court.

A. The severability question is not leave-worthy.

Resolution of the severability question would not break any new ground, because the governing legal standard is well settled. When part of an enactment is found unconstitutional, the question becomes "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." People ex. rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 59 (1920) (Cardozo, J.). Here, the Legislature itself answered this question by explicitly providing that, if any provision should be deemed unconstitutional, it should be severed and the rest of the Enabling Act should remain in effect. See Enabling Act § 10. The inclusion of a severability clause is "the best evidence" of legislative intent on the question. N.Y.S. Superfund Coalition, Inc. v. N.Y.S. Dept. of Environmental Conservation, 75 N.Y.2d 88, 94 (1989); see also Hynes v. Tomei, 92 N.Y.2d 613, 628 (1998). As even plaintiffs concede (Motion at 23), such a clause creates a presumption in favor of severability. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." Id.

Plaintiffs do not and cannot claim that the Appellate Division used the incorrect legal standard in evaluating the severability issue. Plaintiffs' claim that the court below applied that standard incorrectly merely raises an issue of error correction, which generally presents no ground for leave to appeal. Given the unique nature of the statutory scheme, deciding the severability issue would not establish useful precedent for future cases, but would decide only this case.

In any event, the courts below correctly concluded that the legislative veto is severable from the remainder of the Enabling Act. Plaintiffs do not dispute that the statute is fully operative as a law without the legislative disapproval provision. A legislative veto, "by its nature, is separate from the operation of the substantive provisions of a statute." Alaska Airlines, 480 U.S. at 684-85. This is so because the activity under the legislation occurs so long as the legislature refrains from exercising its disapproval power. Id.

Nor is there any reason to believe that the Legislature would have refused to delegate authority to the Commission in the absence of the disapproval provision. On this point, it is difficult to improve upon the cogent analysis of the trial court:

> The Health Commissioner already has broad powers under Public Health Law § 2806(6) to effect hospital operating certificates without oversight by the legislature. While the Commission was charged under the Enabling Act with a comprehensive review of all of the hospitals and nursing homes in the state, the actual power given to the Commission was no greater than the power already vested in the Health Commissioner.

See St. Joseph Hospital, 13 Misc. 3d at 339. Similarly persuasive are the distinct reasons given by the Appellate Division for concluding that the legislative veto was severable -- the Legislature enacted directives to the Commission specific to the Commission's functions and deliberations and retained appointment power over one-third of the Commission's members and two-thirds of the RACs' members. See St. Joseph Hospital, 43 A.D.3d at 146; Enabling Act at §§ 2(b), 5, 7(d). Accordingly, it is not "inconceivable that the Legislature intended the Commission to make its recommendations without those recommendations being subject to subsequent review by the Legislature." St. Joseph Hospital, 43 A.D.3d at 146.

In arguing otherwise, plaintiffs have relied on the post-enactment affidavit of Paul A. Tokasz, the Assembly majority leader at the time of the passage of the Enabling Act (R. 601-602). But a post-enactment statement by an individual legislator provides little insight into legislative intent, and a statement prepared for purposes of litigation is inadmissible, as the trial court below correctly found (R. 16). See Civil Service Employees Association, Inc. v. County of Oneida, 78 A.D.2d 1004, 1005 (4th Dep't 1980). In the end, the best evidence of legislative intent is the Legislature's express statement of intent in the statute itself: "It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein" (R. 41). Enabling Act § 10.

The dissent below suggested that, if the legislative veto were severable, then the Enabling Act might constitute an improper delegation of legislative authority to the Commission. St. Joseph Hospital, 43 A.D.3d at 154. Plaintiffs, however, failed to preserve this claim by failing to raise it in the complaint or at any time in Supreme Court, instead asserting it for the first time in their Appellate Division reply brief (p. 18). In any event, the Appellate Division, First Department, has rejected the claim that the Enabling Act is an unlawful delegation of legislative authority, and this Court has found that claim to be both insubstantial and not leave-worthy. See McKinney v. Commissioner of the N.Y. State Dept. of Health, 41 A.D.3d 252 (1st Dep't), appeal dismissed, 9 N.Y.3d 891, lv. denied, ___ N.Y.3d ___ (Nov. 27, 2007).

B. Plaintiffs lack standing to challenge the legislative veto.

Moreover, this Court likely would not reach the merits of the legislative veto provision because plaintiffs lack standing to challenge it. An essential element of standing is that plaintiffs show they have suffered an injury in fact that is distinct from that of the general public. Matter of Transactive Corp. v. New York State Dep't of Social Servs., 92 N.Y.2d 579, 587 (1998). Critically, the injury of which plaintiffs complain must be tied "to the governmental act challenged," ensuring that they have "an actual legal stake in the matter being adjudicated." Society of the Plastics Ind. Inc. v. County of Suffolk, 77 N.Y.2d 761, 773 (1991). As the parties seeking relief, plaintiffs bear the burden of establishing standing. Id. at 769.

Here, plaintiffs cannot show that they were injured on account of the Enabling Act's legislative disapproval provision, which was never invoked. If anything, plaintiffs could only have benefitted from that provision. Had it been invoked, the Commission's recommendations would have been disapproved in their entirety, and

St. Joseph and the other hospitals and nursing homes slated for right-sizing would have suffered no injury at all. Thus, while plaintiffs are aggrieved by the other parts of the Enabling Act, the legislative disapproval provision could not have harmed them in any way.

Consequently, a judicial ruling on its constitutionality would be the quintessential example of an advisory opinion, which the Court does not render. This Court does not "issue judicial decisions that 'can have no immediate effect and may never resolve anything.'" Cuomo v. Long Island Lighting Co., 71 N.Y.2d 349, 354 (1988) (quoting New York Public Interest Research Group v. Carey, 42 N.Y.2d 527, 531 [1977]). Consistent with this view, courts in other jurisdictions have concluded they lacked jurisdiction to decide whether a legislative veto provision was constitutional when the legislature had not exercised it. See Reece v. Board of Educ. of the City of Chicago, 767 N.E.2d 395, 403 (App. Ct. Ill. 2002); State of Kansas ex rel. Tomasic v. Unified Gov't of Wyandotte County, 955 P.2d 1136, 1155 (Kan. 1998); Clark v. Valeo, 559 F.2d 642, 649 (D.C. Cir. 1977) (en banc).

This case is thus easily distinguished from Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), upon which plaintiffs heavily rely (Motion at 22). There, the House of Representatives actually invoked the legislative veto, passing a resolution overruling the Attorney General's decision not to deport

Chadha. 462 U.S. at 926. The veto thus injured Chadha because it would have resulted in him being deported. Id. at 939-40. Here, in contrast, it is the other provisions of the statute, not the dormant legislative disapproval provision, that impact the plaintiffs.

The disapproval provision was a one-time-only option with a thirty-day shelf life that expired on December 31, 2006. Left unreviewed, it could have no future effect on executive action. Judicial review should await a case in which the Legislature actually exercises a similar veto provision. In such a case, there would be a concrete controversy suitable for judicial resolution. Here, the effect of an unexercised disapproval option on the Commission's deliberations is entirely speculative.

C. **<u>In any event, plaintiffs' underlying constitutional challenges to the legislative veto provision are insubstantial and do not warrant this Court's review.</u>**

1. **<u>The statute is consistent with the Presentment Clause.</u>**

The provision that gave the Legislature the option to disapprove the Commission's recommendations is consistent with the Presentment Clause. The New York Constitution provides 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. Thus, if the legislative disapproval provision purported to permit a bill passed by the Senate and Assembly to become law without presentation to the Governor, it would be unconstitutional.

The legislative disapproval provision does no such thing, however. The Enabling Act was duly passed by the Legislature and then presented to the Governor, in accordance with article IV. <u>See</u> L. 2005, ch. 63, Part E, § 31. Section 9(b)(ii) of the Enabling Act simply makes the Legislature's subsequent passing of a concurrent resolution a contingency that affects the law's ongoing operation. It is well settled that the operation of a bill properly enacted by the Legislature and signed by the Governor can be made contingent on subsequent events, including the actions of political players. <u>See</u> <u>Roosevelt Raceway, Inc. v. County of Nassau</u>, 18 N.Y.2d 30, 37-38 (1966) (local law conditioned its effective date on when the Governor approved a State enactment);

People ex. rel. Unger v. Kennedy, 207 N.Y. 533, 545 (1913) (approving process by which the Legislature passed a bill creating Bronx County, to have effect only if people within that territory then approved it by popular vote); People v. Fire Ass'n of Philadelphia, 92 N.Y. 311, 316 (1883) (approving legislation that only went into effect upon action taken by another state); Meyers v. N.Y.S. Div. of Housing & Community Renewal, 36 A.D.2d 166, 169 (2d Dep't 1971). Because the subsequent event on which the operation of the Enabling Act was made contingent was not the enactment of a law, it was not subject to the requirements of the Presentment Clause. The Legislature's vote on this question no more needs to be presented to the Governor than did the popular vote in Unger.

To be sure, in Chadha, the Supreme Court suggested in dictum that a legislative veto provision might violate the Presentment Clause of the United States Constitution. See 462 U.S. at 947-48. That Presentment Clause contains broader language, however, with no parallel in New York's Constitution. Thus, it not only requires that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States," U.S. Const. Art. I, § 7, cl. 2, but then goes on to state: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States." U.S. Const. Art. I, § 7, cl. 3. This language was added deliberately, Chadha observed, to expand the reach of the federal constitution's presentment requirements. 462 U.S. at 947. In sharp contrast, the Presentment Clause of the New York Constitution speaks only to "bill[s]" that are meant to "become[] . . . law." It does not extend to every "vote."

2. **The statute does not violate the separation of powers doctrine.**

Nor does the statute run afoul of the separation of powers doctrine. Plaintiffs' separation of powers argument echoes their presentment clause argument, asserting that the doctrine is violated because the statute requires the Governor to act on the Commission's recommendations before the Legislature acts (Plaintiffs' Appellate Division Brief, p. 30). But this argument suffers from the same flaw as their presentment clause argument. It confuses the enactment of a law -- which of course must follow the procedures of article IV -- with the administration of a law previously enacted.

The Enabling Act, passed in accord with the presentment clause, delegated to the Commission the task of examining the health care system and making proposals for the reconfiguration the state's hospitals and nursing homes. The Governor's discretionary determination to approve the Commission's final report was not a step in a second legislative enactment process. Rather, it was a final executive action to implement the Enabling Act. His action in this regard is no different from the countless executive or administrative actions performed daily by the Executive.

Petitioners claim that the Legislature usurped the prerogatives of the executive branch by reserving the right to disapprove the Governor's determination, but they are mistaken. First, the Legislature did not in fact disapprove the Commission's recommendations, and therefore any challenge to this provision is not properly presented to the Court. The Legislature's action in simply reserving, but not invoking, the disapproval power did not usurp an executive function in any way. See Muller Optical Company v. Equal Employment Opportunity Commission, 743 F.2d 380, 387-88 (6th Cir. 1984) (statute containing unexercised veto provision did not violate separation of powers because the Legislature and the Executive never came into conflict).

Second, the unexercised power of the Legislature did not unduly intrude into the Executive arena. The statute severely limited the Legislature's role by requiring it to accept or reject the Commission's recommendations in their entirety and by giving it a truncated time-frame in which to act. Moreover, the statute did not subordinate the Governor to the Legislature, but instead gave the Governor his own, similarly circumscribed opportunity to determine whether the Commission's recommendations should go into effect. Finally, the legislative power at issue here was narrowly tailored; it applied to one set of recommendations issued at one time by an independent agency that was created specifically to give those recommendations and that now is disbanded.

CONCLUSION

The Court should deny the motion for leave to appeal.

Dated: Albany, New York
December 10, 2007

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondents

By: Victor Paladino
VICTOR PALADINO

BARBARA D. UNDERWOOD
Solicitor General

ANDREA OSER
Deputy Solicitor General

VICTOR PALADINO
SASHA SAMBERG-CHAMPION
KATHLEEN M. TREASURE
Assistant Solicitors General
of Counsel

Reproduced on recycled paper