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Plaintiffs-Petitioners,

v.

THE STATE OF NEW JERSEY; THE STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; SARAH ADELMAN IN HER CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HUMAN

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089696

ON PETITION FOR CERTIFICATION OF APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO. A-2767-21

PETITION FOR CERTIFICATION

073

SERVICES; THE STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MEGHAN DAVEY IN HER CAPACITY AS DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; STATE OF NEW JERSEY, DEPARTMENT OF HEALTH; DR. KAITLAN BASTON IN HER CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HEALTH

Defendants-Respondents.

On the Petition:

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SHORT STATEMENT OF THE MATTER INVOLVED

On June 30, 2017, fourteen hospitals ("Hospitals") commenced this action asserting claims for as-applied constitutional taking of property without just compensation against the State of New Jersey and some of its constituent agencies and agency heads relating to the state charity care program and the state-federal Medicaid program. The claims spanned the years 2004 through 2017. The Hospitals presented expert reports from a physician-hospital administrator, a reimbursement consultant, and a financial analyst. Following the close of discovery, the parties filed cross-motions for summary judgment. The Hospitals sought partial summary judgment, with a determination that there had been a taking of property but deferring what was "just compensation" to further proceedings. The trial court found that the parties agreed on the material facts and that the Defendants did "not dispute the [Hospitals'] expert's findings, methods, or credibility" with the conclusions being "unrefuted" that the charity care subsidies and Medicaid reimbursement amounts repeatedly failed "to cover the full amount of costs incurred by Plaintiff Hospitals for the provision of services to charity care and Medicaid patients." [Pa131] Nonetheless, on March 31, 2022, the court denied the Hospitals' motion for partial summary judgment, granted summary judgment to the Defendants on multiple claims, and dismissed the remaining claims without prejudice as not being "ripe" for failure to exhaust administrative remedies.

On May 12, 2022, the Hospitals filed their notice of appeal. In an opinion approved for publication, the Appellate Division affirmed the dismissal of all claims for different reasons than expressed by the trial court. The Hospitals now submit this Petition for Certification presenting substantial constitutional questions.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This case presents questions of general public importance along with substantial questions arising under the Constitutions of the United States and the State of New Jersey that have not been settled by this Court. These questions involve the role and responsibility of the State in providing medical care to the indigent population and the constitutionally protected right to not have one's private property taken for public use without just compensation. Recent decisions of the Supreme Court of the United States have emphasized an increased sensitivity to the occurrence of a per se physical taking that triggers a right to compensation in situations that have often been incorrectly characterized by lower courts as regulatory takings that do not require any compensation. In these recent decisions, the Supreme Court clarified that regardless of a governmental action's regulatory origin, labeling it as a "regulatory taking" is misleading when the governmental action physically appropriates property for itself, for the benefit of others, or grants a third-person a right to access private property. Moreover, the relationship to a regulated activity does not preclude a per se physical taking claim.

This Court has not had occasion to address the clarifications to takings jurisprudence resulting from Horne v. Department of Agriculture, 576 U.S. 351 (2015) and Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021). It should do so here, correct the errors of the Appellate Division, and provide guidance to the bench and the bar for the evaluation of takings claims in connection with regulated activity.

In this case, the Appellate Division failed to recognize the occurrence of a physical taking of the Hospitals' property resulting from the statutory requirement in N.J.S.A. 26:2H-18.64 compelling licensed hospitals to treat any person seeking care in conjunction with a related regulatory prohibition in N.J.A.C. 10:52-11.14 against billing or collecting money from persons found eligible for free care under the Charity Care Program. In Kuchera v. Jersey Shore Fam. Health Ctr., 221 N.J. 239, 254 (2015) this Court construed N.J.S.A. 26:2H-18.64, which states that "no hospital shall deny any admission or appropriate treatment to a patient on the basis of that patient's ability to pay or source of payment" to mean that "[e]very acute care hospital is ***required to provide care*** to anyone who seeks care without regard to ability to pay." (Emphasis supplied). Accordingly, since this statute requires a hospital to provide care to all who seek it, this Petition will refer to it as the "Take All Comers Statute." In New Jersey, for over 30 years it has been an acknowledged responsibility of the State to ensure access to and the provision of high-quality hospital care to New Jersey citizens. N.J.S.A. 26:2H-18.51. However, the manner in which the Take All Comers Statute and the Charity Care Program have been applied

results in per se takings in violation of constitutional protections against private property being taken for public use without just compensation because ***hospitals are required to grant access to their private physical space and mandated to use their inventory and private property in the form of supplies, equipment, and services while receiving a subsidy payment from the State of New Jersey which is repeatedly and consistently below the cost of providing the medical care***. This is not simply a restriction on use. It is an appropriation of property; it is also a physical occupation of private property. Although healthcare is a regulated industry, contrary to the trial court and Appellate Division's decisions, this fact does not constitute a surrender by the Hospitals of their constitutional rights as "a condition of licensure."

QUESTIONS PRESENTED

1. In light of the United States Supreme Court's decisions in Horne v. Department of Agriculture, 576 U.S. 351 (2015), and Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021), is there an unconstitutional physical taking of property when the government by statute compels a licensed hospital to participate in a program that requires the private hospital to permit the public to enter onto its property and mandates the use of its private property and resources for indigent patients while also prohibiting the billing for services to such patients without recourse or assurance of fair and reasonable compensation for such services?

2. Can a member of a regulated industry be required to surrender its constitutional right to protection against the taking of private property for public use without just compensation as a legitimate condition of licensure?

3. Can an as-applied constitutional taking claim asserted by several members of a regulated industry, and supported by the specific facts regarding how a statutory or regulatory scheme had been applied to those individual plaintiffs, be converted to a facial challenge to the statutory or regulatory scheme simply because the government defendants have similarly applied the statutory or regulatory scheme in an unconstitutional manner to all members of the regulated industry, though not required to do so by the plain language of the applicable statutes and regulations?

ERRORS COMPLAINED OF

The Appellate Division erred in failing to recognize the presence of a per se physical taking of the Hospitals' private property in the operation of the Take All Comers Statute and the implementing regulations of the Charity Care Program.

The Appellate Division erred in its balancing of the Penn Central factors to conclude that there was no regulatory taking.

The Appellate Division erred in concluding that plaintiffs presented a facial challenge rather than an as-applied challenge to the constitutionality of the Take All Comers Statute and the implementing regulations of the Charity Care Program.

COMMENTS ON THE APPELLATE DIVISION OPINION

A. The Court's Failure to Recognize a Per Se Physical Taking

The Fifth Amendment's Takings Clause and Article I, Paragraph 20 of the New Jersey Constitution of 1947 prohibit government from taking private property for public use without just compensation. "The paradigmatic taking requiring just compensation is a direct government appropriation . . . of private property." Horne v. Department of Agriculture, 576 U.S. 351, 358 (2015). "The physical occupation or appropriation of private property by government most directly and obviously implicates the constitutional obligation to pay just compensation for the taking of property without due process of law." Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 231 (1992). Under the rule expressed in Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021), the essential question in analyzing a takings claim is "whether the government has physically taken property for itself **or someone else**—by whatever means—or has instead restricted a property owner's ability to use his own property." Id. at 149 (emphasis added). The "taking" can occur through a physical taking or an appropriation of the property. It can also be accomplished by authorizing a third party to enter, occupy, and use the property, precluding its use for the owner's purposes. The Appellate Division disregarded long-standing principles concerning government-authorized occupation of private property as a per se physical taking, whether continuous as in Loretto v. Teleprompter Manhattan CATV Corp., 459 U.S. 419 (1982), or occasional but

repeated indefinitely as in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), because "plaintiffs here operate hospitals within the complex and highly regulated health care industry." [Op[1] at 19] This approach raises two essential questions. First, how does one distinguish between a highly regulated industry and an ordinary regulated industry? The Appellate Division does not identify any organizing principle that supports its conclusion. Second, is participation in a regulated industry a basis for summarily dismissing the constitutional challenge? The United States Supreme Court has recently answered this question. The plaintiff raisin growers in Horne were required by the Department of Agriculture to participate in a regulatory program that governed all raisin sales on the open market and, if the growers sold their raisins at all, compelled raisin growers to set aside and reserve a percentage of their crop for the government's use. 576 U.S. at 354. The Court concluded that the requirement to relinquish "specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking." Id. at 365. It summarily rejected any defense to the taking that the Hornes voluntarily chose to participate in the raisin market, holding that this could not "reasonably be characterized as part of a . . . voluntary exchange . . . for the 'benefit' of being allowed to sell" the remaining raisin crop. Id. at 366. The only way for raisin growers to avoid the reserve requirement was to stop selling raisins altogether and leave the

[1] "Op" refers to the Appellate Division's opinion dated June 27, 2024, which is attached to this Petition for Certification.

regulated activity. Id. at 365. Chief Justice Roberts curtly responded to the Government's position in this regard: "[T]he Government is wrong as a matter of law." Id.

Similarly, the Take All Comers Statute applies to all licensed hospitals in New Jersey. In requiring that no patient be denied admission or appropriate care, the statute effectively requires hospitals to set aside, keep, or otherwise reserve space, supplies and professional services for the use of charity care patients. The Charity Care Program in effect requisitions an unlimited amount of hospital space, supplies, and services for an unlimited duration of time, as medically necessary. Unlike the Governor's executive orders during the pandemic that closed and restricted businesses from operating, this is a mandate to utilize one's property in a particular way. See JWC Fitness, LLC v. Murphy, 469 N.J. Super. 414, 430 (App. Div. 2021), certif. denied, 251 N.J. 201 (2022)("[W]hen the State or a municipal government physically takes, commandeers, and utilizes property, for the governmental purpose of ... protecting or promoting the public health, safety, or welfare in the context of a declared emergency, [it is] akin to a physical taking under the constitution.") A requirement that private owners "reserve" or set aside portions of their personal property for use by the government is a "clear physical taking." 576 U.S. at 361. The Horne holding fits the circumstances of this matter.

Similarly, the Appellate Division rejected the Hospitals' reliance on Cedar Point in which the Supreme Court concluded a regulation granting labor union

organizers a three-hour right of access to an agricultural employer's property 120 days a year, for the purpose of soliciting support for unionization was a per se physical taking of the property owner's right to exclude others from the property. 549 U.S. at 143. The Court emphasized that the property in question was a private agricultural business not generally open to the public and distinguished its earlier precedent of Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) that had rejected the property owner's claim that there was a taking of its "right to exclude" leafleteers at a shopping center. The Appellate Division concluded that the hospitals were more like the shopping center in Pruneyard, which was open to the public, than the farms at issue in Cedar Point, stating:

> We conclude the charity care statute's operation does not lead to physical invasion of the hospitals' property by the public because, unlike Cedar Point, the public's presence in a hospital is a natural element of its business, making it more analogous to Pruneyard. [Op. at 20.]

This analogy misses the mark. To begin with, Pruneyard is focused on expressive rights, dissent, and the right of citizens to be informed. Its foundational principle is grounded in the perception that locations such as shopping malls have evolved to be the functional equivalent of downtown business centers with a public square. See, e.g., New Jersey Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 138 N.J. 326, 347-53 (1994), cert. denied, 516 U.S. 812 (1995). Such areas have an implied invitation to the public to enter the space. That invitation is for use of "the vast open spaces, the benches, the park-like setting." Id. at 359. It does not

extend to the interior of the abutting stores located in the shopping center. This is made clear in the concurring opinion of Justice White in Pruneyard emphasizing that the Court was "dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center." 447 U.S. at 95. Justice Powell's separate concurrence also supports this: "Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." Id. at 96. A more factually-related circumstance was presented in Allred v. Harris, 14 Cal. App. 4th 1386 (1993), where the court dealt with picketers at the Fletcher Parkway Medical Center and rejected an application of Pruneyard, stating: "The Medical Center does not provide a place for the general public to congregate but provides services to a specific clientele and is used for specific business purposes by employees, clients and the tenants' prospective clients." Id. at 1392.

So too here, a private hospital is not equivalent to a public forum. Individuals entering the hospital do not have unfettered access to all areas of the hospital. The invitation to the public to use the space is an extremely limited one and does not extend beyond the hospital reception desk unless a person is there to visit a patient or have surgery. Principles of tort law are instructive. A person visiting a patient at a hospital is a business invitee but can exceed the scope of the invitation by going into inappropriate areas and may even become a trespasser. See Williams v. Morristown

Mem. Hosp., 59 N.J. Super. 384, 392-93 (App. Div. 1960). The Appellate Division's mischaracterization of a hospital as being wide open to the general public was, in the words of Chief Justice Roberts, simply "wrong" and improperly enabled it to apply the Pruneyard analysis to avoid coming to terms with the intrusive mandates of the Take All Comers Statute.

The Appellate Division also improperly applied Horne in rejecting the contention that the charity care requirements were an unconstitutional appropriation of the hospitals' tangible personal property. [Op. at 21] It latched onto a tangential fact in Horne concerning the transfer of title to the raisins to the government and distinguished Horne on the supposed basis that "the statute here does not require a transfer of ownership of medical supplies or equipment into the government's or a third party's hands. The hospitals retain the majority of their agency as to their medical supplies and equipment." [Op. at 21] However, the per se physical taking ruling in Horne was not predicated on the transfer of title. Nor has transfer of title ever been a prerequisite for finding a taking in other cases. For example, there was no transfer of title when the government authorized the cable TV companies to occupy rooftop space in Loretto, supra. The Supreme Court summarized and provided illustrative cases in Cedar Point Nursery:

> The government commits a physical taking when it uses its power of eminent domain to formally condemn property [and acquires title]. ... The same is true when the government physically takes possession of property without acquiring title to it. [594 U.S. at 141 (citations omitted).]

The circumstances of this matter perfectly coalesce with our Supreme Court's teachings in Loretto, Nollan, Horne, and Cedar Point Nursery. That there is a "taking" in the most fundamental meaning of the word regardless of title is plainly illustrated by the administration of an intravenous solution or the ingestion of an oral medication by a patient. The hospital as owner has possession of the object and then it does not; the solution or medication is in the patient's body and it is the patient who now has possession without any formal "transfer of title." The truism that "possession is nine-tenths of the law" reflects the common law understanding that actual possession is prima facie evidence of legal title. See e.g., Willcox v. Stroup, 467 F.3d 409, 412-13 (4th Cir. 2006), cert. denied, 550 U.S. 904 (2007). The possession by patients who cannot pay is pursuant to the statutory mandate to provide "appropriate treatment." A similar phenomenon is present in the use of diagnostic equipment or physical presence in an operating room. While a patient is in the MRI scanner, no one else can be. A surgeon's scalpel can make an incision in only one patient at a time. Any other patient is strictly excluded from that place and time by these medical activities.

A comparison to the Federal Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. §1395dd, is also instructive. EMTALA requires all hospitals participating in Medicare to conduct a screening examination when a person comes to an emergency room for any medical emergency condition and stabilize that condition. The statute further provides that a hospital cannot delay examination or

treatment to determine "the individual's method of payment or insurance status." 42 U.S.C. §1395dd(h). It is intended to remedy "the practice of refusing to treat patients who are unable to pay." Marshall on Behalf of Marshall v. E. Carroll Par. Hosp. Serv. Dist., 134 F.3d 319, 322 (5th Cir. 1998). Like the Take All Comers Statute, EMTALA applies to "any and all patients, not just patients with insufficient resources." Brooker v. Desert Hosp. Corp., 947 F.2d 412, 414 (9th Cir.1991). But there is nothing in EMTALA prohibiting attempts to obtain payment or reimbursement. An implementing regulation makes clear that it is permissible to ask "whether an individual is insured and, if so, what that insurance is, as long as that inquiry does not delay screening or treatment." 42 C.F.R. §489.24. See Kizzire v. Baptist Health System, 441 F.3d 1306, 1310 (11th Cir. 2006); Burton v. William Beaumont Hosp., 373 F.Supp.2d 707, 716 (E.D. Mich. 2005).

The effect of the Charity Care Program regulation prohibiting hospitals from billing or attempting to collect payment for the services provided is to eliminate what otherwise would be a common law right to charge and collect for services rendered. See, e.g., Shapiro v. Solomon, 42 N.J. Super. 377, 383-84 (App. Div. 1956). With the Take All Comers Statute mandating "all appropriate care" and with the prohibition on billing for the services rendered, the Hospitals are instead compelled to subsidize the care being provided to Charity Care patients. They must use their own resources and reserves to provide care to those patients and may or may not be able to recoup those amounts through charges to non-Charity Care patients. This

Court invalidated an analogous ordinance that prohibited landlords from raising the rents of only senior citizens, while permitting increased rents to younger residents and placing the burden of any shortfall on the landlords. Prop. Owners Ass'n of N. Bergen v. N. Bergen Twp., 74 N.J. 327 (1977). While acknowledging that seeking to assist needy senior citizens was a rational subject for legislation in furtherance of the public welfare, this Court stated: "But compelled subsidization by landlords or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem." Id. at 339.

Likewise, the Charity Care Program, which requires a hospital to provide indigent patients with an undefined and unlimited amount of care for an equally undefined and unlimited duration of time, is an unconstitutional method to assist the indigent.

No other profession or industry is required to shoulder a similar burden as is imposed on the Hospitals through the Take All Comers Statute and the Charity Care Program. In stating that "[c]harity care restricts how hospitals use their property to provide medical services, not whether they do so" [Op. at 20], without explaining what the restriction is, the Appellate Division glossed over the fact that the so-called "restriction on use" is instead a command, under threat of monetary penalties, to use property and divert the Hospital's tangible resources from the treatment of a general group of patients and direct use of its property and resources for the treatment of charity care patients. This is very much a physical taking. In the absence of just

compensation, it is contrary to the fundamental guarantee of the Fifth Amendment which "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

B. The Court's Failure to Weigh the Penn Central Factors

The Appellate Division identified the three essential factors to be evaluated in assessing whether regulatory restrictions "go too far" and become a taking that were set forth in Penn Central Transp. Corp. v. New York City, 438 U.S. 104 (1978). Those are: (1) economic impact, (2) interference with investment-backed expectations, and (3) the character of the government action. [Op. at 22] The court first concluded that after allowing plaintiffs all favorable inferences, the evidential record was sufficient to support a finding that the Take All Comers Statute had an adverse economic impact on their profitability and that evidence weighed "moderately in favor" of satisfying this element to find a taking. [Op. at 23]

However, the Appellate Division concluded that plaintiffs did not satisfy the other elements of the Penn Central test. The court's analysis used the same erroneous prism for its decision, i.e., that the comprehensive regulation of the healthcare industry makes it unreasonable to have an expectation of covering the costs of providing care and that the character of public healthcare regulations weigh against the finding of a taking. [Op. at 24-25] The court referred to the State's broad power to restrict the uses individuals may make of their property in order to protect the

health, safety, and welfare of the public. Characterizing the Take All Comers Statute as a restriction on use is merely an exercise in linguistic gymnastics to circumvent the 5th and 14th Amendments and Article I, Paragraph 20 of our State Constitution.

The comments in California Chief Justice Bird's dissent in Yarbrough v. Superior Court, 39 Cal.3d 197 (1985), provide a meaningful perspective on the issue in this case. The California Supreme Court considered whether failing to compensate a court-appointed attorney who had incurred costs as part of the representation constituted a taking of property. The Chief Justice stated:

> No one would dare suggest courts have the authority to order a doctor, dentist or any other professional to provide free services, while at the same time telling them they must personally pay their own overhead charges for that time. No crystal ball is necessary to foresee the public outrage which would erupt if we ordered grocery store owners to give indigents two months of free groceries or automobile dealers to give them two months of free cars. Lawyers in our society are entitled to no greater privileges than the butcher, the baker and the candlestick maker; but they certainly are entitled to no less. [Id. at 208.]

Selling and dealing in new and used cars is a regulated activity. N.J.S.A. 39:10-19. Grocery stores are subject to a complicated variety of regulatory requirements, N.J.S.A. 24:15-13; N.J.S.A. 34:1B-304, including some from the Department of Health. Directly involved with healthcare, pharmacies are frequently located in grocery stores, require licensure, and are subject to regulation. N.J.S.A. 45:14-49. However, those who engage in such activities are not required to provide their goods and services without compensation. But if any were characterized as a "highly

regulated industry," why would the Appellate Division's analysis not apply and require them to do so?

That a choice was made to engage in a "regulated" activity has been the response of many lower courts in healthcare-related decisions raising takings claims. There are cases that have held that participation in Medicare is "voluntary" and thus there can be no taking. See, e.g., Livingstone Care Ctr., Inc. v. U.S., 934 F.2d 719, 720 (6th Cir. 1991); Whitney v. Heckler, 780 F.2d 963, 972 (11th Cir. 1986). The same "voluntary" program analysis was used with challenges to Medicaid. See, e.g., Franklin Mem. Hosp. v. Harvey, 575 F.3d 121, 129-30 (1st Cir. 2009); Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare, 742 F.2d 442, 446 (8th Cir. 1984). The Supreme Court of the United States has never ruled on this proposition.

There is a difference between being in a licensed or regulated field and voluntarily participating in a particular regulated program. One can discontinue participation in a particular program albeit with some difficulty, but to abandon one's status as a licensed or regulated business or professional is an existential choice. This Court should resolve that disparity. The mandates of the Take All Comers Statute are applicable regardless of whether a hospital participates in Medicaid. Under the Appellate Division's opinion, the State could require a licensed hospital to provide an unlimited amount of care without any obligation to make any payment for these services and use of the hospital property. If uncorrected by this

Court, that may be the outcome of future applications of the Appellate Division's ruling.

C. The Court's Error in Characterizing the Hospitals' Claims as a Facial Rather than an As-Applied Takings Challenge

The Appellate Division found the Hospitals' challenge to be a facial one enabling the court to analyze every Hospital's claim in the same fashion, determining that because all hospitals operate within a "complex and highly regulated" industry [Op. at 19, 24-25], there can be no taking of hospital property under either the per se or ad hoc tests. By arriving at this conclusion, the Appellate Division makes two fatal factual errors. First, without citation to the record, it finds that "[t]he charity care subsidy reimburses no hospital in New Jersey at one hundred percent." [Op. at 15] However, the evidential record demonstrates that there ***are*** some years that even the Plaintiff Hospitals received 100 percent of their costs, but not in the years identified for as-applied claims. The Hospitals' reimbursement expert calculated each Hospital's annual costs and reimbursements for 2004 through 2017. [Pa511-Pa647] The expert's spreadsheet analysis outlining the financial impact of each Hospital's yearly charity care burden demonstrates that in certain years several Hospitals received a subsidy sufficient to cover their costs. [Pa628-Pa642] For example, Capital Health Regional Medical Center received a subsidy sufficient to cover its charity care costs in the years 2005, 2006, 2011, and 2014 through 2017. Similarly, St. Mary's General Hospital received a subsidy sufficient

to cover its charity care costs in the years 2006, 2009, 2010, and 2013 through 2017. Thus, the evidential record directly contradicts the Appellate Division's conclusion.

The Appellate Division then compounds the error, declaring that "[i]t follows that plaintiffs' claim is one which, if successful, will affect all hospitals, even though the claim was not brought on behalf of all hospitals licensed to operate in the state." [Op. at 15-16] To state the obvious, not all New Jersey hospitals are plaintiffs in this case. There could be a myriad of reasons for this, including that they received 100% of their costs and believe that they have not suffered an as-applied taking at the hands of the State. However, the court's finding that all hospitals are affected and therefore, the Hospitals' current takings claims are a facial attack on the Take All Comers Statute is simply wrong as a matter of law.

The test for a facial challenge, is not whether the decision will impact all regulated parties, but rather, whether the statute can only be applied unconstitutionally. To succeed on a facial challenge to a statute "the challenger must establish that no set of circumstances exists under which the Act would be valid." U.S. v. Salerno, 481 U.S. 739, 745 (1987). Thus, "the remedy for a facial challenge is the broad invalidation of the statute in question, but an as-applied challenge bars its enforcement against a particular plaintiff alone under narrowed circumstances." Green Party v. Aichele, 89 F.Supp. 3d. 723, 737 (E.D. Pa. 2015).

Here, the Hospitals indisputably do not seek the broad invalidation of the Take All Comers Statute, or the regulations prohibiting hospitals from billing Charity Care

patients for services. However, the Hospitals seek just compenstaion for the property taken from them. To the extent just compensation was paid to any Hospital in a given year there has been no constitutional violation. Conversely, a lack of just compensation makes the statute unconstitutional as-applied. There is nothing contained in any of the relevant statutes or regulations precluding Defendants from providing the Hospitals with sufficient compensation for the property taken. The Defendants' actions are unconstitutional because they failed to do so in certain years.

The Appellate Division glosses over these facts and instead erroneously jumps to a finding of a facial challenge which, in turn, permits it to circumvent the Federal and State Constitutions' Takings Clauses, as well as the controlling precedents in Loretto, Nollan, Horne, and Cedar Point, which requires this Court's intervention.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certification and after review, reverse the judgment denying partial summary judgment with a remand to determine the amount of just compensation.

Respectfully,

GREENBAUM, ROWE, SMITH & DAVIS, LLP

James A. Robertson (Atty ID 030881990)

Dated: July 25, 2024