PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

August 9, 2024

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VIA HAND-DELIVERY
Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 970
Trenton, New Jersey 08625

Re: Englewood Hosp. & Med. Ctr., et al. v. the State of New Jersey, et al.
Supreme Court Docket No.: 089696
Appellate Division Docket No.: A-2767-21

Civil Action: On Petition for Certification to the Supreme Court from a Final Judgment of the Superior Court, Appellate Division

Sat Below: Hon. Lisa Rose, J.A.D.
Hon. Morris G. Smith, J.A.D.
Hon. Lisa Perez Friscia, J.A.D.

Letter Brief and Appendix in Opposition to Petition for Certification

Dear Ms. Baker:

Please accept this letter brief and appendix in opposition to Plaintiff-Appellants' petition for certification. In opposition, Respondents rely primarily on the brief they filed below.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The charity care statute mandates that "[n]o hospital shall deny any admission or appropriate service to a patient on the basis of that patient's ability to pay or source of payment." N.J.S.A. 26:2H-18.64. The statute also creates a subsidy that is designed to prospectively defray some of the costs hospitals incur for treating uninsured patients who cannot pay for their care. Notably, the

[1] Because they are closely related, the facts and procedural history have been combined for efficiency and the Court's convenience.

subsidy is not designed to be a "reimbursement" covering all of a hospital's actual charity care expenses. In re Deborah Heart & Lung Ctr. SFY 2009 Charity Care Subsidy Allocation, 417 N.J. Super. 25, 27 (App. Div. 2010). Rather, the allocated amount represents that hospital's proportional share of the State-wide subsidy amount, established by the Legislature in the annual Appropriations Act. See N.J.S.A. 26:2H-18.59i; Deborah Heart & Lung Ctr., 417 N.J. Super. at 27-28.

On June 30, 2017, the Hospitals filed suit in the Law Division, alleging that their adherence to the charity care statute's requirement to provide necessary medical care to those in need results in an unconstitutional taking of their property. (Ab1).[2] In March 2022, following the close of discovery and simultaneous motions for summary judgment, the trial court issued a decision granting Respondents' motion for summary judgment on a portion of the Hospitals' takings claims and dismissing a portion of the Hospitals' takings claims for failure to exhaust administrative remedies. The Hospitals appealed.

On June 27, 2024, following briefing and argument, the Appellate Division issued a published decision, affirming the trial court's order dismissing

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[2] "Pa" refers to the Hospital's Appellate Division appendix; "Pb" refers to their brief below; "Ab" refers to the Petition; "Rb" refers to Respondents' brief below; and "Ra" refers to Respondents' appendix attached hereto.

all of the Hospitals' claims, "but . . . for slightly different reasons" than those of the trial court. (Slip op. at 4).[3]

First, the Appellate Division considered "whether the trial court erred by dismissing some of the [Hospitals'] claims for failure to exhaust administrative remedies," that is, whether the trial court correctly found that the Hospitals' challenges were as-applied. (Slip op. at 15). The court noted that the Hospitals "challenge the Legislature's reimbursement system, including N.J.S.A. 26:2H-18.64, in its entirety," and that if the Hospitals were successful, such an outcome would "affect all hospitals, even though the claim was not brought on behalf of all hospitals licensed to operate in the state." (Slip op. at 15-16). Accordingly, the court concluded that the Hospital's claims were not as-applied, but rather "represent a facial constitutional attack on the charity care statute." (Slip op. at 16).

On the merits of the takings claim, the Appellate Division found that neither a per se nor a regulatory taking had occurred. The court found that no per se taking had occurred because "the charity care statute's operation does not lead to physical invasion of the hospitals' property." (Slip op. at 20). The

[3] A copy of the Appellate Division's June 27, 2024 decision is attached to the Hospitals' Petition for Certification.

Appellate Division also concluded 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." (Slip op. at 21).

The Appellate Division also found that no taking had occurred under Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). (Slip op. at 21-26). As to economic impact, the court noted that while the Hospitals had provided sufficient evidence "to support a finding that N.J.S.A. 26:2H-18.64 has had an adverse impact on their profitability, . . . [a] takings claim cannot be sustained on the sole ground that [the Hospitals] fail to financially perform on par with industry-wide norms." (Slip op. at 22-23). It noted that the Hospitals did not show that the statute "deprives them of economic use of their properties as a whole." Ibid.

As to the Hospital's reasonable investment-backed expectations, the Appellate Division emphasized that "[h]ospital investors in the highly regulated health care industry should expect that use of their property, in all its forms, is likely to be regulated by the state, and that such government regulation may diminish investment-backed expectations without resulting in an unconstitutional taking." (Slip op. at 24 (internal citation omitted)). Given the Hospitals' choice to do business here, "it is reasonable that they should expect

such license conditions to affect business profits." (Slip op. at 25). Accordingly, the Appellate Division concluded that the Hospitals could not satisfy this Penn Central factor, because "it is not reasonable for the hospitals to expect an at-cost reimbursement for the medical services the Legislature has required them to provide as a condition of doing business in our state." (Slip op. at 25 (emphasis in original)).

Finally, as to the character of the government action, the Appellate Division observed:

> Our courts have repeatedly stated that the character of public health and healthcare regulations typically weighs against the conclusion that a law acts as a taking. See JWC Fitness, LLC v. Murphy, 469 N.J. Super 414, 436 (2021) (recognizing the nature of the regulation weighed against finding a taking as it was not specific to plaintiff and was a valid exercise of police power); In re Health Care Admin. Bd., 83 N.J. at 81 (finding no taking where the "regulations in question are directed at an acute social problem affecting the health and welfare of the needy aged and infirm, are well within the power and authority vested in the [DOH] by the Legislature").
>
> [Slip op. at 25].

In that same vein, the court found that the charity care mandate and the accompanying subsidy "are specific to its aims – to ensure equal access to healthcare for indigent patients[.]" (Slip op. at 25). Accordingly, the Appellate

Division concluded that "the character of the government action reflects a reasonable adjustment to the benefits and burdens of economic life for the common good and weighs strongly against finding a taking." (Slip op. at 26).

In sum, the Appellate Division affirmed the trial court's order granting Respondents' motion for summary judgment, concluding that "the record shows no per se taking, nor does a balancing of the Penn Central factors reveal a regulatory taking." (Slip op. at 26).

ARGUMENT

THIS COURT SHOULD DENY THE HOSPITALS' PETITION FOR CERTIFICATION.

A petition for certification to this Court of a final decision of the Appellate Division will only be granted for special reasons. R. 2:12-4. Certification will not be granted where the Appellate Division's decision is essentially an application of settled principles to the facts of a case, does not present a conflict among judicial decisions requiring clarification or calling for supervision by this Court, and does not raise unsettled issues of general importance. See Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 515-16 (1985) (O'Hern, J. concurring); In re Route 280 Contract, 89 N.J. 1, 2 (1982). The decision below correctly applied settled legal principles and thus does not merit this Court's

review.

The Hospitals make three arguments in support of their Petition. First, they argue that the Appellate Division erroneously failed to find that a per se taking had occurred. (Ab5). Second, they claim that the Appellate Division "erred in its balancing of the Penn Central factors to conclude that there was no regulatory taking." Ibid. Third, they assert that the Appellate Division wrongly concluded that the Hospitals presented a facial challenge to the Charity Care statute. Ibid. None of these arguments meet the standards for certification, and all are unpersuasive.

The Hospitals' lead-off argument—to which they devote the majority of their Petition (Ab5-15)—is that the Appellate Division improperly declined to find that a per se taking had occurred. But there is no dispute that the stringent legal rules governing per se takings are well-established in precedents. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982); Horne v. Dep't of Agric., 576 U.S. 351 (2015); and Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021); see also Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 231 (1992). (Ab6-7). As the Supreme Court recently summarized in Cedar Point, per se takings are limited to those where the government "physically acquires private property for a public use." 594

U.S. at 147. By contrast, when the government "instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies"—the flexible regulatory takings standard under Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Cedar Point, 594 U.S. at 147.; accord Bernardsville Quarry, 129 N.J. at 231. The Hospitals identify no conflicting binding authority from the courts of this state. Instead, the Petition simply asserts that the Appellate Division "improperly applied" these precedents. See (Ab11). Not only is that insufficient for certification, see Fox, 98 N.J. at 515 (noting certification is not proper when "the final judgment of the Appellate Division is essentially an application of settled principles to the facts of this case") (O'Hern, J., concurring), it is also wrong, since the Hospitals reiterate the same argument that the Appellate Division correctly rejected below.

As the Appellate Division explained, the challenged statute was not a per se physical taking because it "does not limit the right to exclude individuals from [Hospital] premises." (Slip op. at 19). As the Court added, contrary to the Hospital's argument below and repeated here, "the charity care statute's operation does not lead to physical invasion of the hospitals' property by the public." (Slip op. at 20). After all, unlike in Cedar Point, which involved a California regulation that required access to agricultural land closed to the

public, "the public's presence in the hospital is a natural element of its business." (Slip op. at 20). By contrast, as the United States Supreme Court found in Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980), limiting a property owner's right to exclude as to certain individuals did not affect a taking where the shopping center was publicly accessible and allowing access does not "unreasonably impair the value or use of the[] property as a shopping center." In fact, as the Court pointed out, Pruneyard was not even a per se takings case, but rather evaluated under a regulatory takings framework. Horne, 576 U.S. at 364 (adding "[a] regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under Penn Central").

Here, like Pruneyard and unlike Cedar Point, "[c]harity care restricts how hospitals use their property to provide medical services, not whether they do so. The property will be used as it was intended – to treat patients." (Slip op. at 20). The Hospitals do not dispute that unlike a private farm closed to the public, their hospitals do extend an "invitation to the public to use the space" in order to seek medical care. (Ab10). Although that invitation certainly has limitations—no member of the public could simply walk into a sterile operating room without permission, for example, nothing about the charity care statute grants individuals an affirmative right to enter or occupy areas of the Hospitals not

open to the public. Nor does the charity care statute restrict the Hospitals' ability to deny access in certain circumstances. Accordingly, the Appellate Division correctly found that the statute effects no per se taking.

The Appellate Division similarly rejected the Hospitals' reliance on Horne, concluding that unlike in Horne, "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." (Slip op. at 21). The Hospitals unconvincingly insist that the central issue in Horne—the transfer of tangible physical property—is "a tangential fact." (Ab11). It is not. In Horne, raisin growers challenged a reserve requirement that they set aside a percentage of their crop to be turned over to a government committee, free of charge, for use as the government saw fit. Horne, 576 U.S. at 354. As the Court emphasized, crucial to the question of whether the reserve requirement was "a clear physical taking" are facts regarding transfer, including specifically pointing out that "[t]itle to the raisins passed to the Raisin Committee" and "[t]he Committee disposes of what becomes its raisins as it pleases." Ibid. The Appellate Division correctly applied the holding in Horne to find that no such per se taking occurred here. It is undisputed that unlike in Horne, title to neither the hospital and its operation, nor medication or supplies used by the Hospitals, has passed to the State by virtue of the Hospitals'

treatment of charity care patients. (Slip op. at 21). Indeed, the Hospitals maintain their right to "possess, donate, and devise their property." Id. at 364 (citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979)); (Slip op. at 21).

Thus, the Appellate Division correctly held that under longstanding binding precedent, the Hospitals did not make out a per se takings claim. There is simply no physical acquisition of property, and the Hospitals' arguments about being "compelled to subsidize [] care," (Ab13), is a regulatory takings question subject to the Penn Central test, not a per se takings inquiry.

The Hospitals' secondary argument is that the Appellate Division "erred in its balancing of the Penn Central factors to conclude that there was no regulatory taking," primarily complaining that the court placed too much emphasis on the heavily regulated nature of the healthcare industry when balancing the factors. (Ab16-Ab17; Ab15-Ab18). To start, this argument does not meet this Court's certification standards, as it would simply be a challenge the Appellate Division's "application of settled principles to the facts of this case." Fox, 98 N.J. at 515 (O'Hern, J., concurring). But it also fails on the merits, for the reasons cogently set forth in the Appellate Division decision.

As the Appellate Division explained, balancing the three Penn Central factors yields the conclusion that the charity care statute does not effectuate a

regulatory taking. (Slip op. at 21-16); see also Bernardsville Quarry, 129 N.J. at 232 (noting the three significant factors are: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action").

The Hospitals do not challenge the Appellate Division's findings on the first and third factors. As to the first factor, the court acknowledged that the record shows the Hospitals are "less profitable on average than the average hospital nationally" but pointed out that the Hospitals have made no showing that the charity care statute "deprives them of economic use of their properties as a whole, in effect, as hospitals." (Slip op. at 23 (citing Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992))); see also Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 210–11 (1991) ("[R]restrictions on uses do not necessarily result in takings even though they reduce income or profits."). And as to the third factor, the Appellate Division emphasized that "the requirements of the charity care statute and its subsidy scheme are specific to its aims" that "fits squarely within the police power" of the State. (Slip. Op at 25-26); see also Matter of Health Care Admin. Bd., 83 N.J. 67, 81 (1980) ("[T]he regulations in question are directed at an acute social problem affecting the

health and welfare of the needy aged and infirm, are well within the power and authority vested in the Department by the Legislature and do not constitute a taking of private property without just compensation."). Given the "strong[]" weight that the Appellate Division rightly put on this factor, (Slip Op. at 26), the Petition cannot succeed.

Instead, the Hospitals focus entirely on one aspect of the second factor: the fact that Appellate Division considered the level of regulation in the hospital industry in assessing whether the statute unduly interferes with "investment-backed expectations." (Ab15). The court's analysis was, however, entirely correct. In fact, the Hospitals do not dispute that they operate in a highly regulated industry. See (Slip op. at 24); United Wire, Metal & Mach. Health v. Morristown Mem'l Hosp., 995 F.2d 1179, 1190-91 (3d Cir. 1993) (rejecting takings challenge to system of setting hospital billing rates in part, because the plaintiffs' investment-backed expectations were reduced by "the historically heavy and constant regulation of health care" in the State); (Pa186). And given that fact, the Appellate Division was correct to find that the record shows it would be unreasonable for the Hospitals to conclude that their investment-backed expectations are somehow mismatched with actual outcomes. Indeed, the Appellate Division emphasized that "[h]ospital investors in the highly

regulated health care industry should expect that use of their property, in all its forms, is likely to be regulated by the state, and that such government regulation may diminish investment-backed expectations without resulting in an unconstitutional taking." (Slip op. at 24 (internal citation omitted)). Given the Hospitals' choice to do business here, "it is reasonable that they should expect such license conditions to affect business profits." (Slip op. at 25).[4]

Accordingly, the Appellate Division reasonably concluded that the Hospitals could not satisfy this Penn Central factor, because "it is not reasonable for the hospitals to expect an at-cost reimbursement for the medical services the Legislature has required them to provide as a condition of doing business in our state." (Slip op. at 25 (emphasis in original)). And it correctly balanced this factor with the other two Penn Central factors, which the Hospitals do not challenge in their petition.

Finally, the Hospitals' disagreement with the Appellate Division's

[4] Moreover, the Hospitals are required by certificate of need (CN) regulations—not by the charity care statute—to demonstrate an ability and willingness to provide charity care. N.J.A.C. 8:33-4.9 and -4.10(a)(6). Put another way, the Hospitals were made aware of and affirmatively declared their willingness to provide charity care in connection with their CN applications. More generally, the Hospitals must expect that commitments made during the CN process, in some cases their non-profit status, and the application of State statutes and regulations, will affect how they conduct business and, in turn, their costs and profits.

conclusion that their challenge was a facial one and not as-applied cannot merit certification. (Ab18-Ab20). As a threshold matter, the Appellate Division found that the Hospitals could not show that the charity care statute violated the Takings Clause after assuming—in favor of the Hospitals—that the subsidy created a shortfall. See Slip op. 22-23; see also id. at 15 (assuming the "subsidy reimburses no hospital in New Jersey at one hundred percent"). After all, the Hospitals' claims hinge on not receiving full reimbursement. Here, the Hospitals' argument that the Appellate Division wrongly concluded that the charity care subsidy "reimburses no hospital in New Jersey at one hundred percent" because "even the Plaintiff Hospitals" sometimes "received 100 percent of their costs" cannot possibly benefit the Hospital's bid for certification. (Ab18).

Second, the Appellate Division likewise made no error in concluding that if the Hospitals were successful, such an outcome would "affect all hospitals, even though the claim was not brought on behalf of all hospitals licensed to operate in the state." (Slip op. at 15-16). If the Hospitals were successful, the Appellate Division would have declared charity care unconstitutional "for failing to provide plaintiffs at-cost reimbursement." (Slip op. at 15). This change in the law would indeed affect all hospitals statewide, not just those

involved in this challenge. However, this fact alone was not dispositive of the question of whether this challenge is a facial one. The Appellate Division makes clear that it views the Hospitals' challenge as one made to "the Legislature's reimbursement system, including N.J.S.A. 26:2H-18.64, in its entirety." (Slip op. at 15). See also Heffner v. Murphy, 745 F.3d 56, 65 (3d Cir. 2014) (a facial challenge is one where "there are no set of circumstances . . . under which the [statute] would be valid."). This kind of claim, which is purely a question of law, is a facial one. If the Hospitals were presenting an as-applied challenge, the agency would have been required to hear the claim – and any accompanying evidence proffered – first. (Slip op. at 15).

Indeed, the record confirms that the Hospitals' chief complaint is not – and has never been – how the charity care calculations are done, or the subsequent award of a subsidy to a particular hospital in a particular year; their grievance has always been with the statute itself. See In re Medicaid Inpatient Hospital Reimbursement Rate Appeals for 2009-2012 v. Div. of Medical Assistance & Health Servs., No. A-3726-13 (App. Div. May 20, 2016) (affirming that DMAHS did not have jurisdiction to consider facial constitutional challenge)[5]; In re Englewood Medical Center's SFY 2014 Charity

[5] A copy of this unpublished opinion is provided at Ra1. R. 1:36-3.

Care Subsidy Appeal, Nos. A-1555-13; A-1145-14; A-1146-14; A-1147-14; A-1148-14; A-1149-14; A-1150-14; A-1151-15; A-1152-14 (App. Div. May 20, 2016) (same).[6] For these reasons, the Appellate Division correctly determined that this challenge "represent[s] a facial constitutional attack on the charity care statute." (Slip op. at 16).

In sum, the Hospitals' Petition rehashes previous filings and reflects their continued dissatisfaction with the outcome of this matter. They do not, because they cannot, identify a conflict of law or issue of general importance related to the Appellate Division's thorough and well-reasoned conclusions. The petition should be denied.

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[6] A copy of this unpublished opinion is provided at Ra18. R. 1:36-3.

CONCLUSION

For these reasons, the Hospitals' petition for certification should be denied.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Jacqueline R. D'Alessandro
Jacqueline R. D'Alessandro
Deputy Attorney General
Attorney ID No.: 172902016
Jacqueline.Dalessandro@law.njoag.gov

Melissa H. Raksa
Assistant Attorney General
Of Counsel

c: All counsel via eCourts