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Plaintiffs-Petitioners,

COOPER UNIVERSITY HOSPITAL; HACKENSACK MERIDIAN HEALTH PASCACK VALLEY MEDICAL CENTER; JFK MEDICAL CENTER; OUR LADY OF LOURDES MEDICAL CENTER; LOURDES MEDICAL CENTER OF BURLINGTON COUNTY; HACKENSACK MERIDIAN HEALTH MOUNTAINSIDE MEDICAL CENTER,

Plaintiffs

v.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089696 (A-16-24)

On Appeal From:
SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO. A-2767-21

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

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS-PETITIONERS

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 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 Brief:

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PRELIMINARY STATEMENT

At the heart of this case is the federal question of whether the way in which the State of New Jersey applies N.J.S.A. 26:2H-18.64 (the "Take All Comers Statute") and its related charity care regulations, including N.J.A.C. 10:52-11.14 in particular, violates the Fifth Amendment's Takings Clause as applicable to the State through the Fourteenth Amendment. This is ultimately a question of federal constitutional law. While New Jersey's constitution can provide broader protection, a denial of just compensation in this context necessarily rests on the application of the Fifth Amendment as the minimum protection required. Thus, while relief to the Hospitals could be granted under both constitutions, a denial of relief must be supported by federal law and precedent. The Hospitals contend it is not.

The Take All Comers Statute provides "No 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." The statute is designed to effectuate the public purpose of "ensur[ing] access to and the provision of high quality and cost-effective hospital care to its citizens." N.J.S.A. 26:2H-18.51a. However, the Take All Comers Statute is silent on whether a hospital can charge the patients they treat. From its plain language, the Take All Comers Statute requires hospitals to permit any patient to enter and occupy spaces within the hospital and use hospital property to treat the patient, but it does not restrict a hospital from receiving just compensation for the goods and services

provided. Thus, while the mandate of the Take All Comers Statute results in a physical taking of hospital property for the public purpose of treating patients, it facially does not constitute a Fifth Amendment violation because it does not prohibit a hospital from seeking and obtaining just compensation.

Conversely, the charity care regulations, specifically N.J.A.C. 10:52-11.14, prohibit hospitals from billing patients qualified for charity care for the services provided. However, that regulation on its face does not require a hospital to take such patients or prohibit payment from the State for the services provided. Thus, that regulation is also not facially invalid, because a hospital is not prohibited by the regulation from refusing care to such patients or voluntarily caring for these patients for its own charitable purpose.

While neither N.J.S.A. 26:2H-18.64 nor N.J.A.C.10:52-11.14 in isolation are facially invalid, a federal Constitutional violation nonetheless arises when the State of New Jersey applies both laws in tandem. The consequence is that a taking occurs for the public purpose of providing access to hospital care for New Jersey citizens, which becomes unconstitutional when the hospitals are prohibited from billing the patients, and the State itself fails to provide just compensation for the property taken and consumed pursuant to the statutory mandate. Indeed, the relevant statutory scheme requires the Governor and Legislature to appropriate sufficient funds to carry out its public purpose. N.J.S.A. 26:2H-18.58d. However, the Legislature has

repeatedly failed to fully do so in the years at issue. Consequently, it is the concurrent application of N.J.S.A. 26:2H-18.64 and N.J.A.C.10:52-11.14, together with the Legislature's repeated failure to allocate appropriate funds to provide just compensation to the hospitals for the property taken from them, which result in an as-applied Fifth Amendment violation. This constitutional violation can ***only*** be remedied by requiring the State to pay the hospitals just compensation for the care they are statutorily compelled to provide.

Requiring the State of New Jersey to fulfill its constitutional obligation to pay just compensation will serve two paramount purposes. First, it ensures constitutionally guaranteed property rights are protected and their integrity preserved. Second, it advances the very purpose of the New Jersey charity care laws, which is to promote and protect access to hospital health care for the public, particularly the indigent public. The uncontroverted evidence establishes that the lack of just compensation negatively impacts the Hospitals' financial situation, effecting their ability to attract and retain staff, maintain their facilities and keep pace with changing technologies and practices, which ultimately undermines the Hospitals' ability to survive over the long-term. Should these Hospitals be forced to shut their doors due to the impact on their financial outlook, it would undermine the goal of "ensur[ing] access to and the provision of high quality and cost-effective hospital care to [New Jersey] citizens." N.J.S.A. 26:2H-18.51a.

STATEMENT OF FACTS

For the sake of brevity, the Petitioner Hospitals generally rely upon the Statement of Facts included in their appellate briefs and Petition for Certification, and reiterate only the most pertinent facts here.

The Legislature enacted Public Law of 1992, Chapter 160 known as the Health Care Reform Act of 1992. Section 14 of the Act, codified as N.J.S.A. 26:2H-18.64 (the "Take All Comers Statute"), states:

> No 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.
>
> A hospital which violates this section shall be liable to a civil penalty of $10,000 for each violation.

To comply with the mandates of the Take All Comers Statute, without regard to the ability to pay for the services rendered, the Hospitals must provide any person seeking medical care access to their facilities, including their beds and treatment areas, thereby making them unavailable for other patients while they are being occupied. To provide the mandated care, the Hospitals must also provide these patients with the Hospitals' resources and personal property including, but not limited to, physician and staff services, medications, intravenous solutions, bandages, food, and medical devices such as surgical implants. While medical equipment such as beds or imaging machines can be re-used after a patient's occupancy is completed, medical devices such as orthopedic implants or abdominal

mesh cannot be re-used for another patient. The same is true of oral medications and intravenous solutions. [Pa458-459, 468.]

Charity care eligibility is based on multi-factor criteria which consider an applicant's assets, income and the availability of other insurance or medical assistance. N.J.S.A. 26:2H-18.60; N.J.A.C. 10:52-11.5 - 11.10. Persons qualifying for charity care are generally uninsured and indigent. Id. In 1995, the State promulgated administrative regulations that persons determined to be eligible for charity care "shall not receive a bill for services or be subject to collection procedures." N.J.A.C. 10:52-11.14. With no ability to seek payment from these patients, the only compensation for this mandatory care comes from an annual charity care subsidy, the amount of which is appropriated annually by the Legislature and distributed by the Department of Health. N.J.S.A. 26:2H-18.59; N.J.S.A. 26:2H-18.59e. The trial judge found that the record demonstrated that the charity care subsidy and reimbursement amounts that the Hospitals received from the State failed to cover the costs incurred by the Hospitals to provide medical services and that the defendants "do not dispute" the expert's findings and conclusions in this regard. [Pa131.] As detailed in this expert report [Pa588-642], the failure to even cover the basic cost of the care has occurred regularly in the years at issue despite statutory direction that the Governor and Legislature allocate sufficient funds to carry of the purposes of the charity care statute. See N.J.S.A. 26:2H-18.58d.

LEGAL ARGUMENT

POINT I

THE UNDISPUTED FACTUAL RECORD ESTABLISHES THAT THERE HAS UNDOUBTABLY BEEN A PER SE PHYSICAL TAKING OF HOSPITAL PROPERTY THROUGH THE MANDATES OF THE TAKE ALL COMERS STATUTE.

The Take All Comers Statute provides 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. While the Take All Comers Statute is written in the negative that "no hospital shall deny any admission or appropriate service," this Court has construed the statute as imposing an affirmative duty to provide care, stating "[e]very acute care hospital is ***required to provide care*** to anyone who seeks care without regard to ability to pay." Kuchera v. Jersey Shore Fam. Health Ctr., 221 N.J. 239, 254 (2015) (Emphasis supplied). Thus, the State of New Jersey has mandated that New Jersey hospitals provide care to all patients, including charity care patients.

In order to comply with this statutory mandate, the Hospitals must provide charity care patients access to their facilities and provide these patients with the Hospitals' resources including, but not limited to, physician and staff services and personal property such as medications, intravenous solutions, bandages, food, and medical devices such as surgical implants. The Petitioner Hospitals submitted a certification and expert report from Louis D'Amelio, MD, FACS which details the

types of hospital property required to be used in connection with this statutorily mandated care, as well as a certification and expert report from Patricia Quinn of O'Conco Healthcare Consultants (the "O'Conco Report") setting forth the costs of such care and outlining the losses suffered by each of the Hospitals in providing same. [Pa452-647]. Significantly, as noted by the trial court, the State Defendants did "not dispute the expert's findings, methods, or credibility." [Pa139]. The inevitable conclusion from an appropriate analysis is that the Take All Comers Statute results in a physical appropriation of hospital property for the public purpose of providing hospital care to the State's citizens, without just compensation.

Despite requiring the Hospitals to use their real and personal property for the treatment of charity care patients, the State has prohibited the Hospitals from seeking payment for that mandated treatment from any patient that has been deemed eligible for charity care. N.J.A.C. 10:52-11.14. However, despite statutory direction to allocate sufficient funds to carry out the purposes of the charity care statute, see N.J.S.A. 26:2H-18.58d, as demonstrated by the O'Conco Report, the State has repeatedly failed to do so. [Pa601-642].

Thus, the unrefuted facts establish that the State Defendants have mandated that the Hospitals provide charity care patients with access to their real property and use their personal property for the public purpose of providing care to the State's charity care patient population, while failing to provide just compensation for the

property taken from the Hospitals. This is precisely the type of governmental action prohibited by the Fifth Amendment to the United States Constitution which provides "nor shall private property be taken for public use, without just compensation."

It is axiomatic that "[t]he 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). Where a physical taking is found, a *per se* taking has occurred and the only remaining analysis is whether just compensation has been paid for the property taken. Here, private property is physically taken from the Hospitals for use by charity care patients. However, just compensation has not been paid.

While physical occupation or appropriations of property have always been considered *per se* takings, the United States Supreme Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), attempted to expand the circumstances constituting a taking to include regulatory action which did not physically appropriate property, but rather restricted the use of the property in a manner that

"went too far." Id. at 415. Subsequently, in Penn Central Transp. Corp. v. New York City, 438 U.S. 104 (1978), in the context of regulatory use restrictions, courts were directed to perform an essentially ad hoc analysis weighing several factors including: (1) the character of the government action; (2) the economic impact of the regulation; and (3) its interference with investment-backed expectations. Id. at 124. Even though a governmental action arises from a regulation, the Penn Central test "has no place" in the consideration of a physical appropriation of property. Cedar Point Nursery v. Hassid, 594 U.S. 139, 149 (2021).

While the Penn Central decision was seemingly an attempt to clarify the regulatory takings analysis, it has resulted in confusion in the lower federal courts on how and when it should be applied. When analyzing regulatory actions, numerous courts, without any analysis, have simply determined, *ipse dixit*, that no appropriation has occurred, and proceeded to assess claims under the ad hoc framework. See, e.g., Franklin Memorial Hospital v. Harvey, 575 F.3d 121, 126 (1st Cir. 2009). Because of the lack of brightline rules, there have been very few cases where the Penn Central factors have resulted in the finding of a taking. Indeed, due to the lack clarity in the application of the Penn Central factors, Justice Thomas recently described regulatory taking jurisprudence as "leav[ing] much to be desired" and suggested the Court should reexamine the issue. Bridge Aina Le'a, LLC v. Hawaii Land Use Commission, 141 S. Ct. 731 (2021) (Justice Thomas dissenting

from the denial of certiorari). Other jurists have gone further and described regulatory takings jurisprudence as being "a mess." Nekrilov v. City of Jersey City. 45 F.4th 662, 681 (3d Cir. 2022) (J. Bibas concurring).

As a result, over the last several decades, the United States Supreme Court has slowly but steadily reaffirmed the Constitution's respect for individual property owners' rights with a reinvigoration of the *per se* takings doctrine. During that time, the Court has moved beyond the necessity of there being a permanent occupation of an owner's land to constitute a taking as recognized in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and has acknowledged that a taking can occur even from intermittent, i.e., temporary, flooding of private property, see Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23 (2012), as well as from recurring transitory occupancy of private property pursuant to a permanent governmental authorization to enter. See Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987). The Court has also held that once government takes property, the property owners have the right to assert a Section 1983 claim in federal court without first exhausting administrative remedies, see Knick v. Township of Scott, 588 U.S. 180 (2019), and that the government's retention of surplus funds from a foreclosure sale can constitute an unconstitutional taking of property. See Tyler v. Hennepin County, 598 U.S. 631 (2023). The Court has emphasized that in analyzing a taking claim, courts should be concerned with the substance of an encounter with the

government rather than form over substance. In this regard, it matters not which government actor causes a taking, or the method by which the property was taken. Rather, the Takings Clause is "concerned simply with the act, and not with the government actor." Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702, 713-714 (2010); see also Koontz v. St Johns River Water Management District, 570 U.S. 595 (2013); Sheetz v. County of El Dorado, 601 U.S. 267 (2024). This case should likewise be analyzed through the lens of the Court's recent decisions reaffirming property owners' rights.

The most relevant of these recent Supreme Court decisions for the purposes of this appeal are Horne v. Department of Agriculture, 576 U.S. 351 (2015), and Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021). The plaintiff raisin growers in Horne were compelled by a Department of Agriculture regulation 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. In doing so, it flatly rejected the government's assertion that the Hornes voluntarily chose to participate in the raisin market and could avoid the reserve requirement by "planting different crops" or "sell[ing] their raisin-variety grapes as table grapes or for use in juice or wine." Id. at 365. With a classic pithy comment, Chief Justice Roberts admonished the Government that "'Let them sell wine' is

probably not much more comforting to the raisin grower than similar retorts have been to others throughout history," declaring, "the Government is wrong as a matter of law." Id.

In requiring that no patient be denied admission or appropriate care, the Take All Comers Statute effectively requires every licensed New Jersey hospital to set aside, keep, or otherwise reserve space, supplies, and professional services for use by charity care patients. The Charity Care Program effectively requisitions an unlimited amount of hospital space, supplies, and services for an unlimited duration of time, for use by a potentially unlimited number of patients, as medically necessary. Unlike the Governor's executive orders during the pandemic that closed and restricted businesses from operating, the Take All Comers Statute does not restrict the use of the Hospitals' property; it mandates the use of that property for the benefit of third-parties. 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.") In contrast, a requirement that private owners "reserve" or set aside portions of their personal property for use by the government, or at its

direction, is a "clear physical taking." 576 U.S. at 361. The Horne holding is directly applicable to circumstances of this matter.

Both the Appellate Division and the State improperly attempt to distinguish Horne on the sophistic basis that there is no transfer of title to the Hospitals' property to the government or a third party. This position ignores the circumstances of other *per se* physical taking rulings that hide in plain sight. 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. 458 U.S. 419 (1982). Highlighting this misconception, the Supreme Court clarified in Cedar Point that "[t]he government commits a physical taking when it . . . physically takes possession of property ***without acquiring title to it***." 594 U.S. at 147 (internal citations omitted) (emphasis added). Indeed, the Horne Court likewise made clear a transfer of title is not required for a taking to be found when it stated "[t]he Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking as clearly 'as if the Government held full title and ownership'" 576 U.S. at 362, quoting, Loretto, supra, 458 U.S. at 431. There can be no dispute that a charity care patient who has ingested medication that had previously been in the Hospitals' inventory has taken "actual possession and control" of that medication. The same is true of the bandages, food, medical devices and all other

personal property the Hospitals are required to use in the statutorily compelled treatment of charity care patients. In short, the physical appropriation of this Hospital property is a *per se* taking regardless of who holds title.

While Horne sets the stage for the conclusion that the compelled use of the Hospitals' property for the mandated treatment of charity care patients constitutes an appropriation of the Hospitals' property, Cedar Point hammers the point home with an analysis that inevitably leads to the conclusion that the mandatory admission of those patients to the Hospitals constitutes a physical occupation of Hospital property and a *per se* taking. This is because the Take All Comers Statute deprives the Hospitals of their right to exclude others from their property, a right which has been referred to as "one of the most treasured strands in an owner's bundle of property rights." Loretto, supra, 458 U.S. at 435.

In Cedar Point, the Supreme Court held a regulation granting labor union organizers a three-hour right of access to an agricultural employer's property for a period of 120 days per 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 thereby distinguishing its earlier precedent in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) which had rejected a shopping mall owner's argument that there was a taking of its

"right to exclude" leafleteers at its shopping center. The Appellate Division here concluded that the Hospitals were more like the shopping center in Pruneyard, which was open to the public, than the farms involved 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.]

However, this analogy misses the mark. Pruneyard attempted to provide a balance between competing First and Fifth Amendment rights - - the leafleteers' right to protest war in the "common" spaces of the shopping mall with the shopping mall owner's right to exclude them from the mall altogether. Prunyard is grounded in the perception that locations such as shopping malls have evolved to be the functional equivalent of the traditional public squares often found in downtown business centers. 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 for use of "the vast open spaces, the benches, the park-like setting." Id. at 359. That invitation does not extend to the interior of the abutting stores located within the shopping center. This nuance is emphasized in the concurring opinion of Justice White in Pruneyard clarifying 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 likewise supports this view: "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.

The Hospitals here are more akin to the individual retail establishments within the shopping center, which were not included in the Pruneyard Court's "open to the public" analysis. Indeed, in Allred v. Harris, 14 Cal. App. 4th 1386 (1993), the California 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.

Here, Prunyard is inapposite for two reasons. First, the requirement that the Hospitals provide charity care patients with access to their facilities is not based on the concept of free expression and First Amendment rights. Therefore, there is no balancing of fundamental constitutional rights that needs to be made. Second, and more to the point, the private Hospitals are not equivalent to a public forum. Individuals entering a hospital do not have unfettered access to all areas of the hospital. Patients are only granted access to treatment areas if admitted by a physician who has medical staff privileges at the hospital and only after the patient

is properly registered at the admissions department. Moreover, the public's access to hospital space is extremely limited and does not extend beyond the hospital reception desk unless a person is there to visit a patient. Indeed, although a person is a business invitee while visiting a patient in a hospital, they can exceed the scope of the invitation by going into inappropriate areas and may then even become a trespasser. See Williams v. Morristown Mem. Hosp., 59 N.J. Super. 384, 392-93 (App. Div. 1960). The conclusion that all areas of a hospital are open to the public is simply not supported by the record, the law, or common sense.

The mandate of the Take All Comers Statute to provide admission and appropriate services to all patients, is not limited to public areas of the Hospitals such as the lobby or gift shop. To the contrary, by its plain language, the statute requires the Hospitals to admit such individuals to their patient and treatment rooms - - areas that are reserved only for patients and staff, and an occasional visitor. Further, by requiring Hospitals to provide "appropriate services," the statute mandates that Hospitals provide access to all areas of their facilities where such "appropriate services" would be provided, including diagnostic facilities and surgical operating rooms. These areas are undoubtably closed to the public and visitors, unless specifically authorized by the hospital.

The trial court and Appellate Division conveniently ignore the limitations of the "open to the public" concept. In this regard, the Supreme Court has observed that

property does not lose "its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there." Lloyd Corp. v. Tanner, 461 U.S. 551, 569 (1972). "[A] property does not become a 'public forum' simply because members of the public are permitted to come and go at will." United States v. Grace, 461 U.S. 171, 177 (1983).

The Appellate Division's reliance on Prunyard pushes the limits of permissible government appropriation to an absurd and dangerous degree. In so doing, the Court relies on the false premise that "the public's presence in a hospital is a natural element of its business." [Op. at 20]. While the Hospitals do not dispute that members of the public can and do receive services at their facilities, if medically appropriate, but that fact alone does not preclude a finding that a taking has occurred. To rule otherwise would result in an unfettered license for the government to take private property from ***any*** business providing goods and services to ***any*** members of the public. Like the Hospitals here, restaurants, hotels, department stores, car dealerships, fitness centers, and like businesses all rely on the public's presence in their facilities to support their business. However, no one would suggest that a restaurant could be compelled to provide food and beverage to members of the public without compensation, or a hotel could be compelled to provide lodging without

payment. Yet that is precisely what the Take All Comers Statute does here. Hospitals, like all these other businesses, permit members of the public access to their facilities, but only for the limited purposes of purchasing the goods or services provided by the business. Hospitals are no different than restaurants or hotels. However, unlike restaurants and hotels, the Take All Comers Statute mandates that hospitals provide access to their facilities and medical services by individuals who have not paid and will not pay for the services they receive. The facts here fall squarely within the two broad categories of *per se* takings – appropriations and occupations of private property.[1]

The Hospitals' entitlement to relief here is underscored by two recent lower federal court decisions which found *per se* takings applying the Supreme Court's guidance in Horne and Cedar Point.

The first case is Teva Pharmaceuticals v. Weiser, 709 F.Supp.3d 1366 (D. Colo. 2023), appeal pending, where the court evaluated the constitutionality of the Colorado Epinephrine Affordability Act in advance of its effective date of January 1, 2024. Epinephrine is an effective counter-measure to allergy-induced anaphylactic shock, which can result in death. The plaintiff, a manufacturer of a

[1] Because the Appellate Division indicated "Charity care restricts how hospitals use their property to provide medical services, not whether they do so," [Op. at 20.] it is necessary to point out that the only way to comply with the mandates of the statute is for hospitals to admit all patients seeking treatment, and then use their personal property to provide care to those individuals as medically necessary. It would be disingenuous to characterize these directives as a "limitation on the use" of hospital property. It is a physical taking of hospital property.

generic equivalent to an autoinjector device commonly known as an EpiPen, sought an injunction preventing the law from going into effect. Under the Colorado law, pharmacists may substitute generic alternatives for brand name products. The generic is typically less expensive than the brand name version. To address the rising cost of autoinjectors, the Colorado legislature enacted an affordability program to improve access to autoinjector devices. The law established a fixed price of $60 for qualified consumers who were uninsured and limited the charge to insured consumers to a co-pay of $60 with insurance paying the balance. When a pharmacist dispensed an autoinjector to an uninsured consumer, it would receive only $60 for a product when it likely paid more than five times that amount for the device. To offset this loss, the law provided that a pharmacist or pharmacy could submit a form to the manufacturer of the autoinjector. The manufacturer then had a choice between: (1) reimbursing the pharmacy in an amount that the pharmacy paid for the number of auto-injectors dispensed through the program; or (2) sending the pharmacy a replacement supply of autoinjectors in an amount equal to the number of epinephrine autoinjectors it had dispensed. Failure to comply with this "reimburse-or-resupply" requirement would result in a $10,000 fine. Id. at 1370-71.

The plaintiff generic pharmaceutical manufacturer alleged that the Affordability Program requiring it to provide autoinjectors to pharmacies at no cost was a Fifth Amendment taking of private property without just compensation and

sought a preliminary injunction to prevent the law from going into effect. The District Court denied the preliminary injunction. But it also denied defendants' motion to dismiss for failure to state a claim. Id. at 1370. The court engaged in a pertinent takings analysis.

Citing Cedar Point, the District Court began with the observation that "'[a] physical taking of property under the Fifth Amendment occurs if 'government has physically taken property for itself or someone else—by whatever means .... Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred.'" Id. at 1376. It rejected the State's contention that because it was exercising its police power regarding public health and safety no taking could occur from the "reimburse-or-resupply" requirement. The State relied on cases where there was damage or loss of property in a private home by law enforcement while in pursuit of a criminal fugitive barricaded inside. The court stated:

> That is not the effect of the affordability program's reimburse or resupply requirement. The State in this case does not damage, destroy or devalue Teva's property. It requires that possession of property be transferred from its owner to another. That is all that is required to trigger the Taking Clause. Cedar Point Nursery, 141 S.Ct. at 2072 ("The essential question 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."); Horne v. Dep't of Ag., 576 U.S. 350, 360 (2015) (affirming "the rule that a physical appropriation of property gave rise to a per se taking, without regard to other factors"). ***The affordability program would enact a taking of Teva's autoinjectors, and the Fifth Amendment renders that taking unconstitutional unless just compensation is provided***. [Id. at 1377 (emphasis added).]

The opinion rejected the applicability of Eleventh Amendment immunity to the claim against state officials as only germane to monetary damage claims. (This is an issue of concern only in federal litigation.) The opinion also has an extended analysis of whether prospective injunctive relief against enforcement of the statute was appropriate. It concluded that it might be, but at that point in the litigation the plaintiff was only seeking a preliminary injunction. The court did not accept the argument that the prospect of multiple lawsuits for compensation provided a ground for preliminary injunctive relief. The Colorado district judge did not feel bound by the Eighth Circuit decision in Pharmaceutical Research and Manufacturers of America v. Williams, 64 F.4th 932 (8th Cir. 2023) ("PhRMA"), which reversed the lower court's denial of a permanent injunction concluding that injunctive relief was appropriate because repetitive suits for damages were not practical. The defendants in the Colorado autoinjector case filed a notice of appeal on January 26, 2024 from denial of the dismissal based on Eleventh Amendment immunity. The case has been briefed and was argued before the Tenth Circuit Court of Appeals on November 19, 2024. The limited scope of the appeal was emphasized in the Plaintiff-Appellee's brief:

> The district court has already determined that the affordability program will take Teva's auto-injectors without compensation, in violation of the Takings Clause. That holding is not, however, the subject of this appeal. The only question before this Court is whether the district court properly denied the State Officials' motion to dismiss Teva's suit on

the ground that the State Officials are immune from suit under the Eleventh Amendment.

The Colorado district judge stated that the Minnesota law in the PhRMA case was "very much like Colorado's Affordability Program." 709 F.Supp.3d at 1379.

The sequence of decisions in PhRMA are quite germane to the current matter.

The Minnesota law at issue in PhRMA required pharmacies to dispense insulin to qualifying individuals, while charging no more than a $35 co-pay. 64 F.4th at 938. The pharmacies could then demand that the manufacturer of the insulin either "reimburse the pharmacy in an amount that covers the pharmacy's acquisition cost" or "send to the pharmacy a replacement supply of the same insulin as dispensed in the amount dispensed." A trade group of pharmaceutical companies sought to have the Minnesota statute enjoined and declared an unconstitutional taking. The district court dismissed the case on the grounds of standing. The Eighth Circuit reversed, with a remand to the district court. In its opinion it stated that "this case involves an allegation of ***a physical, per se taking***." Id. at 948 (emphasis added). But in a footnote to its mandate remanding the case for further proceedings, it stated: "We decline PhRMA's invitation to decide the merits of their claim." Id. at 950 n.14.

There have, however, been further developments in the PhRMA case on the merits of the claim. After the remand, the defendants answered including affirmative defenses that the challenged law was not a taking because it abated a public nuisance and because it imposed a reasonable burden on manufacturers in exchange for a

Minnesota license to manufacture drugs, and also arguing that the statute properly balanced the economic benefits and burdens of its public purpose. Pharmaceutical Research and Manufacturers of America v. Williams, 715 F.Supp.3d 1175 (D. Minn. 2024). In an opinion addressing the scope of permitted discovery, the Magistrate Judge ruled that the defendants' request for expansive discovery would be rejected "[b]ecause the affirmative defenses they assert are legally inapplicable." Id. at 1180. The Magistrate then proceeded to strike these affirmative defenses. Id. at 1191-92. On appeal from the Magistrate's ruling, the District Court affirmed. Pharmaceutical Research and Manufacturers of America v. Williams, 728 F.Supp.3d 986 (D. Minn. 2024).

As background for his analysis leading to the striking of the affirmative defenses, the Magistrate Judge set out basic principles of takings law. Quoting Cedar Point, he stated: "'When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner with just compensation.' ... Such physical takings are subject to a *per se* rule: 'The government must pay for what it takes.'" 715 F.Supp.3d at 1187. The first prong a plaintiff must establish in making a takings claim is "a valid interest in the property." Id. He commented further that there was no valid interest in property when its use violated pre-existing limitations on ownership. Governmental action simply enforcing a pre-existing limitation on that property was not a taking because the

owner had no legal right to use the property in a way that was prohibited in the first place. This was the underlying principle permitting government to abate a nuisance without effecting a taking. The defendants contended that their actions were merely the abatement of a nuisance and the imposition of a reasonable burden in exchange for receiving the benefit of a license. PhRMA contended that abatement and license defenses were legally inapplicable because they only applied to regulatory takings. The Magistrate Judge wrote: "No court has found a license or nuisance defense to excuse a *per se* physical taking, and it remains an open question whether these defenses even apply in *per se* physical takings cases." Id. The court did not need to determine whether the nuisance or license exceptions might ever apply to a *per se* physical taking because the predicate for these defenses was absent in the circumstances of this case. Insulin was not a nuisance to be abated but rather was something that was of public benefit. To the extent that the government was alleging that "monopolistic pricing" of insulin created a public harm, the court found that the Act did not set any limit or regulate prices. It stated:

> [The Act] takes the manufacturers' property and gives it away free of charge to certain Minnesota residents. The nature of this practice not only illustrates the difference between a regulatory taking and a *per se* physical taking, it illuminates why no court has applied a nuisance exception in a *per se* physical takings case—the governmental action (at least in this case) is not an abatement. [Id. at 1189.]

Similarly here, the Court should find that the Charity Care Program takes the Hospitals' property and gives it away free of charge to certain New Jersey residents.

Accordingly, the Court should reverse the Appellate Division's decision, declare a *per se* taking of the Hospitals' property has occurred, and declare the Hospitals are entitled to the payment of just compensation in an amount no less than the difference between the cost of care and the charity care subsidy payments received by the Hospitals in each year in accordance with the O'Conco Report.

POINT II

THE APPELLATE DIVISION ERRED IN CONCLUDING THAT MEMBERS OF A REGULATED INDUSTRY CAN BE COMPELLED TO FORFEIT THEIR FIFTH AMENDMENT RIGHTS AS A CONDITION OF PARTICIPATION IN THE MARKET

The State has repeatedly contended that because the Hospitals agreed and committed to provide medical services to indigents and provide charity care in connection with their licensure as acute care hospitals, they have no takings claim. [Db-4.] The Appellate Division then erred in concluding that "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." [Op. at 25.] There are two fundamental defects in these positions.

First, the regulations cited by the State are to N.J.A.C. 8:33 which relate to certificates of need. Until the 1971 enactment of the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq., no hospital had needed a certificate of need. The purpose and scope of the regulations implementing the Act are directed at the "initiation, construction and/or expansion" of hospitals and other health care facilities. These regulations require information on how the applicant will meet the "needs of members of medically underserved groups" but does not require a commitment to provide any particular level of charity care, let alone the unlimited amount of care to an unlimited number of individuals encompassed by the Take All

Comers Statute. The other regulations cited by the State are the actual regulations pertaining to hospital licensing standards in N.J.A.C. 8:43G. These make no reference to charity care at all. Moreover, the Hospitals had been providing charity care and free medical services for years before the Take All Comers Statute and the no-billing regulation became effective. That practice of providing care to needy individuals observed by private non-profit hospitals, many of which trace their origins to religious or benevolent organizations, should not be equated with some form of consent to and voluntary participation in the charity care program that is derived from the Take All Comers Statute's requirement to provide medical care to any person seeking it.

Further, the line of cases in healthcare rejecting takings claims because of voluntary participation in a particular governmental program is not applicable here. See, e.g., Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare, 742 F.2d 442, 446 (8th Cir. 1984), cert. denied, 469 U.S. 1215 (1985) ("The state does not require that nursing homes admit medical assistance residents and participate in the Medicaid program. It is, of course, only through voluntary participation in the state's Medicaid program that a nursing home falls within the purview of [the statute]"); Whitney v. Heckler, 780 F.2d 963, 972, n.12 (11th Cir. 1986) (holding that because "appellants are not required to treat Medicare patients . . . the temporary freeze [of physician reimbursement rates for Medicare

beneficiaries] is therefore not a taking within the meaning of the Fifth Amendment," and "the fact that Medicare patients comprise a substantial percentage of their practices does not render their participation 'involuntary'"); Burditt v. U.S. Dep't. of Health & Human Services, 934 F.2d 1362, 1376 (5th Cir. 1991) (compliance with EMTALA obligations not a taking because "only hospitals that voluntarily participate in the federal government's Medicare program must comply with EMTALA"); Garelick v. Sullivan, 987 F.2d 913, 917-188 (2d Cir. 1993); (observing that "[a]ll court decisions of which we are aware that have considered takings challenges by physicians to Medicare price regulations have rejected them in the recognition that participation in Medicare is voluntary"); Franklin Mem'l Hosp. v. Harvey, 575 F.3d 121, 129 (1st Cir. 2009) ("Of course, where a property owner voluntarily participates in a regulated program, there can be no unconstitutional taking."); Baker Cnty. Med. Servs., Inc. v. U.S. Att'y Gen., 763 F.3d 1274, 1276 (11th Cir. 2014) ("a long line of cases instructs that no taking occurs where a person or entity voluntarily participates in a regulated program or activity"); Va. Hosp. & Healthcare Ass'n v. Roberts, 671 F. Supp. 3d 633, 666 (E.D. Va. 2023) ("[T]he federal government action giving rise to a Takings Clause claim must 'legally compel[ ]' an obligation affecting property for it 'to give rise to a taking.'") In contrast, the Take All Comers Statute does not involve voluntary participation in a program such as Medicare or Medicaid in which a hospital agrees to accept the rates

of the program and governing regulations. To the contrary, the Hospitals are subject to the mandates of the Take All Comers Statute regardless of whether they elect to participate in any governmental programs. It is their participation in the ***hospital industry*** which subjects the Hospitals to the statutory mandate. The Court cannot ignore the distinction between participation in a regulated program and participation in a regulated industry or the distinction between discontinuing participation in program that provides benefits to participants and discontinuing participation in the industry with its literally existential consequences.

In Horne, the Court rebuffed the argument that having voluntarily chosen to participate in the raisin market, the raisin grower could simply plant different crops by invoking the Marie Antoinette aphorism "let them eat cake" as a response to the lack of bread for the poor in France. 576 U.S. at 365. Declaring that "the Government is wrong as a matter of law," the Supreme Court emphasized its prior precedent rejecting this type of argument in Loretto that a landlord could avoid the requirement of allowing the installation and placement of cable TV equipment by ceasing to be a landlord. Id.; Accord, Hutton Park Gardens v. Town Council of Town of West Orange, 68 N.J. 543, 568 n. 9 (1975).

There is nothing voluntary about the Take All Comers Statute. It is a mandate, a directive, a command, an edict that involuntarily compels a hospital to treat any

patient without regard to their ability to pay or source of payment and turn over its property in order to comply.

This highlights the other deficiency in the Appellate Division's decision: the failure to recognize the applicability and impact of the unconstitutional conditions doctrine. As recognized in Cedar Point, a state law may impose limits on an owner's property rights as a condition for obtaining a license without that limitation amounting to a taking. 594 U.S. at 161. However, since at least 1926, the doctrine of unconstitutional conditions has protected against state laws that required companies to forego certain constitutional rights as a condition of obtaining permission to do business in the state. The doctrine enforces the primacy of the United States Constitution by holding that "the power of the state is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of [federal] constitutional rights." Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 594 (1926). The Supreme Court has characterized the unconstitutional conditions doctrine as "vindicat[ing] the Constitution's enumerated rights by preventing the government from coercing people into giving them up." Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013).

The Frost decision presents a somewhat analogous circumstance and is instructive for the disposition of this matter. The case involved a California statute that required a private company to have a permit to transport persons or property for

compensation over a public highway and in addition to the permit, the statute required that the applicant for a permit must obtain a certificate from the Railroad Commission that had the effect of turning a private company into a common carrier with the accompanying obligations of that status. The plaintiffs asserted that the statute was a taking of their property for public use without just compensation. 271 U.S. at 605. The Court construed the effect of the transportation act as offering the privilege of using the public highways to the private carrier for compensation upon condition that he shall dedicate his property to the quasi-public use of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers. Id. at 591. While the State had the power to prohibit the use of the public highways in proper cases, it did not have the power to compel a private carrier to assume against his will the duties and burdens of a common carrier. It remarked:

> If the state may compel the surrender of one constitutional right as a condition of its favor [to grant a license], it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. [Id. at 594.]

This Court cited Frost with approval in Kutcher v. Hous. Auth. of City of Newark, 20 N.J. 181, 188–89 (1955) and reiterated its core principle: "The State may not condition a privilege which it may deny altogether on a surrender of constitutional right."

In PhRMA, supra, 715 F. Supp. 3d 1175, the government attempted to rely on the condition of licensure defense. The government argued that abiding by the Act was simply a condition of maintaining a drug-manufacturing license in Minnesota. In rejecting the defense, the court noted that this was an effective defense when there were pre-existing limitations or restrictions on the use of the property before it was acquired by the owner; such things as zoning, restrictive covenants in a deed, or the prohibition on maintaining a nuisance on one's property. The court pointed out that the Act did not impose a burden consistent with pre-existing property limitations. Before the Act, the manufacturers used their license to sell insulin in Minnesota. But since the Act went into effect, manufacturers were now required to provide free insulin to maintain the same license, without receiving any additional benefit. There was no pre-existing limitation inherent in property ownership that required owners to forfeit their property at no cost to maintain a license to manufacture, distribute, or sell that very property. Id. at 1192. The court also commented that adherence to the Act was not a true condition of maintaining a Minnesota drug-manufacturer license because failing to comply with the Act did not revoke the manufacturer's license, it simply results in a fine. Id. On appeal, the District Court affirmed the Magistrate's ruling and overruled the objections. 728 F. Supp.3d at 991.

Here, while the Department of Health can arguably take action against a hospital's license, the consequence of failure to comply with the Take All Comers

Statute is not loss of a hospital's license, but simply a self-executing penalty of $10,000 per violation, which while not licensure revocation can become quite significant. Accordingly, the Defendants' "Condition of Licensure" defense is without merit and should be disregarded.

POINT III

THE HOSPITALS DO NOT PRESENT A FACIAL CHALLENGE SEEKING TO INVALIDATE THE CHARITY CARE SYSTEM AS A WHOLE, RATHER THEY SIMPLY SEEK JUST COMPENSATION FOR THE PROPERTY THAT HAS BEEN TAKEN FROM THEM THROUGH THE STATE'S APPLICATION OF THESE LAWS - COMPENSATION WHICH IS NOT PRECLUDED BY THE TERMS OF THE RELEVANT STATUTES AND REGULATIONS

The Appellate Division in its decision below mischaracterizes the Hospitals' claim as "challeng[ing] the Legislature's reimbursement system, including N.J.S.A. 26:2H-18.64, in its entirety." [Op. 15]. In coming to the conclusion that the Hospitals assert a facial constitutional attack on the charity care system as a whole, the Appellate Division states, without any citation to the record before it, that the "[t]he charity care subsidy reimburses no hospital in New Jersey at one hundred percent" and determines that the hospitals' "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. 15-17]. The Appellate Division not only misstates the Hospitals' claims, but also the law regarding facial versus as-applied challenges.

At no time have the Hospitals sought the invalidation of the charity care system as a whole, or even the Take All Comers Statute and corresponding regulation prohibiting billing of charity care patients. Rather, the Hospitals merely seek just compensation for the property taken from them through the Defendants' application

of the relevant statutes and regulations. Nothing in those statutes and regulations prohibits the Defendants from paying that just compensation to the Hospitals. Rather, the lack of just compensation arises from the Legislature's failure fulfill its constitutional obligation under the Fifth Amendment and its statutory duty to allocate funds "sufficient to carry out the purposes of" the charity care program. N.J.S.A. 26:2H-18.58d. The Legislature's repeated failure to fulfill its obligations, should not be used to impose a higher burden on the Hospitals to establish their claims.

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).

As discussed above the Take All Comers Statute undoubtedly results in the taking of private hospital property for the public purpose of providing hospital care to the citizens of New Jersey. However, the Fifth Amendment does not prohibit the government from taking private property for a public purpose, rather it prohibits

"private property [from] be[ing] taken for public use, ***without just compensation***." U.S. Constitution, Fifth Amendment (emphasis added). As neither the Take All Comers Statute, nor any other provision of the charity care laws, prohibit the payment of just compensation, the charity care laws are not facially invalid. Rather, it is the Legislature's failure to follow the statutory directive to allocate sufficient funds to carry out the purposes of the charity care laws which makes the State's actions unconstitutional as applied to the Hospitals. N.J.S.A. 26:2H-18.58d.

The Hospitals have presented evidence establishing the types of property taken from them through the mandates of the Take All Comers Statute. [Pa452-502]. They have also presented evidence of the cost of the property taken from them and compared it to the minimal subsidies provided to them through the charity care program. [Pa503-647]. This evidence, which has never been disputed by the Defendants, establishes that the Defendants have applied the charity care laws to the Petitioner Hospitals in the relevant years in a manner which has resulted in the Hospitals' private property being taken for the public purpose of providing hospital care to the citizens of the State, without the payment of just compensation.

Whether or not the State Defendants have also applied the charity care laws to other New Jersey hospitals in an unconstitutional manner, is not relevant to the analysis here. The Hospitals have presented sufficient evidence to establish an as-

applied taking of their specific property without just compensation in violation of the Fifth Amendment's takings clause.

CONCLUSION

For the foregoing reasons the Court should reverse the Appellate Division's decision, find there has been a *per se* taking of the Hospitals' property, and declare that the Hospitals are entitled to the payment of just compensation in an amount no less than the difference between the cost of care and the charity care subsidy payments received by the Hospitals in each year at issue in accordance with the O'Conco Report.

Respectfully submitted,

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