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RECEIVED
FEB 26 2025
SUPREME COURT
OF NEW JERSEY

ENGLEWOOD HOSPITAL & MEDICAL CENTER, HUDSON HOSPITAL OPCO, LLC d/b/a CHRIST HOSPITAL, IJKG OPCO, LLC d/b/a BAYONNE MEDICAL CENTER, HUMC OPCO, LLC d/b/a/ HOBOKEN UNIVERSITY MEDICAL CENTER, CAPITAL HEALTH REGIONAL MEDICAL CENTER, CAPITAL HEALTH MEDICAL CENTER – HOPEWELL, ST. FRANCIS MEDICAL CENTER; and PRIME HEALTHCARE SERVICES – ST. MARY'S PASSAIC, LLC d/b/a ST. MARY'S GENERAL HOSPITAL

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 REPLY 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.

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## PRELIMINARY STATEMENT

Contrary to Defendants' assertions, the Hospitals have shouldered the burden and served the public purpose of caring for the poor as mandated by the State. They do not seek to escape that State mandate or "turn away patients simply because they are poor." The question here is whether that mandate requires the State to pay those Hospitals just compensation for the goods and services they were compelled to provide, and whether the State's failure to do so violates the Constitution of the United States.[1]

Specifically, this case is premised on the legislatively guaranteed right to healthcare found in N.J.S.A. 26:2H-18.51 stating that it is of "paramount public interest for the State to take all necessary and appropriate actions to ensure access to and the provision of high quality and cost-effective hospital care to its citizens" and the long-standing constitutional principle prohibiting "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); Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546, 553 (1999).

The State of New Jersey, through its inappropriately labeled "charity care" program, imposes this burden on solely hospitals by compelling them to not only allow

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[1] As the New Jersey Constitution cannot be more restrictive, the question here is purely a federal one. If the Hospitals are entitled to just compensation under federal law as they claim, then New Jersey law must yield in that regard. However, the Hospitals contend New Jersey and its Constitution follow the federal law and similarly entitles them to just compensation.

indigent individuals access to the hospital facilities but also to utilize their own resources in terms of supplies, space, and services to provide this care without an ability to cover even the rudimentary costs of providing the care. This is aptly described as an appropriation, i.e., a taking of property for a public use without just compensation.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS

Plaintiffs-Petitioners incorporate the information regarding the procedural history and facts pertaining to this matter that appears in its prior briefs.

Following the Court's grant of certification on November 15, 2024, in accordance with the scheduling order Plaintiffs-Petitioners filed a supplemental brief on December 16, 2024. After obtaining an extension of time, Defendants-Respondents submitted their supplemental brief on February 14, 2025.

In light of new material in Defendants' supplemental brief, Plaintiffs-Petitioner have moved for leave to file this Reply Brief.

## LEGAL ARGUMENT

### 1. The New "Threshold Matter" Argument Has Multiple Flaws

As a threshold matter, Defendants advance for the first time that the Hospitals cannot assert a takings claim because they acquired their ownership interest after enactment of the charity care statute in 1992 with a supposed voluntary assumption of the restrictions set out in the statute. This contention is flawed for two reasons. The first flaw is that it relies on facts not in the record and the second flaw arises from the misplaced, misapplied and misstated reliance on outdated authority that is inapplicable

to the per se physical appropriation of property here.

Regarding the first flaw, Defendants rely on information that was not presented below and is not contained in the record before the Court. Presumably they expect that information to be the subject of judicial notice. The State asserts:

> Prime Healthcare Services–St. Mary's Passaic, LLC, d/b/a St. Mary's General Hospital was acquired in 2014. St. Francis Medical Center was purchased by Capital Health Systems **in 2022**. Hudson Hospital OPCO, LLC, d/b/a Christ Hospital; HUMC OPCO, LLC, d/b/a Hoboken University Medical Center; and IJKG OPCO, LLC, d/b/a Bayonne Medical Center were all purchased **in 2023**. And the physical hospital Capital Health Medical Center– Hopewell was not opened until 2011. [Dsb 15-16.]

However, the claimed "acquisition dates" refer to events of 2022 and 2023 that are after this litigation had been commenced in June 2017 and after the time for the claims for compensation which span the period of 2004 to 2017.

More importantly, the statement ignores the long history these hospitals have in New Jersey, having been organized and in operation during or shortly after the Civil War - - long before the statute was enacted, or anyone involved in this case was born.

The webpage of the New Jersey Hospital Association, which should be similarly subject to judicial notice, summarizes this information. https://www.njha.com/about-njha/njha-100-to-health/acute-care-founding-dates/

| Hospital Names | Founding Years | |
|---|---|---|
| CarePoint Health Hoboken University Medical | 1863 | |
| CarePoint Health Christ Hospital | 1872 | |

| | | |
|---|---|---|
| St. Francis Medical Center | 1874 | |
| Capital Health Regional Medical Center | 1887 | Founded as Trenton City Hospital, Trenton, N.J. in 1887; in 1902 name changed to William McKinley Memorial Hospital; in 1959 name changed to Helene Fuld Hospital; renamed Helene Fuld Medical Center in 1972 |
| CarePoint Health Bayonne Medical Center | 1888 | |
| Englewood Hospital and Medical Center | 1890 | |
| Capital Health Medical Center - Hopewell | 1895 | Founded as Mercer Hospital in Trenton. |
| St. Mary's General Hospital | 1895 | |

Furthermore, highlighting the adverse impact the free care mandate has had on patient care, the CarePoint Hospitals recently filed for Chapter 11 bankruptcy.[2] This demonstrates precisely the cumulative catastrophic financial effect that the systemic under-compensation by the State is having on plaintiff hospitals and that is undermining the Legislature's objective of access to quality health care by the underserved citizens of the State. https://jcitytimes.com/carepoint-health-files-for-bankruptcy-future-of-christ-hospital-unclear/

[2] This case is docketed as In re CarePoint Health Systems Inc. d/b/a Just Health Foundation et al., Case No. 24-12534 (JKS).

The second and more important flaw is that this new contention and the citations relied on to make it predate, ignore, and are undermined by the 2001 decision in Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001). There, the United States Supreme Court refused to establish the type of single, sweeping rule advanced now by the State that a purchaser or subsequent title holder is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effected a taking.

Indeed, the Palazzolo Court considered the impact of background principles of state property law but concluded: "Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." Id.

The State's position also ignores this dictum in Murr v. Wisconsin, 582 U.S. 383, 398 (2017): "A valid takings claim will not evaporate just because a purchaser took title after the law was enacted."

The State's position is also contrary to the New Jersey precedent of Rohaly v. State, 323 N.J. Super. 111 (App. Div. 1999). In this 1994 inverse condemnation case, the property owner sought compensation for a taking in the form of three

groundwater monitoring wells installed by the Department of Environmental Protection in 1987. The plaintiff acquired the property in 1988 "after the wells were already in place." The Appellate Division reversed the trial court's determination that there was no taking, stating:

> In a physical invasion case, the law is clear that the size of the invasion does not affect the owner's right to compensation. ... Further, **a "taking" that predates the ownership of land apparently is not an impediment to a subsequent owner's right to seek redress through an inverse condemnation action**. [Id. at 115-16 (emphasis added).]

In stating that a taking that predated ownership of land does not impede a subsequent owner's right to seek compensation, the Appellate Division cited Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), where the Supreme Court found that a taking had occurred notwithstanding that the Nollans purchased their home after a policy requiring public access to a beachfront went into effect.

Here too, any purported post-1992 acquisition of the Hospitals' licenses does not affect the Hospitals' right to claim an unconstitutional taking of their property.

### 2. Defendants Mischaracterize "Permanent" Occupations

In reversing the dismissal of the Rohaly's takings claim, the Appellate Division remanded the matter for further proceedings. From the meager record before it, the court could not "determine whether the DEP's activities constitute a 'permanent physical occupation' entitling plaintiff to compensation." 323 N.J. Super. at 117-18. The Appellate Division's reference to Nollan is instructive in

making this determination.

While Nollan is one of the four "pillar" decisions that the Hospitals relied on in their Petition for Certification and the briefing below, it is not addressed in the State's brief - - and directly refutes the State's assertion that the charity care program does not effect a per se taking because the statute "does not authorize a 'permanent physical occupation' of hospitals' property." (Dsb 17.) (The other three "pillar" decisions are Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), Horne v. Dept. of Agriculture, 576 U.S. 351 (2015), and Cedar Point Nursery v. Hassid, 141 S.Ct. 2062 (2021).)

In Nollan, the Court held that requiring public access to a beach as a condition for a permit to rebuild a beach home constituted a per se taking, stating a "permanent physical occupation" occurs:

> where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. [483 U.S. at 832.]

The State's assertion is further eviscerated by the more recent Supreme Court ruling in Cedar Point Nursery v. Hassid, 594 U.S. 139, 153 (2021), reiterating that its precedents "have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous."

The effect of N.J.S.A. 26:2H-18.64 is to compel the acquiescence in what is effectively an easement giving a continuous right permanently (until and unless

the statute is amended or repealed) for individuals to occupy the hospital space repeatedly even if no individual is permanently on the premises.

### 3. The New Argument - Background Principles of Property Law - This Concept Does Not Apply Here.

In opposing certification, the State had endorsed the ruling of the Appellate Division that charity care was something "'the Legislature has required [the Hospitals] to provide as a condition of doing business in our state.'" (Dlb of August 9, 2024 at 15.] In its Supplemental Brief, the State abandons that position asserting that "[t]he provision of charity care is not a condition of licensure." (Dsb 34.) Now it argues for the first time that the charity care statute is a "background principle" that eliminates the takings claim.

The enactment of N.J.S.A. 26:2H-18.64 in 1992 did not become part of the background principles of property law applicable to the hospitals. This concept does not apply to physical takings. It is used in connection with regulatory takings to assess reasonable investment expectations under Penn Central, which is not the principal focus here. (The Hospitals have not abandoned their regulatory takings challenge, but present that in the Petition as an alternative basis for a finding in their favor if the Court does not conclude there is a per se taking.)

The State contends that "an owner who purchases a hospital is charged with knowing that hospitals are heavily regulated public accommodations, with limitations on their ability to exclude others and **to charge whatever they like**."

(Dsb 2) (emphasis added). While hospitals may be heavily regulated, other than in connection with government health programs and the charity care program at issue here, there is, in fact, no restriction on hospitals charging whatever they like. It is a matter of negotiation and contract, whether express or implied. See DiCarlo v. St. Mary Hospital, 530 F.3d 255 (3d Cir. 2008). Injecting an ADA "public accommodation" factor into a straightforward per se appropriation of property test turns takings principles on their head and enables the State to abrogate ***its*** constitutional obligations. Indeed, neither the ADA, nor the Civil Rights Act list the indigent as a protected class, or require a property or business owner to provide their goods and services to any individual free of charge.

In Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992), Justice Scalia emphasized that to withstand taking scrutiny, confiscatory regulations "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." As the Court pointed out in Palazzolo: "A law does not become a background principle for subsequent owners by enactment itself." 533 U.S. at 630.

That the State of New Jersey has long heavily regulated hospitals is not in dispute but does not provide the appropriate analytical approach. The implication that with N.J.S.A. 26:2H-18.64 and N.J.A.C. 10:52-11.14, the State is acting in a manner consistent with its authority to abate a nuisance does not make sense. Such

a defense for actions taken to deal with a supposed "affordability crisis" was attempted and rejected in Pharmaceutical Research and Manufacturers of America v. Williams, 715 F.Supp.3d 1175, 1188 (D. Minn. 2024), aff'd, 728 F.Supp.3d 986 (D. Minn. 2024), concerning a Minnesota statute regarding free insulin.

Instead, the Williams court found that there was a physical taking as a result of the statute. In rejecting the nuisance defense, the court looked to the Lucas requirement that there be "background principles of nuisance and property law that prohibit the use." 715 F.Supp.3d at 1188. It stated: "[A]pplication of the nuisance abatement theory to a per se physical takings case is literally unprecedented." Id. However, regardless of precedent, it stated that "the Act itself makes clear that widespread availability of insulin is unqualifiedly a public benefit, not a nuisance." With regard to the statute's supposed objective of dealing with an "insulin affordability crisis," the court stated:

> [T]he Act does not purport to set a limit on (or otherwise regulate) the price manufacturers may charge Minnesota residents to abate the nuisance of unaffordability. Rather, it 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.]

The State does not address the takings found in Williams or the related Colorado case of Teva Pharmaceuticals v. Weiser, 709 F.Supp.3d 1366, 1377 (D. Colo. 2023), appeal pending. Instead, it manufactures a rationale that, as discussed

above, is wholly inapplicable in per se takings jurisprudence, and proposes adoption of a legal framework which has no support in the pertinent case law.

### 4. The New Argument Concerning Public Accommodations and Discrimination Is a Fallacy

The State's invocation of Heart of Atlanta, Inc. v. United States, 379 U.S. 241 (1964) and the law prohibiting discrimination, especially racial discrimination, in public accommodations has no applicability where healthcare was administered without regard to the patient's ability to pay. There was and is no discrimination, and the Hospitals are not seeking to permit any. They are seeking to remedy a different issue, the State's abrogation of its constitutional obligations to pay just compensation for the commandeering of goods, services and real property provided by the Hospitals in serving a State mandated public purpose of providing care to those unable to pay. The analogy that an attorney's pro bono obligation does not constitute a taking is not a universally accepted proposition. See, e.g., DeLisio v. Alaska Superior Ct., 740 P.2d 437, 442 (Alaska 1987); Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991); cf. Williamson v. Vardeman, 674 F.2d 1211, 1216 (8th Cir. 1982) (requiring attorney to advance funds for investigatory services, deposition fees, etc. is a taking).

Neither the common law pertaining to innkeepers nor the factual context of Heart of Atlanta provides a basis for imposing an obligation on the Hospitals to provide medical care for free – which is the consequence of the combined

impact of N.J.S.A. 26:2H-18.64 and N.J.A.C. 10:52-11.14.

To illustrate further, even though the Civil Rights Act required the owner of the Heart of Atlanta motel to allow access to a room, the owner retained the right to be paid for the occupancy of the motel room. This obligation of innkeepers at common law to accept anyone who presented for food or shelter was conditioned on payment for these services.

Even in Uston v. Resorts Int'l Hotel, 89 N.J. 163 (1982), although a customer may have had a right of access to the casino, nothing in the opinion entitled him to free drinks (unless gambling at the blackjack table after paying for chips) or to be given the quarters to put into a slot machine.

This point is also made in the law review article cited in the State's brief for the proposition that hospitals are within a class of quasi-public corporations and non-profit organizations. (Dsb 20). In that article, the Harvard Law professor author refers to the commentaries of Justice Joseph Story published in 1832 and includes the following quotations supportive to the Hospitals' argument:

> "An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, **for a reasonable compensation**. ... The common carrier's duty 'to carry passengers **whenever they offer themselves and are ready to pay for their transportation** . . . results from their setting themselves up, like innkeepers, farriers, and other carriers, for common public employment.'" J.W. Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1312-13 (1996) (emphasis added).

A meaningful analogy can be found in the requirements of the Federal Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, which requires a hospital to provide care for an emergency condition without regard to the individual's ability to pay. But while a hospital is required to provide care, it is not precluded from seeking reimbursement.

The Supreme Court of Utah made this observation in Emergency Physicians Integrated Care v. Salt Lake Cnty., 167 P.3d 1080, 1086 (Utah 2007): "EMTALA requires hospital emergency departments to treat individuals who have emergency medical conditions without regard for their ability to pay. ... But it does not prohibit medical providers from recovering payment from emergency patients or their guardians after service has been provided."

The characterization of a hospital as a public accommodation because it opens itself to the general public is irrelevant and inconsequential to entitlement to the relief sought here. That is because there is no discrimination in providing care. On the contrary, care was provided for all. It is the matter of the State's obligation to pay for uncompensated care provided by the Hospitals to serve that non-discriminatory public purpose that is the issue. Therefore, the State's discrimination argument lacks merit.

Moreover, Hospitals have both non-public private spaces and public areas. In a different context, the New Jersey Hospital Association has provided

guidelines making this distinction.

> Non-public areas include treatment rooms, inpatient units, offices, etc. This is essentially any area not open to the public. Hospitals or healthcare facilities should distinguish between public and private spaces by creating policies and/or adding signage on or near entrances to private areas. Private areas may be areas designated for employees, patient treatment, individuals with appointments, etc. [www.njhaimmigrationenforcementguidancewithattachments01292025.pdf.][3]

Some further guidance may be drawn from Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12182, prohibiting discrimination by public accommodation. In Langer v. Kiser, 57 F.4th 1085 (9th Cir. 2023), cert. denied, 144 S. Ct. 823 (2024), reh'g denied, 144 S. Ct. 1132 (2024), the court addressed an apparent case of first impression. The court recognized that there could be facilities within a place of public accommodation that are closed to the public and do not need to comply with Title III of the ADA. 57 F.4th at 1102. It held that the delineation of the bounds of when a facility is, in fact, open or closed to the public, was to be made upon the actual usage of the facility in question to determine whether it is "in fact" open to the public. It supported the limitation on the scope of the public accommodations requirements of Title III of the ADA by

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[3] Pursuant to N.J.R.E. 201(b)(1) and N.J.R.E. 202(b), the Court can take judicial notice as facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute that the quoted passage from the New Jersey Hospital Association guidelines accurately describe the actual use of spaces in a hospital facility.

looking to Title II of the Civil Rights Act which exempts private establishments "'not **in fact** open to the public.'" Id. (quoting 42 U.S.C. § 2000a(e) (emphasis by the court)).

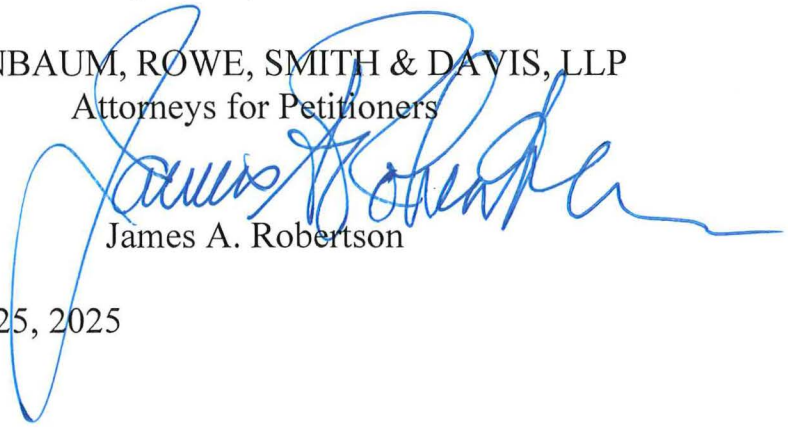
In the final analysis, ***it is the State and not the Hospitals*** that is failing in its obligation to treat all persons equally in accordance with the statutory objective of ensuring access to quality care. Plaintiffs historically and consistently provided care for all people and followed the law to do so regardless of the ability to pay. What this case is about is that it is time for the State to stop commandeering hospital property to satisfy ***its obligation*** to provide care equally for members of the public regardless of their ability to pay.

## CONCLUSION

For the foregoing reasons, Petitioner Hospitals request that this Court find that a taking of private property has occurred and remand this matter for a determination of appropriate just compensation.

Respectfully submitted,

GREENBAUM, ROWE, SMITH & DAVIS, LLP
Attorneys for Petitioners



James A. Robertson

Dated: February 25, 2025