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Plaintiffs-Petitioners,

v.

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

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089696

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

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION

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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1. **Certification Is Appropriate Because The Substantial Constitutional Question Of Whether, In Light Of The United States Supreme Court's Recent Decisions in *Horne* and *Cedar Point*, The State Can Impose A Regulatory Scheme Which Requires A Property Owner To Provide Access To Their Real Property By, And Transfer Of Their Personal Property To, Third-Parties, While Simultaneously Prohibiting The Property Owner From Seeking Compensation For the Property Taken, Has Never Been Addressed By This Court.**

Defendants argue that the Appellate Division decision "applied settled legal principles and thus does not merit this Court's review" and that "there is no dispute that the stringent legal rules governing per se takings are well-established in precedents." [Db 7-8] However, this argument ignores the recent effort by the United States Supreme Court to clarify when a *per se* rather than a regulatory taking has occurred. Those cases definitively establish that whenever private property is appropriated or occupied at the direction of the government, a *per se* taking has occurred regardless of what form the governmental mandate takes, be it a statute, regulation, or any other official action.

This is the lesson in *Horne v. Department of Agriculture*, 576 *U.S.* 350 (2015) and *Cedar Point Nursery v. Hassid*, 594 *U.S.* 139 (2021) which, as decisions of our nation's highest court, no doubt qualify as "well-established" precedents. However, there is scant guidance by New Jersey State courts as to how these well-established federal constitutional principles are to be applied in this State, particularly in a regulated industry such as healthcare. Indeed, this Court has not cited either case. Moreover, the Appellate Division has only cited *Horne* in the decision under review

here and in one other unpublished decision, *see In the Matter of Englewood Medical Center's SFY 2014 Charity Care Subsidy Appeal*, 2016 WL 2962692 (App. Div. May 20, 2016), a precursor to this present case. Similarly, with the exception of this case, *Cedar Point* has only been cited by the Appellate Division in three unpublished decisions, *Rockleigh Country Club, LLC v. Hartford Insurance Group*, 2023 WL 2335707 (App. Div. Mar. 03, 2023), *certif. denied*, 256 *N.J.* 79 (2023); *Solvay Specialty Polymers USA, LLC v. Paulsboro Refining Co., LLC*, 2022 WL 4392064 (App. Div. Sep. 23, 2022); *Matter of Revocation of Permit for Direct Access to Route 206 for Block 2501, Lot 39, Hampton Township, Sussex County*, 2022 WL 2438289 (App. Div. July 5, 2022), *certif. denied*, 254 *N.J.* 74 (2023),[1] none of which provide any significant analysis. Accordingly, this Court's intervention is needed to provide clarity on the application of the *Horne* and *Cedar Point* doctrines.

While judicial doctrine governing *per se* takings is by no means new, the United States Supreme Court's recent admonition to lower courts, as to the proper application of the *per se* taking test in the context of regulatory action, is. *See, e.g.*, Frederic Gilles Sourgens, *Bundles of Freedom*, 76 Rutgers U.L. Rev. 393, 447 (2024)("paradigm shift"); Kathleen A. Brennan, *Cedar Point Nursery: Taking an Unprecedented Approach to the Right to Exclude*, 65 B.C. L. Rev. 1029, 1064 (2024).

[1] Pursuant to R. 1:36-3 copies of each of these unpublished decisions are attached hereto.

The resolution of the application of the *per se* test in this State is thus of great public interest. Moreover, in the context of this case, the Court can address and clarify who is responsible for ensuring the State's indigent population receives appropriate medical care, and just as importantly, whether the State can shift that obligation solely to the hospital industry without providing just compensation. The Hospitals contend that *Horne* and *Cedar Point* do not allow it. Further, the resolution of these questions is not just important to the indigent population, the Hospitals, and the State, but also to the general public who may ultimately bear the burden of that cost through their taxes or increased charges for the services provided to them in an already expensive healthcare system.

2. The Court Should Grant Certification To Clarify The Impact Of *Cedar Point* And *Horne* Which Clearly Support A Finding That The Mandates Of The Take All Comers Statute Result In A *Per Se* Taking Of Hospital Property.

Of equal importance is whether a government requirement that private property owners permit access to their property for the benefit of a third party, thereby losing their ability to exclude others from their property, is a "restriction on use" or rather, an acquisition or appropriation of their property? *Cedar Point* held that regulations requiring access to private property by third parties is an appropriation of a right of access and a *per se* taking. 594 *U.S.* at 152. *Cedar Point* further explains that it is a *per se* taking regardless of whether the requirement comes in the form of a regulation, statute, ordinance, or miscellaneous decree. *Id.* at 149.

"Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Id.*

Here, it is undisputed that the Take All Comers Statute requires hospitals to permit members of the public to enter and occupy the space and facilities of the hospital and obtain the hospitals' property interests in its medical services and supplies without paying anything for the goods and services they receive. Because there is no limit in the Take All Comers Statute on the number of people who must be treated and how much medical care must be provided through the Charity Care Program, the fact that a hospital retains the ability to use remaining property and resources to provide services to other people does not minimize the infringement on the hospital's right to exclude, which the Supreme Court has described as "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 *U.S.* 419, 435 (1982). Indeed, when the government authorizes a physical occupation of another's property it "does not simply take a single strand of the bundle of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

While the State acknowledges that under the charity care statute "no member of the public could simply walk into a sterile operating room without permission" [Db10], it does not address the fact that under the charity care statute a member of the public has an expectation and a right to receive that operation if it is "appropriate

care" for their condition. While the physicians at the hospital may determine what care is given, that decision is not made in a vacuum but is subject to the statutory requirement that it be "appropriate care" consistent with the common law requirement that it comply with the standard of care; otherwise liability for damages can result. That "the public's presence in the hospital is a natural element of its business" [Op at 20] does not justify disregarding the Fifth Amendment's protection against the taking of private property for a public purpose without just compensation. In the setting of a farmstand which relies on the public's presence in having food to eat, would a requirement that members of the public may simply take the food without paying for it be permitted to override recognition of the farmer's investment and labor in growing the food in order to sell it to others? Or in the setting of a hotel that exists to have people occupy its beds and rooms, would the court sustain a government requirement that the hotel simply give the shelter away to the public? Few would argue such requirements meet the standards of the Fifth Amendment, without also requiring just compensation. Hospital care is no different.

Moreover, the State attempts to bolster the Appellate Division's rationale for rejecting the applicability of *Horne* by misstating, or at the very least misapprehending, the Hospitals' argument as "the central issue in *Horne* – the transfer of tangible physical property—is 'a tangential fact.'" [Db at 11] The mandatory transfer of tangible physical property was the very essence of the issue

in *Horne*. It was the "transfer of title" aspect of that case that presented the tangential fact that was inappropriately seized upon by the Appellate Division in an effort to distinguish and avoid the *Horne* ruling. Transfer of title is not the determinative aspect in any of the *per se* physical taking cases. That was made clear by *Horne* where the Court 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.

Finally, the contention that "the Hospitals maintain their right to 'possess, donate, and devise their property'" [Db at 12] after a medication has been ingested by a patient or a hip prosthesis has been implanted in a patient's body is an absurdity. Once such items have been transferred to a charity care patient, they are forever lost to their previous owner, the hospital, and have no further value.

3. The Court Should Grant Certification To Correct The Appellate Division's Errors In Applying The *Penn Central* Factors.

The State conveniently ignores the Appellate Division's conclusion that the Hospitals satisfied the first *Penn Central* factor, stating, "Giving all favorable inferences [] this factor should weigh moderately in favor of finding a taking of plaintiffs' property." [Op at 23.] While the court properly recognized that "this one factor is not dispositive," it failed, however, to appreciate that the three *Penn Central* factors need not be weighed equally or that all must be present. *Penn Central* established no brightline rules, rather, it contemplated courts engaging in

"essentially ad hoc, factual inquiries" and identified three factors of "particular significance." *Penn Central Transp. Co. v. City of New York, 438 U.S.* 104, 124 (1978). Nevertheless, each of those factors of "particular significance" should weigh in favor of the Hospitals here.

In *State Farm Mut. Auto. Ins. Co. v. State*, 124 *N.J.* 32 (1991), this Court construed the precedents of the United States Supreme Court to have articulated the principle that "participants in a regulated industry are entitled to something more than mere survival." *Id.* at 48. Indeed, in an analogous context, when rate setting regulations affecting public utilities are analyzed under the *ad hoc* test, courts have applied the "fair return" standard. Under this standard, to be constitutional, regulated rates must be "just and reasonable" meaning they must provide not only for a company's cost, but also for a fair return on investment. *Tenoco Oil Co. v. Dept. of Consumer Affairs*, 876 *F.*2d 1013, 1020 (1st Cir. 1989). In determining whether the compensation paid is constitutional, the rate set must be within a "zone of reasonable outcomes," and it must at a minimum permit a business to: (1) operate successfully, (2) maintain financial integrity, (3) attract capital, and (4) compensate its investors for the risk assumed. *See generally Fed. Power Comm'n. v. Hope Natural Gas Co.*, 320 *U.S.* 591, 601-605 (1944). Here, rather than having any return on investment, the Hospitals have suffered significant losses, in the millions of dollars annually, from the statutorily mandated treatment of charity care patients.

While the Hospitals have emphasized the inability to recover their costs in treating charity care patients, the State continues to demean the Hospitals as being more concerned with their profits than with any social obligation of providing care to needy individuals. This misses a fundamental point. The cost of providing the services is different than what revenue the Hospitals would have received if the services had been billed at standard charges. As the unquestioned evidential record demonstrates, because of the way the Charity Care program has been repeatedly applied to the Hospitals, the Hospitals had to take from their reserves to implement the requirements of the Take All Comers Statute which eventually could undermine their ability to function at all. [Pa793 to Pa796] Regardless of the ever-increasing level of regulation that has been put in place since the Plaintiff Hospitals were initially established (some 100 years ago), no reasonable investor would expect their investments to result in such significant losses.

Finally, as to the nature of the governmental action, the fact that the regulatory scheme aims to address a societal problem related to the health and welfare of the public does not preclude a finding of an unconstitutional taking. Indeed, regardless of the reason for a governmental requirement, the Fifth Amendment "was designed to bar Government from forcing some people alone to bear the 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). Here, the Take All Comers Statute places the

entire burden of providing healthcare to the State's indigent population squarely on the Hospitals' shoulders. No other healthcare provider is subject to the statute's mandate.

These factors of "particular significance," when viewed together, establish that the Appellate Division erred in finding no regulatory taking had occurred.

4. The Court Should Grant Certification So It Can Address The Appellate Division's Erroneous Conclusion That The Hospitals Assert A Facial Challenge To The Charity Care Program As A Whole.

Despite the Hospitals clearly asserting as-applied challenges to the charity care program and presenting individualized evidence of the costs and reimbursement received by each Hospital for each year [Pa511-Pa647], both the Appellate Division and the State conclude that the Hospitals' claims represent a facial challenge to the charity care program as a whole. They come to this conclusion because "[i]f successful plaintiffs would have us declare charity care unconstitutional for failing to provide plaintiffs' at-cost reimbursement []" with the assumption that "[t]he charity care subsidy reimburses no hospital in New Jersey at one hundred percent. It follows that plaintiffs' claim is one which, if successful, will affect all hospitals, even though the claim was not brought on behalf of all hospitals. . ." [Op. at 15-16.]

However, neither the Appellate Division, nor the Defendants, rely on any authority which holds that because a decision in favor of a plaintiff would impact other members of the public, the claim is a facial challenge. We are similarly

unaware of any such authority because this is not the test to determine if a challenge is a facial or an as-applied one. The difference between an as-applied challenge and a facial challenge is the remedy sought. "The remedy for a facial challenge is the broad invalidation of the statute in question, but an as-applied challenge bars its enforcement against a particular plaintiff alone under narrowed circumstances." *Green Party v. Aichele*, 89 *F.Supp.* 3d. 723, 737 (E.D. Pa. 2015).

Here, the Hospitals do not seek to invalidate the Take All Comers Statute, they merely seek just compensation for the property taken from them. Nothing in the regulatory scheme prevents the State from providing that last element of a Fifth Amendment taking - - just compensation. Thus, it is not solely the mandates of the statute which makes the Defendants' actions unconstitutional, it is the lack of adequate compensation. Requiring the Hospitals to meet the higher burden of establishing that the Take All Comers Statute is facially invalid rewards Defendants for consistently failing to provide just compensation for their taking.

Respectfully submitted,

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