No. 25-

IN THE

Supreme Court of the United States

CAPITAL HEALTH REGIONAL MEDICAL CENTER, *et al.*,

Petitioners,

v.

THE STATE OF NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two important questions concerning protection of private property rights under the Fifth and Fourteen Amendments. These questions are:

1. Whether the New Jersey Supreme Court erroneously distinguished this Court's precedents in *Horne v. Dep't of Agric.,* 576 U.S. 350 (2015) and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) thereby failing to find that a *per se* physical taking of private property occurred where Petitioner Hospitals are required by statute to provide access to their hospital facilities and healthcare services to patients who are unable to pay, are prohibited from billing those patients for services and treatments provided, but instead must rely on underfunded and unguaranteed subsidies?

2. Whether *certiorari* should be granted to clarify that *Penn Central's ad hoc* standard should not be used to summarily condone government action where, as here, the New Jersey Supreme Court found, without any reference to the record, that Petitioners have no reasonable investment-backed expectations simply because they do business in a highly regulated industry and that the nature of the government action was to "adjust the benefits and burdens of economic life to promote the common good"?

PARTIES TO THE PROCEEDINGS

Petitioners Capital Health Regional Medical Center, Capital Health Medical Center – Hopewell, St. Francis Medical Center, Englewood Hospital and Medical Center, Hudson Hospital Opco, LLC d/b/a Heights University Hospital, formerly known as Hudson Hospital Opco, LLC d/b/a CarePoint Health – Christ Hospital, and HUMC Opco, LLC d/b/a Hoboken University Hospital, formerly known as HUMC Opco, LLC d/b/a CarePoint Health – Hoboken University Medical Center are non-profit entities licensed by the State of New Jersey as acute care hospitals.

Petitioners IJKG Opco, LLC d/b/a Bayonne University Hospital, formerly known as IJKG Opco, LLC d/b/a CarePoint Health – Bayonne Medical Center and St. Mary's Passaic, LLC d/b/a St. Mary's General Hospital are for-profit entities licensed by the State of New Jersey as acute care hospitals.

These Petitioners are collectively referred to as "Petitioners" or the "Hospitals."

This case had included a group of 17 hospitals as plaintiffs when it commenced; however, the over 15 years of administrative and civil litigation so exhausted many of the original participants that only eight hospitals were parties to the proceedings before the New Jersey Supreme Court and remain to petition this Court.

Respondents are the State of New Jersey; the New Jersey Department of Human Services; the Commissioner of the Department of Human Services; the New Jersey

Department of Human Services – Division of Medical Assistance and Health Services; the Director of the Division of Medical Assistance and Health Services; New Jersey Department of Health; and the Commissioner of the Department of Health.

CORPORATE DISCLOSURE

The parent corporation of Petitioners Capital Health Regional Medical Center, Capital Health Medical Center – Hopewell, and St. Francis Medical Center is Capital Healthcare, Inc. The parent corporation of Englewood Hospital and Medical Center is Englewood Healthcare Foundation. No publicly held company owns 10% or more of the stock of any of these entities. Petitioners Hudson Hospital Opco, LLC d/b/a Heights University Hospital, formerly known as Hudson Hospital Opco, LLC d/b/a CarePoint Health – Christ Hospital and HUMC Opco, LLC d/b/a Hoboken University Hospital, formerly known as HUMC Opco, LLC d/b/a CarePoint Health – Hoboken University Medical Center do not have a corporate parent. IJKG Opco, LLC d/b/a Bayonne University Hospital, formerly known as IJKG Opco, LLC d/b/a CarePoint Health – Bayonne Medical Center is privately owned without a corporate parent. St. Mary's General Hospital is a subsidiary of Prime Healthcare, Inc. which is privately owned and not publicly traded.

RELATED PROCEEDINGS

The proceedings identified below are directly related to the above-captioned case in this Court.

Englewood Hospital and Medical Center et al. v. State of New Jersey et al., Superior Court of New Jersey – Law Division: Mercer County, Docket No. L-1434-17, No. L-1397-18 (March 31, 2022).

Englewood Hospital and Medical Center v. State of New Jersey, Superior Court of New Jersey – Appellate Division, Docket No. A-2767-21 (June 27, 2024), reported at 478 N.J. Super. 626, 317 A.3d 967 (N.J. App. Div. 2024).

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PETITION FOR CERTIORARI

Petitioners respectfully petition this Court for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

Englewood Hospital and Medical Center et al. v. State of New Jersey et al., Superior Court of New Jersey – Law Division: Mercer County, Docket No. L-1434-17, No. L-1397-18 (March 31, 2022).

Englewood Hospital and Medical Center v. State of New Jersey, Superior Court of New Jersey – Appellate Division, Docket No. A-2767-21 (June 27, 2024), reported at 478 N.J. Super. 626, 317 A.3d 967 (N.J. App. Div. 2024).

Englewood Hospital and Medical Center v. State of New Jersey, Supreme Court of New Jersey, Docket No. A-16-24 (July 16, 2025), reported at 261 N.J. 195, 338 A.3d 43 (2025).

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review the final judgment rendered by the highest court of a State in which a decision could be had where the validity of a statute or regulation of any State is drawn in question on the ground of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

N.J.S.A. 26:2H-18.64 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. A hospital which violates this section shall be liable to a civil penalty of $10,000 for each violation. The penalty shall be sued for and recovered pursuant to 'the penalty enforcement law,' N.J.S. 2A:58-1 et seq. and shall be deposited in the fund."

N.J.A.C. 10:52-11.14 provides, "Persons determined to be eligible for charity care shall not receive a bill for services or be subject to collection procedures. Persons determined to be eligible for reduced charge charity care shall not be billed or subject to collection procedures for the portion of the bill that is reduced charge charity care."

STATEMENT OF THE CASE

Starting in 2009, Petitioners unsuccessfully attempted to obtain relief from violations of the Fifth and Fourteenth Amendments through administrative proceedings leading ultimately to two decisions in 2016 from the New Jersey Superior Court Appellate Division holding the state administrative agencies lacked jurisdiction to decide the takings claims and directing the Hospitals to pursue their claims before the trial court. [B74a-76a.] On June 30, 2017, the Petitioners commenced this action in the Superior Court of New Jersey, Law Division asserting as-applied constitutional taking claims against the State of New Jersey and constituent agencies and agency heads. They challenged the state Charity Care Program's requirement that licensed hospitals provide care to everyone who presents at their doors without the State providing for just compensation. In 1992 the Legislature enacted P.L. 1992, chapter 160 entitled the "Health Care Reform Act," codified at N.J.S.A. 26:2H-18.51 et seq., declaring the "paramount public interest" in ensuring high quality care to New Jersey citizens. The Act includes N.J.S.A. 26:2H-18.64, which 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.

The New Jersey Supreme Court construed this statute in *Kuchera v. Jersey Shore Fam. Health Ctr.*, 221 N.J. 239, 254, 111 A.3d 84, 93 (2015) as imposing an

affirmative obligation that "every acute care hospital in this State **is required to provide care to anyone who seeks care** without regard to the ability to pay. N.J.S.A. 26:2H–18.64." (Emphasis added). Given that judicial interpretation, this statute will be referred to as the Take All Comers Statute (TACS) of the Charity Care Program.

The agencies responsible for the Charity Care Program are the Department of Health and the Department of Human Services. In 1995, Department of Human Services issued a regulation, later codified as N.J.A.C. 10:52-11.14, barring hospitals from billing patients who qualify for "Charity Care" status:

> Persons determined to be eligible for charity care shall not receive a bill for services or be subject to collection procedures. Persons determined to be eligible for reduced charge charity care shall not be billed or subject to collection procedures for the portion of the bill that is reduced charge charity care. [27 N.J.R. 656, 661 (Feb. 21, 1995); 27 N.J.R. 1995, 2003 (May 15, 1995)].

Charity care eligibility is based on multi-factor criteria considering 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.*

Recognizing the burden being placed on New Jersey hospitals, the Legislature declared that "it is necessary to provide disproportionate share hospitals with a charity care

subsidy supported by a broad-based funding mechanism." N.J.S.A. 26:2H-18.51(c). Accordingly, hospitals that serve a disproportionate share of low-income patients who are unable to pay their hospital bills receive charity care subsidy payments from funding allocated annually by the Legislature to the Health Care Subsidy Fund. N.J.S.A. 26:2H-18.58. All Petitioners are disproportionate share hospitals and have received charity care subsidy payments spanning the years at issue. [C94a.] Petitioners do not challenge the State's ability to require treatment to be provided to persons unable to pay for it; however, they do challenge the approach to this public purpose of imposing on hospitals alone the burden of meeting the needs of these patients and providing hospitals with subsidy payments inadequate to cover the cost of the supplies, service, space, and other resources expended to satisfy this obligation. The burden of medical care for the indigent should be borne by the public as a whole.

The privately owned Petitioners are licensed by the State of New Jersey as general acute care hospitals. These hospitals were organized and have been in operation in New Jersey since the Civil War or shortly afterwards. The non-profit hospitals among the Petitioners have maintained tax-exempt status as charitable organizations by meeting the IRS "community benefit standard" in effect since 1969 in part by providing care to underserved populations, long before the Charity Care Program and the TACS were established in New Jersey.

From 2004 through 2017, Petitioners repeatedly provided medical care to patients eligible for the New Jersey Charity Care Program. The undisputed record demonstrated that Petitioners own or operate buildings

on parcels of land regularly entered and occupied by these patients. These Hospitals acquire resources necessary for treatment of these patients. The resources are personal and real property, including physical objects like medications, intravenous solutions, and food consumed by these patients. They also include access to and use of other items such as bandages, sutures, medical equipment, imaging machines, and implantable devices. The resources used include allocation of hospital beds and staff whose time, effort, and skill are appropriated to provide medical care to the individuals who occupy the physical spaces constituting examination rooms, treatment rooms, operating rooms, and the like.

While some items of property, such as a bed, occupied by only one patient may later be reused for another patient, many items cannot be reused and are totally consumed during treatment. Oral medications, bags of intravenous solutions, and artificial implants are examples. [Pa299-315; Pa452-Pa502.][1] To have these capabilities available for use when needed, the Hospitals must have the resources in inventory. The acquisition of these resources and having personnel who provide services, in turn requires the expenditure of hospital money.

The costs of acquiring and having these hospital resources available were calculated by the Hospitals' reimbursement experts and compared to the subsidies and reimbursement received to assess the economic impact of these programs on each Hospital. They calculated the shortfall for each hospital over the span of years at

1. The "Pa" references are to the appendix filed with the New Jersey Appellate Division constituting the record below.

issue. In some years, the applicable subsidy covered only between 10 and 15 percent of the hospitals' costs despite a statutory requirement that no hospital receive a subsidy less than 43% of its documented charity care, N.J.S.A. 26:2H-18.59i(b)(4). In some years the reimbursement was much worse, amounting to only 1 percent of the documented charity care for certain hospitals. [C100a-101a.] Utilizing the reimbursement consultant's calculations, the Hospitals' financial analysis expert performed a year-by-year analysis for each Hospital to assess the adverse economic impact of the shortfalls from failure to receive their costs for treatment of Charity Care patients. This analysis using national benchmarks demonstrates that the mandatory TACS, with its extremely limited subsidies, has had a significant negative impact on key financial indicators of profitability, liquidity and leverage. [Pa766-Pa799.]

The parties filed cross-motions for summary judgment. The trial court found that the Defendants did "not dispute the [Hospitals'] expert's findings, methods, or credibility" and that it was "unrefuted" that the charity care subsidies during the relevant years repeatedly failed "to cover the full amount of costs incurred by Plaintiff Hospitals" to provide the care mandated by the statute. [A9a.] Nonetheless, on March 31, 2022, the trial court denied Petitioners' motion for partial summary judgment, granted summary judgment to the Defendants on multiple claims, and dismissed the remaining claims without prejudice as not being "ripe" due to failure to exhaust administrative remedies. In an unpublished written opinion, the trial court concluded that there was no *per se* physical taking and that the Hospitals had not satisfied the requirements for a regulatory taking under the *Penn Central ad hoc* analysis.

The intermediate Appellate Division affirmed this dismissal in a published opinion on June 27, 2024. After granting further review, the New Jersey Supreme Court affirmed on July 16, 2025, holding that state law requiring hospitals to provide care and not bill patients but instead receive subsidies from the State was not a taking under federal law.

In coming to its decision that no taking had occurred, the New Jersey Supreme Court distinguished the facts of this matter from those in *Horne v. Dep't of Agric.,* 576 U.S. 350 (2015), and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

In distinguishing *Horne,* the New Jersey Supreme Court emphasized that the TACS did not require hospitals to "physically set aside" any portion of the hospitals' property for the government or qualified indigent patients and stressed that there was no transfer of title. [C113a.] It stated that "[i]f plaintiffs were required to hand over boxes of bandages or to surrender medical devices to the government or a third party, which could then sell or dispose of those bandages or devices at will, this case would fall neatly into *Horne's* analysis." [C113a.]

In distinguishing this matter from *Cedar Point,* the New Jersey Supreme Court stated that the hospitals are "open to the public." [C117a]. Based on that statement, it concluded the hospitals were more analogous to the shopping center involved in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), than the farm property in *Cedar Point* or the beach front residence in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), where the elimination of the property owners' right to

exclude others from their properties resulted in *per se* takings. The hospital-shopping center analogy was rejected in *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, 1664–65, 286 Cal. Rptr. 427, 428 (Ct. App. 1991), where the court stated: "[W]e conclude this privately owned Medical Center is not so devoted to public use that it can be deemed the functional equivalent of the traditional public forum historically provided by town centers, public streets and public sidewalks, as is the case with the major metropolitan retail shopping mall addressed in *Robins v. Pruneyard Shopping Center*." The New Jersey Supreme Court not only rejected the contention that there was a physical taking of property, but it also concluded that the Hospitals failed to satisfy the test for regulatory takings announced in *Penn Central Transport. Co. v. City of New York*, 438 U.S. 104 (1978).

Nonetheless, the New Jersey Supreme Court acknowledged the unfairness of the Charity Care Program requirement "for medical professionals and hospitals to bear, alone, the cost of providing those services to those who cannot pay for them." [C116a.] However, it directed Petitioners to seek relief through legislative or administrative processes. [C116a-117a; 129a-130a.] In making this suggestion, it failed to recognize that the applicable agencies cannot provide hospitals with increased charity care subsidies greater than the total appropriated by the Legislature. *In the Matter of Deborah Heart and Lung Center SFY 2009 Charity Care Subsidy Allocation*, 417 N.J. Super. 25, 30-31, 8 A.3d 250, 253-54 (App. Div. 2010).

REASONS FOR GRANTING THE PETITION

POINT I

WHETHER THE TAKE ALL COMERS PORTION OF THE NEW JERSEY CHARITY CARE PROGRAM EFFECTS A *PER SE* PHYSICAL TAKING OF HOSPITAL PROPERTY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

A. This Court's Precedents Confirm That the Take All Comers portion of the Charity Care Program Is a Physical Taking Notwithstanding Its Connection to a State Regulatory Scheme for the Regulated Healthcare Industry.

This case presents the Court with a significant opportunity to continue to clarify and articulate the physical takings doctrine under the Fifth Amendment that it had begun with *Horne* and continued with *Cedar Point* and *Sheetz v. County of El Dorado*, 601 U.S. 2667 (2024). It is an opportunity to reiterate that, regardless of whether the government action at issue is labeled a "regulation" or "statute," *per se* physical takings occur in regulated industries and must be recognized as such. The essential question, as framed in *Cedar Point*, is whether the government has physically taken property for itself or someone else—by whatever means—or has instead only restricted a property owner's ability to use the property. The New Jersey Supreme Court's strained attempt at distinguishing key U.S. Supreme Court precedents led to its erroneous conclusion that the New Jersey Charity Care Program is not a physical taking requiring just compensation.

The fundamental importance of private property rights to the continuing vitality of a free society is not open to serious debate. Ownership of property as a fundamental right was recognized by our nation's founders. In *Cedar Point* when discussing protection of private property as indispensable to the promotion of individual freedom, this Court turned to the remarks of John Adams: "'Property must be secured, or liberty cannot exist.'" *Cedar Point,* 594 U.S. at 147. Indeed, this Court has characterized the right to property as equal to, and inextricably intermingled with, an individual's fundamental right to liberty. In *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), the Court stated:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. [*Id.* at 552.]

The protections of the Fifth and Fourteenth Amendments encompass not only individuals but also corporate entities. This is such a long-standing rule of law that in *Santa Clara Cnty. v. S. Pac. R. Co.,* 118 U.S. 394, 396 (1886), the Court declared that it did not even wish to hear oral argument on whether the protections of the Fourteenth Amendment applied to corporations, stating: "We are all of the opinion that it does."

B. The Petitioners' Protectible Property Interests.

The threshold question repeatedly identified in Takings Clause claims is whether the governmental

conduct affects "property." *W. Radio Servs., Inc. v. United States*, 175 Fed. Cl. 98, 106 (Ct. Claims 2025). Property interests are not created by the Constitution but "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 161 (1980). In *Horne,* this Court ruled that the Fifth Amendment protects personal property. 576 U.S. at 358. The Ninth Circuit has since recognized protectible personal property interests in a medical provider's "ambulances, equipment, wages, supplies, insurance, goodwill, and ambulatory-service and employment contracts." *See Sierra Medical Services Alliance v. Kent*, 883 F.3d 1216, 1224 (9th Cir. 2018). *See also Virginia Hosp. & Healthcare Ass'n v. Roberts,* 671 F. Supp. 3d 633, 652 (E.D. Va. 2023) (property interest recognized in supplies, facilities and professional labor).[2]

The New Jersey Supreme Court acknowledged that medical supplies and equipment the hospitals use to treat charity care patients come within the scope of "property" as elucidated in *Horne*. It also ruled that professional services provided in treating charity care patients were a cognizable property interest under New Jersey law. [C115a.]

This ruling by the New Jersey Supreme Court resolves the threshold question of whether Petitioners have a "property interest" that can be taken.

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2. For reasons not germane to this case, the District Court did not find that there was a taking of property.

C. The Transfer of Petitioners' Property to Third Parties Compelled by Governmental Mandate.

While the New Jersey Supreme Court accepted the proposition that Petitioners have property interests in the space, services, and supplies necessary to comply with the TACS mandate, it distinguished *Horne*, one of two cases the Hospitals primarily relied on for their contention that the TACS provision of the Charity Care Program resulted in an unconstitutional physical appropriation of their property.

In *Horne*, this Court held that a governmental order requiring raisin farmers to physically set aside a certain percentage of their crop for the government free of charge constituted a *per se* unconstitutional appropriation of property. The order required growers to transfer raisins to the Government with title to the raisins passing to a governmental agency. The Government then could sell, allocate or otherwise dispose of the raisins as it might choose. The focus of the Court's opinion was on what the property owner had lost, *i.e.*, "the rights to possess, use and dispose" of the property, not what the government had gained. *Horne, supra,* 576 U.S. at 361-64.

The New Jersey Supreme Court, in contrast, emphasized that the TACS did not require hospitals to "physically set aside" any portion of the Hospitals' property for the government or qualified indigent patients and stressed that there was no transfer of title. [C113a.] Rather, it hypothesized that "[i]f plaintiffs were required to hand over boxes of bandages or to surrender medical devices to the government or a third party, which could then sell or dispose of those bandages or devices at will,

this case would fall neatly into *Horne's* analysis." [C113a.] The New Jersey Supreme Court misreads *Horne* with a mistaken perception that title to property must transfer for a physical taking to occur. This proposition was soundly rejected in *Cedar Point, supra,* 594 U.S. at 147 ("The government commits a physical taking when it . . . physically takes possession of property without acquiring title to it"). While a hospital may not have put supplies in a box labelled as "reserved for charity care patients," it must have resources available at all times for use in caring for such patients. Similarly, while hospitals do not cordon off a hospital wing for charity care patients, these patients continuously occupy beds and rooms as appropriate for their care throughout the hospital. When the hospitals are compelled to use their property to treat charity care patients, they have indeed been deprived of "the rights to possess, use and dispose" of the property used in the care of those patients, and a *per se* taking has occurred. The manner in which the property is transferred, and what the receiving party can do with the newly obtained property, are distinctions without a difference and are irrelevant.

Formal transfer of title was generally part of the raisin program in *Horne*. That would occur when the government took possession of the set-aside portion of the raisin crop. 576 U.S. at 355. But in *Horne*, transfer of title did not happen. The Government sent trucks to the Hornes' facility after they refused to set aside raisins, but the Hornes refused entry. In response, the Government assessed a fine equal to the market value of the missing raisins. *Id.* at 356. This Court held that the Hornes could raise the takings issues based on the fine even though there had been no passing of title. *Id.* at 367-68.

Formal transfer of title has never been a requirement for a physical taking. It is the loss of possession to the Government or a governmentally designated third-party with accompanying use to benefit that third-party that makes the appropriation a taking – not the formal transfer of title. As stated by this Court in *United States v. Dow*, 357 U.S. 17, 22 (1958): "[T]he passage of title does not necessarily determine the date of 'taking.' The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking."

Significantly, there was no transfer of title in the physical taking in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where a statute required a landlord to allow installation of cable television equipment on a building's roof for the benefit of tenants. Moreover, a physical taking in a claim for inverse condemnation, by definition, has no formal transfer of title. *Compare United States v. Clarke,* 445 U.S. 253, 257 (1980) *with Klumpp v. Avalon,* 202 N.J. 390, 411-13, 997 A.2d 967, 979-80 (2010). Transfer of title is immaterial. It is the governmental mandate giving a third-party the right to possess, use, dispose of, and occupy the property which is controlling.

When medications are administered to patients, they are no longer in the possession of the hospital for further use. Likewise, when a patient occupies an MRI machine it is not available for the hospital's use for another patient while that individual occupies the MRI machine. The New Jersey Supreme Court found it significant that the hospital "retains both ownership and control of its own facilities and equipment, and it makes choices about the allocation of those resources based on its assessment of patient needs"

and that "the provision of such consumables incidental to compelled medical care" did not seem to be the same as the governmentally-compelled turnover of the raisins in *Horne* which retained economic value and could be sold or disposed of at the transferee's discretion. [C113a-114a.] This reading of *Horne* ignores this Court's statement: "But when there has been a physical appropriation, 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken." 576 U.S. at 363. Indeed, this Court expounded on this point by referring to *Loretto*. The installation of a small cable box on the roof with the owner still able to sell, rent, and economically benefit from the property was, nonetheless, a *per se* taking. Thus, the *Horne* Court emphasized that "[t]he fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking." *Id.*

The New Jersey Supreme Court observed that if a hospital provides pain medication or applies a cast on a broken bone, patients have not taken possession or been transferred ownership of those supplies in precisely the same way the government took possession of the raisins in *Horne*. [C114a.] In *Horne*, it was the government itself that would take possession of the property. But with medical treatment at a hospital, a patient necessarily comes into possession of what was the hospital's property by virtue of the government's mandate that Charity Care patients be given "admission or appropriate service" at the hospital facility. Under both scenarios the result is the same—the property owner has been deprived of "the rights to possess, use and dispose" of the property. It is not the technicality of whether title has passed to a third-party, but rather, the property owner's loss of control over how the property will be used that is dispositive.

This analysis is consistent with principles developed in *FCC v. Florida Power Corp.,* 480 U.S. 245 (1987), where this Court found requirements of the Pole Attachment Act, 47 U.S.C. § 224, permitting cable companies to use space on utility poles was not a taking under *Loretto*. Unlike the statute in *Loretto*, nothing in the Act gave cable companies any right to occupy space on utility poles or prohibited utility companies from rejecting agreements with cable operators permitting such use. *Id.* at 251. "[T]he element of required acquiescence" essential to the determination of a taking was missing. *Id.* This analysis is substantiated by *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), involving a 1996 amendment to the Pole Attachment Act. Because the statute now "require[d] a utility to acquiesce to a permanent, physical occupation of its property, we conclude that the Act's mandatory access provision effects a *per se* taking of a utility's property under the Fifth Amendment." *Id.* at 1329. Just as the statute's mandate caused a cable company to be in possession of and able to occupy a portion of the utility pole, the TACS mandate causes a charity care patient to be in possession of, use, and occupy the Hospitals' property. As articulated in *Cedar Point*, there is a Fifth Amendment taking when "the government has physically taken property for itself or someone else." Charity care patients are the "someone else."

This analysis of a governmental action concerning healthcare that benefits a third-party can be clearly found in two recent decisions at the District Court level. These decisions underscore the conflict between the interpretation of *Horne* and *Cedar Point* by the lower federal courts and that by the New Jersey Supreme Court here, providing a further basis for review by this Court.

Cf. Hillman v. Maretta, 569 U.S. 483, 489 (2013) ("We granted *certiorari* to resolve a conflict among the state and federal courts.")

The plaintiff in *Teva Pharms., USA, Inc. v. Weiser*, 709 F. Supp. 3d 1366 (D. Colo. 2023), *aff'd*, No. 24-1035, 2025 WL 2555552 (10th Cir. Sept. 5, 2025), alleged that the recently enacted Colorado Epinephrine Affordability Program requiring it to provide autoinjectors to pharmacies at no cost violated the Fifth Amendment's prohibition against taking private property without just compensation. The state defendants moved to dismiss on the grounds that Teva did not have standing, its claim was not ripe, the affordability program would not cause a taking, and the defendants had immunity under the Eleventh Amendment. 709 F. Supp. 3d at 1372. The District Court denied the motion to dismiss. It concluded that the complaint stated a claim that the program was a physical taking requiring just compensation. To address rising costs of autoinjectors, the Colorado legislature enacted an affordability program to improve access to devices commonly known as EpiPens. The law established a fixed price of $60 for qualified uninsured consumers and limited the charge to insured consumers to an insurance co-pay of $60. When a pharmacy 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 pharmacy could submit a form to the autoinjector's manufacturer, which then had a choice between: (1) reimbursing the pharmacy the amount the pharmacy paid for the number of auto-injectors dispensed; or (2) sending the pharmacy a replacement supply of autoinjectors in an amount equal to the number of 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 court stressed that the State "requires that possession of property be transferred from its owner to another. That is all that is required to trigger the Taking Clause." *Id.* at 1377 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) and *Horne v. Dep't of Agric.*, 576 U.S. 350, 360 (2015)). Accordingly, it ruled: "The affordability program would enact a taking of Teva's autoinjectors, and the Fifth Amendment renders that taking unconstitutional unless just compensation is provided." 709 F.Supp.3d at 1377. The state defendants took an interlocutory appeal from the denial of dismissal based on Eleventh Amendment immunity, but the Tenth Circuit affirmed denial of the motion to dismiss in a non-precedential order. It remanded for further proceedings. 2025 WL 255552.

In *Pharm. Rsch. & Manufacturers of Am. v. Williams*, 715 F. Supp. 3d 1175, 1180 (D. Minn.), *objections overruled,* 728 F. Supp. 3d 986 (D. Minn. 2024), the court reviewed a Minnesota law requiring pharmacies to dispense insulin to qualifying individuals, while charging no more than a $35 co-pay. 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." The Eighth Circuit had reversed an earlier dismissal based on the plaintiff trade association's lack of standing. It concluded:

> The present case involves an allegation of a ***physical*** taking of insulin, not a ***regulatory*** taking. Under *Horne*, this type of taking is "a *per se* taking" that does not require a court to analyze other factors. [*Pharm. Rsch. & Manufacturers of Am. v. Williams*, 64 F.4th 932, 947–48 (8th Cir. 2023) (emphasis in original).]

On remand, the State defended the statute on the ground that it was not a taking because it abated a public nuisance and imposed a reasonable burden on manufacturers in exchange for a Minnesota license to manufacture drugs with a balancing of the economic benefits and burdens of its public purpose. Relying on *Cedar Point* and *Horne* to determine the scope of permissible discovery, the Magistrate Judge struck the abatement defense. 715 F. Supp.3d at 1187. Abatement of a nuisance was not a defense to a *per se* physical takings case. *Id.* Moreover, insulin was not a nuisance to be abated but was something of public benefit. 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.]

Reviewing objections to the Magistrate Judge's rulings, the District Court stated: "[T]he magistrate judge was correct in all respects." 728 F. Supp. 3d at 991.

So too here, the TACS takes the Hospitals' property and gives it away free of charge through the New Jersey Charity Care Program. This is a physical taking requiring the payment of just compensation.

D. The Government-Authorized Occupation of Petitioners' Property by Charity Care Patients.

In interpreting the Fifth Amendment's Takings Clause, this Court has long distinguished between appropriations of property and regulations affecting the use of property. When government physically acquires private property for a public use, the Takings Clause imposes a categorical obligation to provide the owner with just compensation. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). The government commits a physical taking when it uses its power of eminent domain to formally condemn property. The same is true when the government physically takes possession of property without acquiring title to it. When the government occupies or authorizes the occupation of property, there is a physical taking.

In *Tahoe-Sierra*, the Court pointed out that a distinction between physical takings and regulatory takings can be found in the text of the Fifth Amendment with a mandate to pay compensation when the government "takes" private property. *Id.* Before the decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property. *Pennsylvania Coal* expanded this protection, to require compensation for a "regulatory taking," that is, a restriction on the use of property that went "too far." Starting with *Penn*

Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), the Court began developing its modern regulatory takings doctrine with an *ad hoc* balancing approach to determining when a regulation went too far. However, this expansion of Fifth Amendment protections, to include excessive restrictions on the use of property, did not eliminate violations of the Fifth Amendment in circumstances of physical takings.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a New York statute mandated that landlords allow cable television companies to install equipment on the landlords' property. The Court stated: "A permanent physical occupation authorized by state law is a taking without regard to whether the State, **or instead a party authorized by the State**, is the occupant." *Id.* at 433 n.9 (emphasis added). It further observed: "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987), the Court clarified the "permanent" nature of the physical occupation for purposes of a taking:

> We think a 'permanent physical occupation' has occurred, for purposes of that rule, 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.

In *Cedar Point*, *supra,* 594 U.S. at 147-48, the Court reaffirmed that the physical takings doctrine applies when government takes physical possession of property without acquiring title to it. This is an appropriation under the Fifth Amendment. *Cedar Point* involved a California regulation requiring agricultural employers to allow union organizers onto their property for up to three hours per day, 120 days per year. *Cedar Point* adhered to the clarification of the "permanent" nature of the physical occupation for purposes of a taking that "appropriation of a right to physically invade property may constitute a taking 'even though no particular individual is permitted to station himself permanently upon the premises.'" *Id.* at 153 (quoting *Nollan*, *supra,* 483 U.S. at 832).

In contrast, rejecting the assertion that the TACS imposed a physical invasion or occupation of hospital property, the New Jersey Supreme Court erroneously stated that the Program "does not grant an affirmative right of access to occupy hospitals." [C95a.] It explained:

> Unlike the regulation at issue in *Cedar Point* and the permit condition in *Nollan*, however, charity care only limits hospitals' right to exclude and ability to bill patients who cannot pay for treatment; it does not involve an affirmative 'right of access' that would allow any individual to physically invade or occupy the hospital. [C118a.]

This is a strained interpretation of the statutory language which clearly states that "no hospital shall deny any admission . . . to a patient on the basis of ability to pay" which has been held to mean that "every acute

care hospital in this State is required to provide care to anyone who seeks care without regard to the ability to pay." *Kuchera v. Shore Fam. Health Ctr.*, 221 N.J. 239, 254, 111 A.3d 84, 93 (2015). This requirement has the hallmarks of an affirmative right to access and occupy space in the hospital, because otherwise one would have been denied admission and not obtained the care required by the statute.

The New Jersey Supreme Court attempted to bolster its conclusion by emphasizing that hospitals are "in the business of generally providing medical care to patients and are open to the public." It further commented: "Any use of the hospitals' facilities in treating charity care patients is not the specific objective or mandate of the program, but rather is incidental to the hospitals' determination of how to provide the care the program requires." [C117a.] This comment ignores the text of the TACS that "no hospital shall deny any admission or appropriate service" meaning that "every acute care hospital in this State **is required to provide care** to anyone who seeks care" according to the ruling in *Kuchera*. How does one provide the care the program requires without using the facilities and resources of the hospital?

The New Jersey Supreme Court found the precedents of *Cedar Point* and *Nollan* concerning access to private property to be distinguishable and that the decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) was more apt because the properties in *Cedar Point* and *Nollan* to which access was being required were essentially private and not open to the public. But hospitals, the New Jersey Supreme Court emphasized, "even when privately owned, are open to the public."

[C118a.] In this respect, the court concluded hospitals were more akin to the shopping center in *PruneYard,* where this Court had ruled that the property owner could not exclude high school students seeking to distribute political leaflets because the shopping center "to which the public is invited" was the modern equivalent of a town square and thus restrictions on free expression were not permitted. However, the separate concurring opinions in *PruneYard* made clear that the "open to the public" standard for access did not apply to the interiors of separate stores located in the shopping center. These remained private even though shoppers were invited to enter for the purpose of purchasing the store's goods.

Although a hospital facility is available to members of the public, a hospital is not a business generally open to the public. The hospital is available to patients to receive necessary medical care under the auspices of an attending physician. Without an attending physician who is on the hospital's medical staff, no member of the public can gain access to a bed inside the hospital. Members of the general public may not access the premises. While family members and friends may visit the patient, they are invitees and not free to roam the hospital facility. The New Jersey Supreme Court failed to appreciate the obvious differences between a mall and a hospital. Indeed, it failed to recognize the many non-public areas to which the public is not invited, such as the operating rooms, radiology suites, laboratories, and rooms for examination and diagnosis. Even access to patient rooms is restricted and not open to the general public. Access to and occupation of these non-public areas is at issue here. The facts of this case concerning access to the hospital facilities are more in line with the facts presented in *Loretto*, *Nollan,* and *Cedar Point,* and are

quite different from the access provided to the public areas of the shopping center in *PruneYard*. The coalescence of *Loretto, Horne, Nollan*, and *Cedar Point* demonstrates that the compulsory requirement to admit patients to the hospital facilities for treatment with hospital resources is a *per se* physical taking and compelled occupation of the hospitals' property and appropriation of their underlying and subsisting right to exclude.

POINT II

THIS COURT SHOULD GRANT CERTIORARI SO IT CAN PROVIDE THE LOWER COURTS AND LITIGANTS WITH CLARIFICATION AS TO WHEN, AND HOW, THE *PENN CENTRAL* FACTORS SHOULD BE APPLIED TO DETERMINE WHETHER AN UNCONSTITUTIONAL TAKING OF PROPERTY HAS OCCURRED REQUIRING THE PAYMENT OF JUST COMPENSATION.

This Court began in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) to recognize that unconstitutional takings may occur, in the absence of a physical appropriation or occupation, through excessive regulation, stating that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

To determine whether government regulation has gone "too far" this Court established the *ad hoc* analysis in *Penn Central Transp. Co. v. City of New York*, which requires courts to look at these factors: (1) the character of the governmental action; (2) the economic impact of the regulation; and (3) the extent to which the regulation has

interfered with distinct investment-backed expectations. 438 U.S. 104, 124 (1978). Such takings are reflexively referred to as "regulatory takings."

Because the Court has "generally eschewed any set formula for determining how far is too far" there has been a lack of clarity regarding when, or how, these factors should be applied. *Tahoe-Sierra, supra,* 535 U.S. at 326. As a result, lower courts have by default deferred to the government's position, resulting in only limited rulings in favor of claimants in such cases. *See* Thrasher, Daunting Odds: Regulatory Takings Claim in the United States Circuit Courts of Appeals, 94 *Miss. L.J.* 637, 647 (2025) (Of 366 regulatory takings cases decided by the Courts of Appeal only 24 (or 6.6%) decided in favor of the claimant).

Even under the bright line rule established by this Court that a categorical taking occurs where a regulation leaves land "without economically beneficial or productive options for its use," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992), the results have significantly favored the government. *See* Brown & Merriam, On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim, 102 *Iowa L. Rev.* 1847, 1849-1850 (2017) (noting that claimants were successful in only 27 of more than 1,700 cases applying *Lucas* over a 25-year period). It is unclear whether these results reflect implicit bias by the lower courts in favor of the government, or simply confusion regarding how to apply the rules governing regulatory takings. In either case, clarification from this Court regarding how, and when, to apply the *Penn Central* factors would benefit both litigants and the lower courts.

Justice Thomas recently acknowledged this lack of clarity in his dissent to this Court's denial of *certiorari* when he stated "[o]ur current regulatory takings jurisprudence leaves much to be desired." *Bridge Aina Le'a, LLC v. Hawaii Land Use Commission*, 141 S.Ct. 731, 731-732 (2021) (Thomas, J. dissenting). He noted that in regulatory takings, the Court has required lower courts 'to engage in essentially *ad hoc*, factual inquiries'" . . . which, "nobody—not States, not property owners, not courts, nor juries—has any idea how to apply." *Id.* Justice Thomas described how the case before the Court demonstrated that the *ad hoc* test is not a "workable standard," indicating "a know-it-when-you-see-it test is no good if one court sees it and another does not." *Id.* He concluded "[i]t is time to give more than just 'some, but not too specific, guidance.'" *Id.* at 732 *citing Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Justice Thomas is not alone in his criticism of the *ad hoc* analysis. In the recently issued dissent in *Nekrilov v. City of Jersey City*, 45 F.4th 662, 681 (3rd Cir. 2022), Judge Bibas more forcefully agreed that "regulatory-takings doctrine is a mess."

The confusion in the application of *Penn Central* has been prominent in cases involving regulation in the healthcare industry, where courts have tended to default to the *ad hoc* analysis without any significant examination of whether a physical taking has occurred. *See Franklin Memorial Hosp. v. Harvey*, 575 F.3d 121 (1st Cir. 2009) and *Sierra Medical Services Alliance v. Kent*, 833 F.3d 1216 (9th Cir. 2018).

In *Franklin Memorial*, the court misconstrued the distinction between a *per se* and a regulatory taking. The

First Circuit affirmed dismissal of a hospital's challenge to statutes requiring it to provide charity care ("Free Care") and Medicaid ("MaineCare") as an unconstitutional taking. The court, without any significant factual analysis, stated the government action there "does not directly appropriate FMH's property but rather regulates how FMH may use it, [and therefore] is properly analyzed under the law of regulatory takings." 575 F.3d at 125.

Based on that conclusion, the court applied the *ad hoc* analysis and concluded the hospital could avoid the taking by "choos[ing] to stop using its property as a hospital." *Id.* at 126. However, the idea that a property owner by participating in a regulated market voluntarily accepts a taking was subsequently and soundly rejected by this Court in *Horne*. 576 U.S. at 365 (government's argument that raisin reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market is "wrong as a matter of law," *citing Loretto*, *supra*, 458 U.S. at 439.)

Similarly, in *Sierra Medical*, the Ninth Circuit improperly applied an *ad hoc* analysis, even though the regulations at issue resulted in a physical appropriation of the plaintiffs' property. The plaintiffs challenged a California law requiring ambulance companies to provide emergency medical transportation and services while en route irrespective of the patient's ability to pay. 833 F.3d at 1219. Despite acknowledging the plaintiffs' property interest "in their ambulances, equipment, wages, supplies, insurance, goodwill, and ambulatory-service and employment contracts" the court concluded that if there was a taking "it is a regulatory one because DHCS does not directly appropriate the Plaintiffs' ambulances

or other personal property through the mandatory-care provision. DHCS instead regulates how the Plaintiffs can use their property." *Id*. 1224-1225. It failed to provide an explanation as to why it concluded that the statute does not appropriate the ambulance company's property needed to provide care to the patients during transport.

Applying the pliable *ad hoc* analysis, the court held that the plaintiffs failed to meet their burden of proof, emphasizing that the plaintiffs did not present evidence of the regulation's impact on their overall operations and stating that the law may have a "negligible effect on the Plaintiffs' bottom line, depending on the amount of revenue that the Plaintiffs recoup by transporting non-Medi–Cal patients." *Id.* at 1225.

Strikingly absent from both the *Franklin Memorial* and *Sierra Medical* decisions is any meaningful analysis of the plaintiffs' property interests, whether those property interests were involuntarily conscripted for a public use and why, under those circumstances, the governmental action did not amount to an appropriation of the property used to provide the care. Also absent is any description of how the State regulated **use** of the property. In short, these Courts of Appeal*s* applied an *ad hoc* analysis without explaining why the subject laws did not cause an appropriation of private property and were only a restriction on its use. Perhaps this was because both courts mistakenly believed that the *ad hoc* analysis must be performed whenever the taking occurs pursuant to a regulation.

But this Court has repeatedly made clear that it is **the effect** of the regulation on the property owner which

determines whether a *per se* or *ad hoc* analysis should be applied. Where there is an appropriation or physical invasion of property, a *per se* taking has occurred without regard to the *ad hoc* factors. An *ad hoc* analysis is only appropriate where the government merely restricts the use of property.

Indeed, this Court has drawn a clear distinction between regulatory actions that restrict an owner's use of property and those governmental directives that affirmatively compel or mandate a property owner to use the property in a certain manner. *See Webb's Fabulous Pharmacies*, 449 U.S. 155, 163 (1980), where the Court held that a county's taking of accrued interest on an interpleader fund constituted a taking, explaining:

> This Court has been permissive in upholding governmental action that may deny the property owner some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. . . . Here, however, Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." . . . **Rather, the exaction is a forced contribution to general governmental revenues**, and it is not reasonably related to the costs of using the courts. **Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."** [*Id.* (Citations omitted) (emphasis added).]

This Court's decision in *Cedar Point* further clarifies that the term "regulatory taking" can mislead, stating:

> Government action that physically appropriates property is no less a physical taking because it arises from a regulation. . . . The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It 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. **Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place**. [*Cedar Point,* 594 U.S. at 140 (emphasis added).]

Cedar Point makes clear that an *ad hoc* analysis is only appropriate where a regulation restricts an owner's use of his or her property, not where, as here, the TACS directs and compels Petitioners to use their private property for the benefit of Charity Care patients.

Here, like the courts in *Franklin Memorial* and *Sierra Medical*, the New Jersey Supreme Court quickly glossed over the *per se* analysis and applied the *Penn Central* factors. The New Jersey court provided some analysis as to why it did not believe a *per se* taking had occurred. But since it could not avoid the conclusion that hospital property was transferred to charity care patients, it distinguished the method used in *Horne* where the property was set aside and title was supposedly transferred. Similarly, it did not find that the statute does

not require the occupation of hospital facilities by charity care patients, rather it concluded, without explanation, that "charity care only limits hospitals' right to exclude . . . it does not involve an affirmative right of access." [C118a.] This contradicts the judicial interpretation of TACS that all hospitals are required to provide care thereby giving patients an affirmative right of access.

Although determining there was no *per se* taking, the New Jersey Supreme Court acknowledged the Petitioners had established the *Penn Central* factor concerning adverse economic impact but noted "that alone does not mean that charity care amounts to a regulatory taking." [C121a.] It then relied upon overly broad statements of the law to conclude the Petitioners could not establish the other factors in the *Penn Central* analysis.

As to Petitioners' reasonable investment backed expectations, the court referred to regulations to which hospitals are subjected and concluded that because the hospitals operate in a highly regulated industry they could not meet this prong of the *Penn Central* analysis. While the regulated nature of the healthcare industry may "temper" hospitals' investment backed expectations, we are aware of no case from this Court suggesting that participation in a regulated industry precludes claims for an unconstitutional taking. Indeed, regardless of the level of regulation in any industry, it is not "unreasonable" for a member of the regulated industry to expect that their property will not be confiscated from them without compensation.

Disconcertedly, the court came to this conclusion without once referencing the hospital-specific evidence in

the record addressing investment backed expectations – analyzing three key financial indicators in the healthcare industry: profitability, liquidity and leverage and comparing each of the Hospital's financial indicators to the national averages, both with and without including the statutorily mandated treatment provided to charity care patients. This evidence clearly shows that after providing the statutorily mandated care, Petitioners fail to meet national averages on each of these financial indicators. [Pa766-Pa799.] With the court not addressing this evidence, it is difficult to comprehend its conclusion that Petitioners could not have a reasonable expectation that they would operate at a similar level to other hospitals in the "highly regulated" hospital industry.

Similarly, the court found Petitioners could not prevail on the third factor of the *Penn Central* analysis, the nature of the governmental action, by making the broad pronouncement that the charity care program merely "adjust[s] the benefits and burdens of economic life to promote the common good." [C129a.] In doing so, the court failed to make any reference to the actual nature of the government action here, which is to deny the hospitals the right to exclude charity care patients from their facilities, and requiring transfer of property to provide "appropriate care." While the court noted that the *Penn Central* Court stated that a taking is less likely where the regulation adjusts burdens and benefits in further of the public good, it simply cherry-picked the statement that would support its conclusion. It failed to acknowledge this Court's preceding statement that: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. "Physical invasion" is the nature of the government action here.

The New Jersey Supreme Court's decision demonstrates how the holding in *Penn Central* has been misapplied by courts in ways that have restricted the circumstances under which a taking will be found. By granting *certiorari* this Court can clarify that *Penn Central* was intended to expand the scope of the Takings Clause rather that restrict it as so many courts have done. It will also provide an opportunity to deliver clarity regarding what evidence should be analyzed in determining if the *Penn Central* factors have been met.

As Justice Thomas noted, "[t]he current doctrine is 'so vague and indeterminate that it invites unprincipled, subjective decision making' dependent upon the decisionmaker." *Bridge Aina Le'a*, *supra*, 141 S.Ct. at 731-32 *quoting* Echeverria, Is the *Penn Central* Three-Factor Test Ready for History's Dustbin? 52 *Land Use L. & Zon. Dig.* 3, 7 (2000). By granting *certiorari* the Court can curtail such "undisciplined, subjective decision making" in the future.

CONCLUSION

Petitioners respectfully request that this Court grant *certiorari* to review the judgement of the Supreme Court of New Jersey.

Respectfully submitted,

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October 13, 2025

APPENDIX

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APPENDIX A — ORDER AND OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY, FILED MARCH 31, 2022

CONSOLIDATED ACTIONS

SUPERIOR COURT OF NEW JERSEY LAW DIVISION—MERCER COUNTY
DOCKET NO. L-1434-17
CIVIL ACTION

ENGLEWOOD HOSPITAL & MEDICAL CENTER, *et al.*,

Plaintiffs,

v.

THE STATE OF NEW JERSEY, *et al.*,

Defendants.

DOCKET NO. L-1397-18
CIVIL ACTION

INSPIRA MEDICAL CENTER—VINELAND, *et al.*,

Plaintiffs,

v.

THE STATE OF NEW JERSEY, *et al.*,

Defendants.

Appendix A

ORDER DENYING PLAINTIFFS' APPLICATION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' APPLICATION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, on the application of Plaintiffs, represented by James A. Robertson, Esq., John Z. Jackson, Esq., and Paul L. Croce, Esq., for an order granting partial summary judgment as specified in their Notice of Motion; and Defendants State of New Jersey, et al., represented by Deputy Attorney General Jacqueline R. D'Alessandro, appearing, having additionally filed their own application for an order granting summary judgment; and all parties having filed opposition and replies; and the Court having considered the parties' pleadings and arguments; and for the reasons as stated in the opinion filed and served with this Order; and for good cause shown;

IT IS on this 31st day of March 2022 **ORDERED** that:

1. Plaintiffs' application for an order entering partial summary judgment and determining that Defendants, by and through N.J.S.A. 26:2H18.64, have effectuated a *per se* taking of Plaintiffs' property under the Takings Clauses of the United States and New Jersey Constitutions is **DENIED**.

2. Plaintiffs' application for an order declaring that the only remaining issue before the Court is whether Defendants provided Plaintiffs just

compensation for the property taken by the State for the public purpose of providing care to Charity Care and Medicaid patients is **DENIED**.

3. Defendants' application for an order entering summary judgment is **DENIED in part and GRANTED in part**. Specifically, the Court grants summary judgment to Defendants against those Plaintiffs that have exhausted their administrative remedies.

4. The Court **DISMISSES without prejudice** those claims for years and for hospitals that have not exhausted their administrative remedies.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

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Appendix A

NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY DOCKET
NOS.: L-1434-17, L-1397-18

CONSOLIDATED

ENGLEWOOD HOSPITAL &
MEDICAL CENTER, *et al.*,

Plaintiffs,

v.

THE STATE OF NEW JERSEY, *et al.*,

Defendants.

INSPIRA MEDICAL CENTER—VINELAND, *et al.*,

Plaintiffs,

v.

THE STATE OF NEW JERSEY, *et al.*,

Defendants.

Appendix A

Argued: February 22, 2022

Decided: March 31, 2022

HON. ROBERT LOUGY, A.J.S.C.

This matter comes before the Court on the parties' respective applications for summary and partial summary judgment. Plaintiffs—numerous hospitals from across the State—seek a declaration that N.J.S.A. 26:2H-18.64 *et seq.* (the "charity care statute"), as implemented, constitutes a *per se* taking in violation of the federal and New Jersey Constitutions.[1] They move for partial summary judgment on the question of whether a taking occurred, leaving for another day the question of adequate compensation. Defendants seek an order dismissing Plaintiffs' complaint in its entirety. Defendants prevail here, as the statute does

1. Plaintiffs refer to this provision as the "Take All Comers Statute." Defendants refer to it as the "charity care statute." The Court adopts Defendants' terminology because Defendants are charged with administering the statute and such terminology appears in numerous published and unpublished decisions. *See e.g., DiCarlo v. St. Mary Hosp.,* 530 F.3d 255, 259 (3d Cir. 2008) (discussing New Jersey's "Charity Care Program"), and *In re Englewood Med. Center's SFY 2014 Charity Care Subsidy Appeal,* Docket Nos. A-1555-13T2, A-1145-14T2, A-1146-14T2, A-1147-14T2, A-1148-14T2, A-1149-14T2, A-1150-14T2, A-1151-14T2, A-1152-14T2, 2016 N.J. Super. Unpub. LEXIS 1172 (May 20, 2016), at *2 (referring to "charity care"). Additionally, as Defendants emphasize, the statute does not require hospitals to take *all* patients that might otherwise be subject to exclusion. Consistent with other judicial opinions, both published and unpublished, the Court adopts Defendants' more precise terminology.

not deprive Plaintiffs of their property in violation of the Constitutions; rather, it merely adjusts "the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978).

The Court first summarily reviews these matters' extensive procedural histories. Plaintiffs filed their complaint in this Court after the Commissioner of the Department of Health issued and the Appellate Division affirmed a dismissal of their constitutional challenges on jurisdictional grounds. *See In re Englewood Med. Center's SFY 2014 Charity Care Appeal,* at *1. The Appellate Division instructed that "the hospitals' claims should be raised, in the first instance, by way of complaints filed in the trial court." *Id.* at *12-13.

Six weeks later, Plaintiffs in the matter docketed as L-1434-17 filed a complaint against multiple institutional and individual Defendants, alleging two counts of unlawful taking. The Court denied Defendants' motion to dismiss the complaint and directed Defendants to file an answer. Plaintiffs in the matter docketed as L-1397-18 filed their amended complaint on June 29, 2018. Plaintiffs in the original matter filed their first amended complaint on July 11, 2018. The Court denied the parties' earlier efforts to prevail by summary judgment and directed them to proceed with additional discovery. The parties filed dispositive motions for partial summary judgment on November 18, 2021. The Court heard remote oral argument on February 22, 2022.

Appendix A

The parties agree on the material facts. Plaintiffs operate for-profit and non-profit general acute care hospitals in the State of New Jersey. Each of those hospitals qualify as disproportionate share hospitals, meaning that each serves "a disproportionate number of low-income patients with special needs" and that each qualifies as a "disproportionate share hospital" ("DSH Hospital") for charity care and Medicaid reimbursement purposes. Defendants include the State of New Jersey, the State of New Jersey Department of Human Services ("DHS"), the Division of Medical Assistance and Health Services ("DMAHS"), within DHS, and several State officials named in their official capacities based on their office holding at the time of filing of the complaints. Collectively, Defendants implement the charity care and Medicaid Programs in the State of New Jersey.

From 2004 through 2017, Plaintiffs submitted claims to Defendants to receive subsidies and reimbursements for hospital services rendered pursuant to the Charity Care and Medicaid Programs. Plaintiffs submitted Medicaid and charity care claims for hospital services provided in the following years:

- Calendar years 2004 through 2017 for Capital Health Medical Center—Hopewell, Capital Health Regional Medical Center, Englewood Hospital & Medical Center, Hackensack Meridian Health—Mountainside Medical Center, Inspira Medical Center—Elmer, Inspira Medical Center—Vineland, Inspira Medical Center—Woodbury, JFK Medical

Center, St. Francis Medical Center, St. Mary's General Hospital

- Calendar years 2008 through 2017 for Bayonne Medical Center

- Calendar years 2013 through 2017 for Christ Hospital and Hackensack Meridian Health—Pascack Valley Medical Center

- Calendar years 2011 through 2017 for Hoboken University Medical Center

Often, the subsidies and reimbursements received by Plaintiffs did not cover the full costs incurred by Plaintiffs for hospital services provided to charity care and Medicaid patients.

Plaintiffs initiated various administrative appeals related to the charity care subsidies and Medicaid reimbursement amounts and calculation method. They did not prevail in any of those appeals. In Plaintiffs' most recent appeal, Plaintiffs asserted the charity care subsidy and Medicaid reimbursement shortfall amount to an as-applied unconstitutional taking of their property without just compensation in violation of the United States and New Jersey Constitutions. The Appellate Division affirmed the Commissioner's final decision that the Defendant agencies lacked jurisdiction to decide Plaintiffs' constitutional challenges. The panel advised that Plaintiffs must first bring such claims to a trial court. *See In re Medicaid Inpatient Hosp. Reimbursement Rate*

Appeals for 2009-2012 v. Div. of Medical Assistance & Health Servs., No. A-3726-13T2 (App. Div. May 20, 2016) (slip op. at 16); In re *Englewood Med. Ctr.'s SFY 2014 Charity Care Subsidy Appeal*, at *6-7.[2] This litigation results from that instruction.

Defendants do not question the validity of the underlying Medicaid and charity care claims submitted by Plaintiffs. Plaintiffs' expert, Pamela Quinn, demonstrates in an unrefuted report and certification that the charity care subsidy and Medicaid reimbursement amounts received by Plaintiffs from Defendants during the relevant years sometimes failed to cover the full amount of the total costs incurred by Plaintiff Hospitals for the provision of hospital services to charity care and Medicaid patients. Defendants do not dispute the expert's findings, methods, or credibility. Defendants admit Plaintiffs' Statement of Material Facts is accurate when considered in conjunction with Defendants' Amended Answers and Objections to Plaintiffs' First Request for Admissions. *See* Defs.' Opp'n Br. 3, n. 1; *Id.* at Ex. B. And Defendants' Amended Answers and Objections to Plaintiffs' First Request for Admissions are consistent with Plaintiffs' Statement of Material Facts. Thus, the parties present no genuine dispute of material fact.

Plaintiffs move for partial summary judgment and seek an order declaring Defendants' application and

2. Similar appeals are pending in a variety of other forums, including before DMAHS, the Office of Administrative Law, and the Appellate Division. Plaintiffs contend that those appeals are likely futile given the 2016 Appellate Division opinion.

implementation of the charity care statute effectuated a *per se* taking of Plaintiffs' property under the Takings Clauses of the United States and New Jersey Constitutions. They argue that the provision, as implemented, compels them to provide hospital services to charity care and Medicaid patients without any ability to bill such patients for the shortfall in subsidies and reimbursements received from Defendants. Plaintiffs argue that the law's mandate to provide Medicaid and charity care patients with medical treatment regardless of ability to pay constitutes a public use of private property to provide access to hospital care or, alternatively, a government mandated transfer of property between private parties (from the hospitals to the patients), which represent *per se* takings. Plaintiffs assert that Defendants do not adequately reimburse Plaintiffs for medical treatment they were required by law to provide to charity care and Medicaid patients for all relevant years. That shortfall, they argue, constitutes a taking of Plaintiffs' private property for public use without just compensation.

First, Plaintiffs argue they have satisfied the "public use" and "private property" requirements. Plaintiffs contend:

> [Plaintiff hospitals] must use their private property to provide medical care to [] indigent patients, including real property (constituting the physical space comprising the hospital facility, inpatient beds, and examination, treatment, and operating rooms), personal property (such as medical supplies

> and equipment, medications, intravenous solutions, syringes, bandages, food, oxygen, imaging machines, and implantable devices), and human resources (such as employed physicians, physician assistants, nurses, nurse practitioners, pharmacists, social workers, food service and janitorial staff, and administrative personnel) whose time, effort, and skill are all necessary to provide[] quality care to . . . patients.
>
> [Pls.' Br., at 2.]

Plaintiffs argue they satisfy the "public use" requirement because the charity care statute, as implemented, gives the public a legal right to Plaintiffs' property to achieve the statute's purpose of ensuring citizens' access to high quality and cost-effective hospital care. *Id.* at 18-19. Plaintiffs contend real property, personal property, and professional services, as well as the "bundle of rights" inherent to a citizen's or entity's relationship with physical property, are all considered "private property" within the meaning of the Takings Clauses. *Id.* at 19-21.

Second, Plaintiffs argue that the constitutional deprivation is a *per se* taking rather than a regulatory taking. Plaintiffs assert the statutory mandate to treat all patients without regard to ability to pay, in combination with the administrative regulation precluding Plaintiffs from billing for such treatment, results in a government-authorized invasion of Plaintiffs' property and a physical appropriation of its resources in violation of the Takings

Clauses. *Id.* at 15. Plaintiffs assert a *per se* taking occurs when the government physically appropriates private property for itself or a third party by physically occupying property, taking property rights without title, or by condemning property via eminent domain. *Id.* at 21-22. Plaintiffs assert a regulatory taking occurs when a regulation goes too far in restricting the owner's use of the land as measured by the multi-factor test developed in *Penn Central Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Pls.' Br. 22-23. Plaintiffs argue the *Penn Central* standard only applies where there is not a physical appropriation of property and there is only a regulation restricting the use of property. *Id.* at 30-35. Plaintiffs contend the mere existence of a regulation does not trigger the *Penn Central* standard; rather, the court must examine the effect of the regulation on the property owner and ask whether it results in a physical appropriation of private property. *Id.* at 35-37.

They argue a *per se* taking occurred here because the government appropriated Plaintiffs' private property and right to use it for the benefit of Medicaid and charity care patients. Plaintiffs argue that the law deprived them of their right to exclude those patients because it required Plaintiffs to open its facilities to Medicaid and charity care patients regardless of ability to pay, and Medicaid and charity care patients physically occupied Plaintiffs' facilities and consumed Plaintiffs' resources and services. *Id.* at 24-29. Seeking to place their claims outside of the regulatory takings framework, Plaintiffs argue that the statute does not restrict their use of their private property as a hospital and does not deny Plaintiffs some

beneficial use of their property; rather, the statute directly appropriates their property by requiring Plaintiffs to provide Medicaid and charity care patients with access to Plaintiffs' facilities, resources, and professional services. *Id.* at 38-39.

Defendants cross-move for partial summary judgment and seek an order denying Plaintiffs' motion and declaring that the charity care statute and Medicaid inpatient rates of reimbursement, N.J.A.C. 10:52-14.1 to -14.17, do not constitute a taking of Plaintiffs' property under the Takings Clauses of the United States and New Jersey Constitutions.

First, Defendants argue the six-year statute of limitations imposed by N.J.S.A. 2A:14-1 pursuant to the Eminent Domain Act, N.J.S.A. 20:3-1.1 to -50, under which Plaintiffs raise their claims, bars Plaintiffs' inverse condemnation claims older than 2011. Defs.' Br., at 15-16.

Second, Defendants argue Plaintiffs claims amount to facial challenges to the validity of the Medicaid reimbursement rates and charity care statute because Plaintiffs challenge what factors are included or excluded from the statutory reimbursement formula rather than how the calculation is applied to them specifically or the resulting subsidy received in a given year. *Id.* at 16-20. Such facial challenges, Defendants argue, trigger a presumption of constitutionality and impose a heavier burden on Plaintiffs that they fail to satisfy. *Id.* at 18-19.

Third, Defendants argue Plaintiffs improperly define the property interest in granular terms and that the proper measure of the property interest for a takings analysis is each Plaintiff Hospital's entire operation. *Id.* at 20-21. Defendants contend Plaintiffs define the property interest as the individual chattels they utilize for patient treatment, such as bandages, gloves, pieces of equipment, etc. *Ibid.* Defendants assert takings jurisprudence considers the extent of interference on the property as a whole rather than the interference as to a discrete segment. *Id.* at 21-29.

Fourth, Defendants argue that the charity care statute does not result in an unconstitutional taking of Plaintiffs property under either the *per se* or *Penn Central* standards. *Id.* at 29-30. Defendants contend *Penn Central* is the relevant legal standard because the plain language of the charity care statute is written in the negative, meaning it restricts the Plaintiffs' use of property by prohibiting the denial of care to indigent persons rather than affirmatively appropriating property for medical care. *Id.* at 30-32.

Defendants argue that the charity care statute does not result in a *per se* taking because it meets none of the required characteristics: it does not impose an absolute and permanent occupation or appropriation of Plaintiffs' property; the government, by the statute's operation, does not acquire title to the hospitals; the government has not taken over the operation of the hospitals; the Plaintiffs maintain their rights to control, possess, use and dispose of the hospitals; the statute does not require Plaintiffs to

surrender any portion of the hospitals; the statute only prohibits Plaintiffs from turning away patients on the basis of ability to pay; and Plaintiffs may turn patients away for any number of other reasons. *Id.* at 33-39.

Defendants also maintain the charity care program does not result in a regulatory taking. According to Defendants, Plaintiffs have not proved that the program's failure to provide a dollar-for-dollar reimbursement has so adversely jeopardized Plaintiffs' overall economic viability. *Id.* at 40-42. Defendants also assert Plaintiffs cannot show the charity care statute unduly interferes with their investment backed expectations or will render their operation unprofitable because Plaintiffs operate in a highly regulated industry such that they must expect the regulation in conjunction with their non-profit status will affect how they conduct business, incur costs, and collect profits. *Id.* at 42-45. Defendants contend that the charity care program adjusts the benefits and burdens of economic life to promote the common good yet leaves the Plaintiffs' core property rights intact and thus does not effectuate a regulatory taking. *Id.* at 45-48.

Defendants additionally argue that Plaintiffs have no property interest in their Medicaid inpatient rates of reimbursement to advance a claim of unconstitutional taking because Plaintiffs voluntarily participate in the Medicaid program. *Id.* at 48-51. Even if the Court considers Plaintiffs' taking claim for the Medicaid program, Defendants maintain that Plaintiffs' claims fail as a matter of law because they attempt to reframe previously rejected arguments to change the rate

calculation that the Appellate Division has affirmed multiple times. *Id.* at 51-55.

Opposing Defendants' summary judgment motion, Plaintiffs first dispute that the statute of limitations bars their claims because the claims did not accrue until Plaintiffs officially denied them just compensation at the conclusion of Plaintiffs' administrative appeal and audit process, which occurred within the last six years. Pls.' Opp'n Br., at 10-16. Plaintiffs also argue they assert an as-applied constitutional challenge because Plaintiffs seek just compensation for hospital-specific property taken in identifiable years and do not seek to change the statutory formulas. *Id.* at 17-23.

Plaintiffs dispute Defendants' position that the charity care statute does not physically appropriate or invade Plaintiffs' property. Plaintiffs argue the regulatory scheme obliges them, under threat of significant monetary penalty, to provide care using their resources and property because they cannot deny admission and treatment to Medicaid and charity care patients that cannot pay for such care and Plaintiffs cannot bill those patients for the care provided. *Id.* at 24-29. For those same reasons, the regulatory scheme ultimately deprives Plaintiffs of their right to exclude such patients from their property and requires Plaintiffs to use their property for the benefit of Medicaid and charity care patients, which constitutes a *per se* taking and is not a regulatory taking. *Id.* at 29-32. Where there is a *per se* taking, Plaintiffs contend the denominator concept is irrelevant because the law categorically imposes a duty to compensate regardless of

whether the property interest taken constitutes an entire parcel or merely a segment thereof. *Id.* at 32-36.

Plaintiffs further argue that they prevail on their application even if the court applies the *Penn Central* standard. *Id.* at 37-39. The legislative history of the charity care and Medicaid statutes demonstrates that the Legislature recognized that paying hospitals less than the full cost for services rendered to indigent patients could push hospitals to the brink of bankruptcy and closure. *Id.* at 39-41. Plaintiffs contend their expert's calculations confirm Plaintiffs lose millions of dollars each year due to the subsidy and reimbursement shortfalls, which demonstrate the charity care statute and related regulations imposes severe negative economic impacts on Plaintiffs or at least creates a genuine dispute of material fact to deny the State's motion. *Id.* at 42-47. Plaintiffs assert the charity care statute interferes with their investment-backed expectations because it places an unlimited financial obligation on Plaintiffs to provide medical care regardless of actual costs, a financial obligation which in all fairness and justice should be borne by the public rather than the hospitals alone. *Id.* at 47-49. Additionally, Plaintiffs expert's report calculates the aggregate lost revenue for charity care alone totals $628 million dollars, demonstrating a significant negative impact on Plaintiffs' reasonable investment backed expectations. *Id.* at 49-52. Plaintiffs acknowledge the charity care statute may adjust the burdens and benefits of life but argue that it accomplishes that goal in a manner inconsistent with requisite fairness. *Id.* at 52-54.

Finally, Plaintiffs dispute that participating in the Medicaid program is "voluntary" and Plaintiffs do not claim a property interest in their Medicaid reimbursement. *Id.* at 55-56. Plaintiffs argue the fact that they elect to participate in the Medicaid program does not foreclose a takings claim. *Id.* at 56.

In opposition to Plaintiffs' motion for partial summary judgment, Defendants first reiterate the mandates of the charity care statute do not result in an unconstitutional taking of any kind. Defs.' Opp'n Br. 5. Defendants maintain the appropriate legal standard here is the *Penn Central* regulatory taking standard. *Id.* at 6. Defendants argue the charity care statute does not result in a taking because it does not interfere with Plaintiffs' property ownership rights, the statute does not require Plaintiffs to permanently surrender all or even a portion of their property, Defendants have not physically appropriated or invaded Plaintiffs' property, and charity care subsidies are properly allocated to Plaintiffs through a statutory formula and the Appropriations Act to distribute the burden of healthcare costs among hospitals while ensuring residents receive necessary medical care regardless of ability to pay. *Id.* at 6, 17-18. Defendants reiterate the proper measure of the property interest is a hospital's entire operation. *Id.* at 8. Defendants emphasize that the charity care statute does not grant individuals an affirmative right to enter or occupy Plaintiffs' property, and the plain language of the statute restricts the use of Plaintiffs' property by prohibiting Plaintiffs from denying care to indigent persons only based on ability to pay and Plaintiffs may decline to provide services for a multitude of other reasons. *Id.* at 11-12.

Defendants maintain the statute does not physically appropriate property because it is a public program adjusting the benefits and burdens of economic life to promote the common good. *Id.* at 13. Defendants also argue that Plaintiffs inappropriately and incorrectly rely upon cases involving physical takings as controlling precedents for what is a regulatory taking claim. *Id.* at 15. Additionally, Defendants argue the statute does not impermissibly infringe upon Plaintiffs' right to exclude because Plaintiffs agreed to provide medical services to indigent patients during the licensing process they chose to undertake in order to open their doors as a hospital business. *Id.* at 19-20.

Defendants also argue the Medicaid reimbursement rates received by Plaintiffs for the treatment of Medicaid patients do not result in an unconstitutional taking of any kind. *Id.* at 23. Defendants reiterate Plaintiffs have no property interest in their Medicaid inpatient rates of reimbursement and ask the Court to decline to consider anew what is a settled issue regarding the reimbursement calculation. *Id.* at 23. Defendants emphasize the voluntary nature of the Medicaid program and the fact that the Appellate Division previously affirmed the Medicaid reimbursement calculation. *Id.* at 23-30.

In reply, Plaintiffs respond that the government can take Plaintiffs' property without taking title to it. Pls.' Reply Br. 1-4. Plaintiffs dispute Defendants' position that the charity care statute only restricts Plaintiffs' use of their property. *Id.* at 5. Plaintiffs contend that Defendants' own witnesses have confirmed the statute

imposes an affirmative obligation on hospitals to treat patients regardless of ability to pay. *Id.* at 5-10; Pls.' Ex. 10, at 35:11-13. Plaintiffs assert that the statute's compulsory nature amounts to a physical taking because the statute requires Plaintiffs expend physical resources and provide care to Medicaid and charity care patients. Pls.' Reply. Br. 5-10.

Plaintiffs also argue the "voluntary participation defense" raised by Defendants does not apply here because the statute compels all hospitals—whether they participate in the Medicaid program or not—to treat patients regardless of ability to pay and threatens hospitals with a monetary penalty if they do not. *Id.* at 10. According to Plaintiffs, this creates an illusory choice for hospitals to participate in the Medicaid program to receive a limited reimbursement for statutorily mandated care or decline to participate in the Medicaid program and receive no reimbursement for statutorily mandated care. *Id.* at 11. Plaintiffs also contend the statute places an unconstitutional condition on their exercise of a privilege to engage in regulated activity—i.e., the forfeiture of either Plaintiffs' property rights or right to just compensation. *Id.* at 11-15.

In reply, Defendants first argue the statute of limitations on some of Plaintiffs' claims began to run when all facts supporting all elements of the cause of action were present and knowable, which was at least when Plaintiffs first filed their administrative challenges for each year at issue. Defs.' Reply Br. 2-3. Defendants contend the Appellate Division already determined that Plaintiffs

are raising facial constitutional challenges to the validity of the Medicaid reimbursement rates and the charity care statute. *Id.* at 3-4. Defendants reiterate Plaintiffs' grievance is with the subsidy and reimbursement rate calculations generally rather than how Defendants apply those calculations to Plaintiffs specifically. *Id.* at 5-6. Defendants maintain that Plaintiffs continue to misstate the property interest at issue, that the regulatory taking analysis applies here, and that Plaintiffs fail to carry their burden. *Id.* at 6-8, 12-16. Defendants reiterate that, even if the court applies the *per se* taking standard, it will reach the same conclusion that no taking exists here. *Id.* at 8-12. Finally, Defendants maintain Plaintiffs hold no property interest in their Medicaid rates of reimbursement on which they may even bring a takings claim, and the Appellate Division already rejected the kind of arguments made by Plaintiffs, affirming the validity of the Medicaid rates of reimbursement. *Id.* at 16-20.

This matter involves both Medicaid reimbursements and the charity care statute. The Court first provides the legal framework and context for Plaintiffs' Medicaid claim. "Medicaid was created to provide medical assistance to the poor at the expense of the public." *Mistrick v. Div. of Med. Assistance & Health Servs.*, 154 N.J. 158, 165-66 (1998) (citations omitted). The federal Medicaid Act, under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 to 1396v, authorizes a joint federal-state program to provide financial assistance to individuals whose income and resources are insufficient to meet the costs for necessary medical services. *Id.* at § 1396a. Participation in the Medicaid program is optional for states; however,

"once a State elects to participate, it must comply with the requirements" of the Medicaid statute and federal regulations in order to receive Medicaid funds. *Harris v. McRae,* 448 U.S. 297, 301 (1980).

Defendants also administer the New Jersey Health Care Cost Reduction Act, N.J.S.A. 26:2H-18.51 to -18.69, which includes the charity care statute. The charity care statute provides in relevant part 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. Under the charity care statute:

> Hospitals in the State of New Jersey have a statutory duty to provide care to anyone seeking treatment regardless of their ability to pay. N.J.S.A. 26:2H18.64. To assist hospitals with this effort, the Legislature authorized the Department of Human Services, in conjunction with the Department of Health and Senior Services (collectively, the Departments), to create the New Jersey Charity Care Program. *See* N.J.S.A. 30:4D-7. Patients "determined to be eligible for charity care" will not be billed "or be subject to collection procedures [and patients] determined to be eligible for reduced charge charity care [will] not be billed or subject to collection procedures for the portion of the bill that is reduced charge charity care." N.J.A.C. 10:52-11.14.

> Under the charity care regulatory scheme, a hospital patient "or [a] responsible party may submit a completed application for a hospital to make a determination for charity care or reduced charge charity care at any time up to one year from the date of outpatient service or inpatient discharge." N.J.A.C. 10:52-11.13(b). A hospital then has "two years after the date of patient discharge (inpatient) or date of service (outpatient)" to submit a "clean charity care claim[,]" N.J.A.C. 10:52-12.1, in order for the claim to be documented and considered in the Department of Health and Senior Service's funding formula. *See* N.J.A.C. 10:52-13.4.
>
> [*Newton Med. Ctr. v. D.B.*, 452 N.J. Super. 615, 622-23 (App. Div. 2018).]

Per N.J.S.A. 26:2H-18.52, hospitals are subject to a $10,000 civil penalty per violation for each violation of the charity care statute.

The Charity Care Act ensures that citizens who cannot afford to pay for necessary hospital care have equal access to it. N.J.S.A. 26:2H-18.51(c). The charity care program is "the payer of last resort." *Newtown Med. Ctr.*, 452 N.J. Super. at 623. Patients are generally ineligible for charity care if they qualify for other medical assistance programs. *Ibid.* (citing N.J.A.C. 10:52-11.5(k)).

> The regulations concerning regular admissions impose a three-month window for uninsured

> patients who have made no payments at the time of service to complete a medical assistance application, otherwise the hospital "[m]ay bill the applicant, consistent with the manner applied to other patients[.]" N.J.A.C. 10:52-11.5(d)(1)(i).
>
> [*Ibid.*]

To financially assist hospitals that serve disproportionate numbers of low-income patients ("disproportionate share hospitals" or "DSH hospitals"), including charity care and Medicaid patients, the Act establishes a Health Care Subsidy Fund to provide "disproportionate share payments." N.J.S.A. 26:2H18.51(d)-(e). Disproportionate share payments include several subsidies, including a "charity care subsidy." *See* N.J.S.A. 26:2H-18.52; N.J.S.A. 26:2H-18.58(a)(1). The charity care subsidy is "the component of the disproportionate share payment that is attributable to care provided at a disproportionate share hospital to persons unable to pay for that care[.]" N.J.S.A. 26:2H-18.52. Each year, the State appropriates an amount for the charity care subsidies, and the Department of Health (DOH) determines the amount of charity care subsidies that eligible hospitals will receive, using a statutorily prescribed formula. N.J.S.A. 26:2H-18.59.

"Eligible hospitals, however, do not necessarily receive a full 'reimbursement' covering all of their actual charity care expenses; rather, a hospital receives only its proportionate share of the total subsidy funded by the Legislature for that year." *Univ. of Med. & Dentistry v.*

Grant, 343 N.J. Super. 162, 165 (App. Div. 2001) (citing N.J.S.A. 26:2H-18.59e) ("UMD"); *accord In re Deborah Heart & Lung Ctr. SFY 2009 Charity Care Subsidy Allocation,* 417 N.J. Super. 25, 27-28 (App. Div. 2010) ("The program does not provide full funding for such care.").

As the *UMD* panel further explained:

> The statutory distribution formula requires a determination of how much charity care an eligible hospital has provided, valued not at its usual and customary charges but rather on the amount Medicaid would pay for such services ("documented charity care"). N.J.S.A. 26:2H-18.59e(a)(1). To this end, hospitals seeking charity care subsidies are "required to submit all claims for charity care cost reimbursement . . . to the department in a manner and time frame specified by the Commissioner of Health and Senior Services. . . ." N.J.S.A. 26:2H-18.59(b)(3).
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> . . .
>
> The actual dollar amount of charity care provided by the hospital must be "verified in the department's most recent charity care audit. . . ." N.J.S.A. 26:2H18.59e(a)(1) (" . . . documented charity care shall be equal to the audited Medicaid-priced amounts for the most recent calendar year"). In other words, the DHSS must perform charity care audits

> of all charity care claims submitted by eligible hospitals for the reporting year.
>
> Hospitals record the value of the charity care they provide at their usual and customary charges, but, as noted, the charity care subsidy is based on the amount Medicaid would pay for such services. N.J.S.A. 26:2H18.59e(a)(1). Therefore, the initial value must be converted or "priced" to the Medicaid value to determine ultimately the "documented charity care" for each eligible hospital.
>
> [343 N.J. Super. at 165-67.]

Additionally, the program does not reimburse all hospitals for charity care services equally:

> Hospitals providing charity care are ranked according to their ratio of free care to total revenue, which is called the relative charity care percentage (RCCP), and hospitals that have higher RCCPs receive a greater percentage of the cost of their actual charity care than hospitals with smaller RCCPs. Hospitals are required to seek reimbursement from other sources, such as Medicaid, for charity care services. Any such reimbursement is deducted in determining the amount of a hospital's charity care subsidy.
>
> [*In re Deborah Heart & Lung Ctr.,* 417 N.J. Super. at 28 (internal citations omitted).]

Finally, hospitals in New Jersey go through an extensive licensing procedure. *See* N.J.A.C. 8:33-1.1 to -6.2. In order to be granted a certificate of need (the first step toward obtaining an operating license), hospitals must commit to the provision of services to "medically underserved populations," such as "low income persons," N.J.A.C. 8:33-4.9(c), and demonstrate an ability and willingness to provide charity care, N.J.A.C. 8:33-4.10(a)(6).

The parties both move for summary judgment. The procedures and standards for summary judgment are well-established. Summary judgment shall be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *Ibid.* Summary judgment is appropriate where the party opposing summary judgment points only to disputed issues of fact that are "of an insubstantial nature." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 529 (1995). Where the evidence on a factual issue "is so one-sided that one party must prevail as a matter of law," the court "should not hesitate" to grant summary judgment. *Id.* at 540 (quoting *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 252 (1986)). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. *Brill,* 142 N.J. at 523. Bare conclusions without factual support cannot defeat summary judgment; instead, evidence

submitted in support of the motion must be admissible, competent, non-hearsay evidence. *Brae Asset Fund, L.P. v. Newman,* 327 N.J. Super. 129, 134 (App. Div. 1999); *Jeter v. Stevenson,* 284 N.J. Super. 229, 233 (App. Div. 1995).

The moving party must sustain the burden of showing clearly that no genuine issue of material fact is present in the case and that the moving party is entitled to judgment as a matter of law. *Judson v. Peoples Bank & Tr. Co.,* 17 N.J. 67, 73 (1954) (Brennan, J.). In determining whether a dispute is genuine, the court makes all legitimate inferences in favor of the non-moving party and denies the motion if there is the slightest doubt about the existence of a material issue of fact. *Saldana v. DiMedio,* 275 N.J. Super. 488 (App. Div. 1998). The court must "consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party." *Brill*, 142 N.J. at 523. The court must engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict, namely, "whether evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 533 (quoting *Anderson,* 477 U.S. at 251-52). Summary judgment may be rendered on any issue in an action although there is a genuine factual dispute as to any other issue. R. 4:46-2(c).

Assertions that are unsupported by evidence "[are] insufficient to create a genuine issue of material fact."

Miller v. Bank of Am. Home Loan Servicing, LP, 439 N.J. Super. 540, 551 (App. Div. 2015) (alteration in original) (quoting *Heyert v. Taddese*, 431 N.J. Super. 388, 414 (App. Div. 2013)). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" *Hoffman v. Asseenontv.Com, Inc.*, 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting *Merchs. Express Money Order Co. v. Sun Nat'l Bank*, 374 N.J. Super. 556, 563 (App. Div. 2005)). Furthermore, "the act of filing the cross-motion represents to the court the ripeness of the party's right to prevail as a matter of law." *Spring Creek Holding Co. v. Shinnihon U.S.A. Co.*, 399 N.J. Super. 158, 178 (App. Div. 2008).

As the Court explained in *Friedman v. Martinez*, "a key aim 'of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.'" 242 N.J. 450, 472 (2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Ibid.* (quoting *Celotex Corp.*, 477 U.S. at 322).

The Court turns to Plaintiffs' claims. Some are not ripe, as Plaintiffs continue to pursue administrative remedies for certain years. Expiration of the statute of limitations is an affirmative defense for which Defendants bear the burden of proof. *See* R. 4:5-4; *Notte v. Merchs. Mut. Ins. Co.*, 185 N.J. 490, 500 (2006); *Pension Tr. Fund*

for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc., 730 F.3d 263, 271 (3d Cir. 2013). The six-year statute of limitations set forth in N.J.S.A. 2A:14-1 applies to inverse condemnation actions initiated under the Eminent Domain Act, N.J.S.A. 20:3-1.1 to -50. *Klumpp v. Borough of Avalon,* 202 N.J. 390, 409 (2010). For any takings claim, "the cause of action . . . begins to accrue on the date the landowner becomes aware or, through the exercise of reasonable diligence, should have become aware, that he or she had been deprived of all reasonably beneficial use." *Id.* at 409-12 (quotations and citations omitted); *see also Raab v. Borough of Avalon,* 392 N.J. Super. 499, 509-11 (App. Div. 2007).

An inverse condemnation claim is not ripe for determination by a trial court until the property owner exhausts all procedures available for obtaining just compensation. *See Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186-87 (1985); *Heyert v. Taddese,* 431 N.J. Super. 388, 441-42 (App. Div. 2013) (explaining that New Jersey courts apply *Williamson County Regional Planning Commission* in various contexts, including inverse condemnation). Only then is the property owner capable of proving a regulation deprives the property of all economically viable use because no other means exist for recouping the lost property. *See Heyert,* 431 N.J. Super. at 442; *United Sav. Bank v. State,* 360 N.J. Super. 520, 525-26 (App. Div. 2003) (holding failure to pursue administrative procedures prevented inverse condemnation claim from ripening for land use permit application disrupted by environmental agency determination letter); *Moroney v. Mayor &*

Council, 268 N.J. Super. 458, 465 (App. Div. 1993) (finding inverse condemnation claim not ripe for determination until owner exhausted all remedial measures to contest denied variance). "[U]ntil just compensation has been denied, an owner has not suffered a constitutional injury and does not have a [] takings claim." *R&J Holding Co. v. Redevelopment Auth.,* 670 F.3d 420, 432-33 (3d Cir. 2011) (citing *Williamson Cnty.,* 473 U.S. at 186, 194 n.13).

Some of the inverse condemnation claims advanced by Plaintiffs are not ripe for determination by this Court because the question of just compensation remains unresolved. N.J.A.C. 10:52-14.17 delineates the subsidy and rate appeal process. "Any hospital[] which seeks an adjustment to its final rate shall submit a rate appeal request." N.J.A.C. 10:52-14.17(c). "The Division [of Medical Assistance and Health Services] shall review the documentation and determine if an adjustment is warranted." N.J.A.C. 10:52-14.17(d).

> If a hospital is not satisfied with the Division's determination, the hospital may request an Office of Administrative Law (OAL) hearing pursuant to N.J.A.C. 10:49-10. . . . The Director of the Division of Medical Assistance and Health Services shall thereafter issue the final agency decision either adopting, modifying, rejecting or remanding the Administrative Law Judge's initial decision. Thereafter, review may be had in the Appellate Division of New Jersey Superior Court.
>
> [N.J.A.C. 10:52-14.17(e).]

Here, the administrative procedure to appeal charity care subsidies does not end until the Appellate Division renders a final decision on the rate appeal. Only then can Plaintiffs assert that they sustained a constitutional injury. Therefore, Plaintiffs' takings claims begin to accrue on the date the Appellate Division issues its final decision on the subsidy and rate reimbursement appeal for a particular year.

The parties submitted two unpublished Appellate Division opinions issued on May 20, 2016 for appeals filed by various hospitals and specifically pertaining to subsidies and reimbursements allocated in fiscal years 2009-2012 and 2014-2015. *See In re Medicaid Inpatient Hosp. Reimbursement Rate Appeals,* slip op. at 3-9; *In re Englewood Med. Ctr.'s SFY 2014 Charity Care Subsidy Appeal,* slip op. at 2-5.[3] These two opinions are the only proofs that demonstrate exhaustion of administrative remedies outlined in N.J.A.C. 10:52-14.17. Because these two Appellate Division cases only involved subsidies and reimbursement rates for specific fiscal years and for only the specific Plaintiffs named in the opinions, the scope of exhaustion is limited to those years and Plaintiffs.

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3. Here, the Court relies on these opinions for case history and evidential purposes, not for precedential value. *See R.* 1:36-3 ("No unpublished opinion shall constitute precedent or be binding upon any court."); Pressler & Verniero, *Current N.J. Court Rules,* cmt. on *R.* 1:36-3 (Gann 2021) ("[T]he court itself may not cite an unpublished opinion except to the limited extent required by the application of preclusionary legal principles or case history."); *State v. Robertson,* 438 N.J. Super. 47, 60 n.8 (App. Div. 2014) (citing unpublished opinions for "evidential and not precedential purposes").

Plaintiffs, individually, may not yet assert takings claims for which they have not exhausted administrative remedies. Plaintiffs' counsel certifies subsidy and reimbursement appeals are currently pending and have not even reached the Appellate Division, confirming the claims are not ripe. *See* Robertson Opp'n Certif. $$5, 10-12, 14, Ex. A. Plaintiffs cannot establish that they have exhausted the administrative procedures available to obtain just compensation for subsidy and reimbursement shortfalls for the hospitals and claim years that the Appellate Division has not addressed.

Some Plaintiff Hospitals named in the present action before this Court were part of the subsidy and rate appeals decided by the Appellate Division in 2016. Plaintiffs Englewood Hospital & Medical Center and JFK Medical Center appealed subsidies and rates allocated in fiscal years 2009-2012 and 2014-2015. Plaintiffs Hoboken University Medical Center, Capital Health Regional Medical Center, and Capital Health Medical Center—Hopewell appealed subsidies and rates allocated in fiscal years 2014-2015 only. Plaintiffs Hackensack Meridian Health Pasack Valley Medical Center, Hackensack Meridian Health—Mountainside Medical Center, and St. Mary's General Hospital appealed subsidies and rates allocated in fiscal years 2009-2012 only. For these Plaintiffs, their takings claims began to accrue on the date the Appellate Division issued its final decision on the subsidy and rate reimbursement appeals: May 20, 2016. Because Plaintiffs filed their takings claims in this trial court on June 30, 2017, the six-year statute of limitations does not bar Plaintiffs claims for the fiscal years addressed by the Appellate Division.

Therefore, the Court dismisses without prejudice all takings claims for lack of ripeness except for the following:

- Englewood Hospital & Medical Center and JFK Medical Center for fiscal years 2009-2012 and 2014-2015;

- Hoboken University Medical Center, Capital Health Regional Medical Center, and Capital Health Medical Center—Hopewell for fiscal years 2014-2015 only; and

- Hackensack Meridian Health Pasack Valley Medical Center, Hackensack Meridian Health—Mountainside Medical Center, and St. Mary's General Hospital for fiscal years 2009-2012 only.

The Court turns to the merits of Plaintiffs' takings claims.

The inquiry must begin with assessing whether Plaintiffs assert a facial or as-applied takings challenge to the charity care statute. Throughout their pleadings and argument, Plaintiffs maintain that they advance as-applied challenges. The Appellate Division characterized the appellant hospitals' arguments as raising a "facial constitutional challenge." *In re Medicaid Inpatient Hosp. Reimbursement Rate Appeals for 2009-2012,* No. A-3276-13 (App. Div. May 20, 2016). Defendants urge the Court to accept that characterization and apply the resultant higher bar to Plaintiffs' claims.

Appendix A

The New Jersey Supreme Court has instructed that this Court should follow United States Supreme Court precedent regarding the distinctions between facial and as-applied constitutional challenges. *See In re Contest of November 8, 2011 Gen. Election,* 210 N.J. 29, 46-48 (2012) (stating that New Jersey will continue applying United States Supreme Court standard for facial challenges unless it signals its abandonment). In the context of takings analysis, the distinction between a facial and an as-applied takings claim is both substantial and substantive. As the United States Supreme Court has explained, there is "an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 494 (1987); *see also Brubaker Amusement Co. v. United States,* 304 F.3d 1349, 1356 (Fed. Cir. 2002) ("The Supreme Court has repeatedly emphasized a distinction between takings claims that arise in the context of facial challenges and those that arise in the context of challenges to the application of a statute or regulation to a particular piece of property."). In a facial challenge, the inquiry is whether the statute "denies an owner economically viable use of his land." *Keystone Bituminous,* 480 U.S. at 495 (quoting *Agins v. Tiburon,* 447 U.S. 255, 260 (1980)). In an as-applied challenge, a party alleges that "the particular impact of government action on a specific piece of property requires the payment of just compensation." *Id.* at 494.

Additionally, concluding that Plaintiffs raising an as-applied constitutional challenge comports with principles espoused by the highest courts of the United States and this State. The United States Supreme Court has emphasized that its "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting making such a decision necessary . . . is particularly important in cases raising allegations of an unconstitutional taking of private property." *Ibid.* (multiple citations omitted). Likewise, our Court has explained that "[f]acial challenges run contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *In re Contest of Nov. 8, 2011 Gen. Election of Off. of N.J. Gen. Assembly,* 210 N.J. 29 (2012) (quoting *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008)).

The more prudent course is to assess Plaintiffs' complaints as advancing as-applied constitutional taking claims. The crux of Plaintiffs' claims are that a taking occurs when Plaintiffs provide hospital services to charity care and Medicaid patients because they are required by law to do so, and the application of the subsidy and reimbursement formulas to particular Plaintiff Hospitals in particular years deprived them of their constitutional right to just compensation because the particular reimbursement or subsidy failed to cover the full cost of mandated hospital services rendered by that particular hospital. *See* Am. Compl. ¶¶ 68-69, 76-78. Plaintiffs seek

judgment declaring the mandate plus the individualized shortfalls constitutes an "as-applied" takings clause violation and ordering Defendants pay just compensation to each Plaintiff Hospital that experienced a shortfall in the relevant years. *Ibid.*

Plaintiffs do not argue the statute as written is unconstitutional or seek to vindicate the rights of hospitals statewide. Pls.' Opp'n Br. 18, 21-22. Additionally, Plaintiffs acknowledge the statute could operate constitutionally, in their view, if the subsidies and reimbursements received fully cover the costs of mandated care to charity care and Medicaid patients provided by a particular hospital in a particular year. *Id.* at 18-19. Finally, Plaintiffs' prayers for relief, if ultimately granted, would require this Court to fashion individualized decretory paragraphs that specify the amount to be paid to each Plaintiff's hospital or hospitals for each year. The particularized nature of the constitutional injury as well as the remedy sought indicates the challenge is an as-applied constitutional challenge. The Court will analyze them as such.

The Court acknowledges that the Appellate Division referred to Plaintiffs' challenges as facial challenges to the charity care statute. The Court declines Defendants' invitation to follow that conclusion here. Plaintiffs in these consolidated matters include hospitals that were not part of the appellate matter so, for at least those parties, that conclusion is not the law of the case under even the most generous and expansive sense. Additionally, the Appellate Division panel discussed takings claims that were not raised in a formal pleading nor substantively addressed

by the Commissioner except as to jurisdiction. Finally, it would be an inconsistent reading of the Appellate Division's opinion to require Plaintiffs to pursue their takings claim in the Law Division and simultaneously conclude that the Appellate Division's determination constrains their ability to do so. While an appellate remand constrains both the trial court and the parties, *see* Pressler & Verniero, *Current N.J. Court Rules,* cmt. 2 on *R.* 2:9-1 (Gann 2022) (noting that "terms and scope of the remand or specific instructions [that the Appellate Division] has issued regarding the litigation bind the court below . . . "), the Appellate Division did not remand this matter to the Court. Rather, it merely affirmed the Commissioner's decision to not address Plaintiffs' constitutional challenges. The panel's instruction to the hospitals to pursue their claims in the Law Division did not constrain Plaintiffs' ability to litigate those claims anew, as pleaded. Thus, the Court does not consider these Plaintiffs to be constrained by the panel's characterization of the appellants' claims as facial challenges.

The government may not take private property for public use without just compensation. *See U.S. Const.* amends. V, XIV; *N.J. Const.* art. I, ¶ 20; *Klumpp,* 202 N.J. at 404 (providing the New Jersey Constitution offers protections "coextensive with the Takings Clause . . . of the United States Constitution"). "Under those federal and state provisions the government is prohibited 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Simmons v. Loose,* 418 N.J. Super. 206, 233 (quoting *Greenway Dev. Co. v. Borough of Paramus,* 163

N.J. 546, 553 (2000)). Although the "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 537 (2005), the safeguards afforded by the Takings Clause apply to both real and personal property. *Horne v. Dep't of Agric.,* 576 U.S. 351, 357 (2015).

The Takings Clause recognizes two types of takings: physical and regulatory. *Cedar Point Nursery v. Hassid*, ___ U.S. ___, 141 S. Ct. 2063, 2071-72 (2021); *see also Klumpp,* 202 N.J. at 405 ("A constitutional taking may occur in one of two ways: 1) via physical taking, in which the government takes title to private property or 'authorizes a physical occupation [or appropriation] of property'; or 2) via regulatory taking, through which a government regulation deprives the property owner of all economically viable use of their land.") (quoting *Yee v. Escondido,* 503 U.S. 519, 522 (1992)) (multiple additional citations omitted). The distinction is important because different standards apply in each context. *See Cedar Point Nursery,* 141 S. Ct. at 2072. And it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 323 (2002).

As the Supreme Court explained in *Cedar Point Nursery,* in identifying a physical taking,

> [t]he 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. *Tahoe-Sierra,* 535 U.S. at 321-23. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.
>
> [141 S. Ct. at 2072.]

A physical taking occurs if the government, by whatever means, "appropriates" private property for itself or someone else. *Id.* at 2071-72. "The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. R.I.,* 533 U.S. 606, 617 (2001). When that happens, the size and duration of the appropriation do not bear on the question of whether a taking occurred; they only bear on the question of compensation. *Cedar Point Nursery,* 141 S. Ct. at 2074; *see also Tahoe-Sierra,* 535 U.S. at 322 (stating government must compensate owner for physical taking "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof"), *Simmons,* 418 N.J. Super. at 234 ("In a physical invasion case, the size of the invasion does not affect the owner's right to compensation.").

A physical taking is "relatively rare, easily identified, and usually represent[s] a greater affront to individual property rights." *Tahoe-Sierra,* 535 U.S. at 324; *see also Klumpp,* 202 N.J. at 405 (noting that "physical occupation or appropriation of property is usually an

obvious demonstration of a taking"). The most obvious examples of physical takings include when the government condemns property, takes possession without acquiring title or physically occupies property, such as by recurring flooding from building a dam. *Cedar Point Nursery,* 141 S. Ct. at 2071.

A physical taking also occurs when the government authorizes a physical invasion of property for its own or another's benefit. *Id.* at 2073-74. A statute imposes a government-authorized invasion if it grants an affirmative right to third parties to access or "traverse [private property] at will." *Id.* at 2074-75; *see also Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 831 (1987) (reasoning physical taking would occur if zoning board outright required plaintiff to grant public easement to obtain permit). A statute that does not grant an affirmative right to access nonetheless imposes a government-authorized invasion if it prevents a property owner from excluding third parties. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 423-24, 434-35 (1982) (concluding law that required landlords to allow cable companies to install equipment on private property constituted physical taking); *Kaiser Aetna v. United States,* 444 U.S. 164, 167, 180 (1979) (finding that physical taking occurred when government prohibited developer from excluding public from marina converted from privately-owned dredged pond). A government-authorized invasion also occurs when the law transfers actual chattel and the authority to dispose of it to the government or a third party. *See, e.g., Horne,* 576 U.S. at 361-62 (finding physical taking where law compelled farmers to set aside

portion of raisin crop for government use); *Loretto,* 458 U.S. at 439 (emphasizing cable company owned cable installed on private premises). Thus, government affects a *per se* taking where the owners "lose the entire 'bundle' of property rights in the appropriated [property]—'the rights to possess, use, and dispose' of them." *Horne,* 576 U.S. at 351-52. In other words, a taking by occupation occurs when the government "absolutely dispossess[es] the owner of this right to use, and exclude others from, his property." *Loretto,* 458 U.S. at 435 n.12. "Not every physical *invasion* is a taking." *Ibid.*

New Jersey courts have upheld medical facility licensing provisions that imposed obligations like those imposed by the charity care statute. In *New Jersey Association of Health Care Facilities v. Finley,* the Court dismissed as "without merit" the nursing homes' argument that regulations imposing a licensing condition to make available "a reasonable number of [their] beds to indigent persons" or to maintain all patients regardless of a change in economic status constituted a taking. 83 N.J. 67, 80 (1980). The Court noted that the regulations considered the economic impact, provided an administrative review process, and were "directed at an acute social problem affecting the health and welfare of the needy aged and infirm, are well within the power and authority vested in the Department by the Legislature and do not constitute a taking of private property without just compensation." *Id.* at 81.

In *Cooper Medical Center v. City of Camden,* the Appellate Division easily concluded that no taking occurred

when the hospital was compelled to provide hospital care and medical treatment to "two persons injured by the police in the course of their apprehension." 214 N.J. Super. 493, 494 (1987). After rejecting the argument that due process compelled the city and county to compensate the hospital for the care, *id.* at 495, the court dismissed the takings claim as well. It noted that "restrictions on the use of property, if in furtherance of a valid governmental purpose, serve the public interests and are considered a proper exercise of the police power even though they may result in some economic disadvantage." *Id.* at 496. The panel denied the takings claim because the "[t]he expenses for the hospitalization and medical care and services to [the indigent persons] is clearly contemplated by the [Uncompensated Care Factor] built into the hospital's fees" under State and federal law. *Id.* at 497.

Additionally, federal courts, both before and after *Horne,* have upheld similar regulatory schemes or provisions against takings challenges. In *Franklin Memorial Hospital v. Harvey,* the First Circuit rejected a hospital's challenge that Maine's free care laws—a collection of statutes and regulations that "required all hospitals to provide free medical services to certain low income patients"—amounted to unconstitutional takings of property.[4] 575 F.3d 121, 123 (1st Cir. 2009). In *Franklin*

4. Maine's statutory scheme was, the court observed, unique among the States because of three characteristics: "(1) the laws mandate that a hospital provide free/uncompensated care to persons deemed eligible by the state through a penalty enforcement scheme, (2) the hospital is not reimbursed any amount for the provision of care, [and (3)] the provision of free care is not

Memorial, the appellant hospital advanced an argument similar to these Plaintiffs: "in FMH's view, Maine's free care laws are not a form of price control but instead the direct transfer of property from the hospitals to low-income patients." *Id.* at 127. The Court summarily rejected the appellants' *per se* takings claim, relying upon *Yee* and noting that Maine did not require it to serve low-income patients because appellant could stop using its property as a hospital. *Id.* at 126 (citing *Yee,* 503 U.S. at 528). Turning to the *Penn Central* ad hoc analysis, the court concluded that (a) in terms of economic impact, the appellants failed to allege, much less demonstrate, that the free care laws were threatening appellant's economic viability, *id.* at 127; (b) regarding the appellant's investment-backed expectations, the court first rejected the government's argument that non-profit entities could not assert that factor, *id.* at 127-28, and then noted that appellant's

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a license condition or is not linked to the state's certificate of need process." *Franklin Mem. Hosp.,* 575 F.3d at 124. "To the parties[']knowledge, no other state has a system of free care with each of those three features." *Ibid.* The court also discussed Rhode Island's statutory and regulatory structure, which imposed the requirement of free medical care as a licensure requirement. *Id.* at 124 n.2. Under Rhode Island law, hospitals must "'provide charity care (i.e., a 100% discount) to patients/guarantors whose annual income is up to and including 200% of the Federal Poverty Levels, taking into consideration family unit size.'" *Ibid.* (quoting 14-90-28 R.I. Code R. § 11.3(c)). "Rhode Island's free care requirements are enforceable by the state's attorney general, and noncompliance may result in revocation of the hospital's license, up to a $ 1 million fine, and 5 years in prison." *Ibid.* (citing R.I. Gen. Laws § 23-17.14-30). This Court found no constitutional or other challenge to Rhode Island's laws.

"investment-backed expectations are tempered by the fact that it operates in the highly regulated hospital industry," *id.* at 128 (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1027-28 (1992)); and (c) that the character of the government action "strongly favored finding no taking here," *id.* at 128, because "Maine's free care laws merely require that hospitals not refuse to treat patients based on their ability to pay and that they provide those services freely to those with incomes at or below 150% of the federal poverty level," *id.* at 129. The appellant "may otherwise set the terms on which it provides access to its facilities and services." *Ibid.* The court concluded that the appellants' objection to Maines' free care and Medicare program is "a dispute with the policy choices made by the state's political branches" best addressed through the political process. *Id.* at 130.

In a similar context, the Ninth Circuit rejected a takings challenge to a California statute that "requires ambulance companies to provide emergency medical transportation irrespective of a patient's ability to pay," with only partial reimbursement available when both the provider and the patient are enrolled in the state's Medicaid program, known as Medi-Cal. *Sierra Med. Svcs. All. v. Kent.,* 883 F.3d 1216 (9th Cir. 2018); *see also, id.* at 1224 (discussing Cal. Health & Safety Code § 1317(d), which requires providers to provide "emergency care and services . . . without first questioning the patient or any other person as to his or her ability to pay therefor."). This provision, the court discussed, applied to all "emergency-medical-transportation providers, whether or not they enroll as MediCal providers." *Ibid.* Accordingly, the court

concluded that the plaintiffs had a legally protectable property interest in "their ambulances, equipment, wages, supplies, insurance, goodwill, and ambulatory-service and employment contracts." *Id.* at 1224-25.

Discussing *Horne,* the court acknowledged that (a) "the Fifth Amendment also protects against the taking of personal property without just compensation," *ibid.* (citing *Horne,* 576 U.S. at 358 ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.")), and (b) "voluntary participation in a market that is subject to regulation does not defeat a takings claim," *ibid.* (citing *Horne,* 576 U.S. at 364-67).

The court rejected the appellants' argument that the statute imposed a *per se* taking, observing that, "[i]f § 1317(d) effects a taking, it is a regulatory one because [California's Department of Health Care Services ("DHCS")] does not directly appropriate the Plaintiffs' ambulances or other personal property through the mandatory-care provision. DHCS instead regulates how the Plaintiffs can use their property." *Id.* at 1225.

The court then turned to the *Penn Central* analysis because "California's mandatory care provision constitutes a temporary restriction on [appellants'] use of their property, so this balancing test applies." *Ibid.* (citing *Loretto,* 458 U.S. at 435 n.12). The court quickly disposed

of appellants' claim because (a) while "the record simply shows that the plaintiffs operate at a loss when they serve Medi-Cal patients," "evidence of red ink generated by serving this one segment of California's population tells us nothing about the overall economic impact of § 1317(d)," *ibid.*; (b) the record did not "identif[y] any distinct expectations that [appellants] had when they entered the emergency-transportation market, let alone provided evidence that § 1317(d) has interfered with those expectations," *id.* at 1226; and (c) the appellants failed to "provide[] evidence or raise[] any arguments as to the character of the government action," *ibid.* The court further concluded that the statute does not constitute a *per se* regulatory taking because the statute did not require appellants to "'sacrifice all economically beneficial uses' of their property," *ibid.* (quoting *Lucas,* 505 U.S. at 1019-20), or compel "'permanent physical occupation authorized by government'" because the appellants also transported other patients, *ibid.* (quoting *Loretto,* 458 U.S. at 422, 426).

Plaintiffs rely considerably on the Supreme Court's more recent takings jurisprudence, such as *Horne* and *Cedar Point Nursery,* to advance their arguments and attempt to bring their claims within the category of *per se* takings. For instance, to escape federal case law that uniformly weighs against their claims, Plaintiffs try to distinguish and discount *Franklin Memorial Hospital* by observing that it predated *Horne* and to dismiss *Sierra Medical* because it predated *Cedar Point Nursery.* While Chief Justice Roberts, in both *Horne* and *Cedar Point Nursery,* goes to great lengths to explain and persuade that both decisions are logical applications of existing law,

rather than significant expansions or inversions of that Court's precedents, Plaintiffs seek to establish recent takings cases as fundamental reworkings of the Supreme Court's takings doctrines.[5]

Other courts have declined to credit such an argument. In *Maryland Shall Issue v. Hogan,* the Fourth Circuit explained that, even after *Horne:*

> *per se* regulatory takings have been recognized in only two limited instances—*Loretto,* where the regulation required property owners to permit third parties to physically occupy their property, and *Lucas,* where the regulation rendered *real property* economically worthless. As we explain below, the Supreme Court has left intact Lucas' distinction between real and personal property with regard to *regulatory*

5. In *Horne,* Justice Sotomayor alone concludes that the Hornes did not state a *per se* takings claim. *See Horne,* 576 U.S. at 370 ("I join the Court's opinion in full.") (Thomas, J., concurring); *id.* at 371 (agreeing with the majority decision in all respects that a takings occurred but arguing that Court should remand matter on question of just compensation, a question "not presented in the Hornes' petition for certiorari" and "barely touched on in the briefs") (Breyer, J., joined by Ginsburg, J., and Kagan, J., concurring in part and dissenting in part); *id.* at 377 ("Because the Order does not deprive the Hornes of all of their property rights, it does not effect a *per se* taking.") (Sotomayor, J., dissenting) (emphasis added). Thus, neither the Court's opinion nor the principle dissenting opinion suggests that *Horne* reworks the boundary between *per se* and regulatory takings.

> takings. Thus, the *per se* regulatory taking in *Lucas* applies only to real property.
>
> [936 F.3d 356, 364 n.4 (4th Cir. 2020).]

Other courts have likewise given both *Horne* and *Cedar Point Nursery* their full breadth but nonetheless declined to expand the *per se* taking concept as far as Plaintiffs here attempt. As the Ninth Circuit explained:

> The Supreme Court has recognized two kinds of claims under the Takings Clause. When the government carries out "a physical appropriation of property, a *per se* taking has occurred." *Cedar Point Nursery* [141 S. Ct. at 2072]. But when the government "has instead restricted a property owner's ability to use his own property," *id.*, a court must evaluate the action under the three-factor test announced in Penn Central [] to determine whether it constitutes a "regulatory taking."
>
> [*CDK Global LLC v. Brnovich,* 16 F.4th 1266, 1281 (9th Cir. 2021).]

Additionally, courts continue to acknowledge the unchanged principle that "once 'property owners open their property to occupation by others,' they 'cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.'" *Id.* at 1282 (citing *Yee,* 503 U.S. at 530; *Pruneyard Shopping Ctr. v. Robins,* 474 U.S. 74, 82-84 (1980), *Heart of Atlanta Motel,*

Inc. v. United States, 379 U.S. 241, 261 (1964)); *see also Cedar Point Nursery,* 141 S. Ct. at 2077 ("Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade a property closed to the public."); *Horne,* 576 U.S. at 364 (discussing *Pruneyard,* and noting that "a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property.").

This Court concludes that Plaintiffs fail to establish that the charity care statute effectuates a *per se* takings against these hospitals. Stated plainly, they fail to bring their claims within the limited bounds of a *per se* takings claim. Nothing in the statute or its operation directly appropriates Plaintiffs' property. They remain free to use their property as they see fit, consistent with the comprehensive regulatory structure established by this State for general acute care hospitals. While this Court does not rely upon *Yee*, as it need not navigate the voluntariness issue, it is hard to imagine an industry more emblematic than health care in which the State has exercised "traditionally high degree of control."[6] *Lucas,*

6. Note the different positions highlighted between *Franklin,* 575 F.3d at 126, which relied upon *Yee*, and *Sierra Medical Services Alliance,* 883 F.3d at 1225, issued after *Horne,* concerning the viability of a takings claim where a property owner has chosen to voluntarily participate in a market. Notably, *Horne* does not cite *Yee* at all; rather, it discusses *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984). The *Horne* Court did not diminish the voluntary exchange rationale of *Ruckelshaus;* rather, it simply concluded that

"raisins are not dangerous pesticides; they are a healthy snack" and a "case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point." 576 U.S. at 366. While the Court has not abandoned *Yee* altogether, *see, e.g., Cedar Point Nursery v. Hassid,* __ U.S. __, 141 S. Ct. 2063, 2072 (2021) (citing *Yee* as among those cases that have described "'use restrictions that go 'too far' as 'regulatory takings'"), other courts have questioned the vitality of *Yee*'s voluntariness rationale after *Horne. See 301, 712, 2103 & 3151 LLC v. City of Minneapolis,* ___ F.4th ___, 2022 U.S. App. LEXIS 6397, at *5-*10 (8th Cir. 2022) (discussing *Yee* and *Horne,* and noting that "since *Horne,* this court has not cited *Yee,* while acknowledging *Horne* and its voluntary exchange principle," citing *Southeast Ark. Hospice, Inc. v. Burwell,* 815 F.3d 448, 450 (8th Cir. 2016)). That caveat notwithstanding, however, the *Southeast Arkansas Hospice* court affirmed the district court's conclusion that appellant's "voluntary participation in the Medicare program precludes a takings claim." 815 F.3d at 450. The court referenced *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1007 (1984), not *Yee*, for its holding that "as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Ibid.* This Court need not wade into the voluntariness waters to resolve this matter—as it may be an academic distinction, because these two courts each have rejected Medicaid-related takings challenges under different formulations of the voluntariness rationale—as the Court neither relies upon nor rejects Defendants' argument that Plaintiffs' voluntary participation in the Medicaid program deprives them of a takings claim. Notably, both Franklin and Sierra Medical ultimately rejected the takings challenges presented in those appeals, one under *Yee* and the other under *Ruckelshaus.* Whatever the distance that may exist between the voluntariness rationales of *Yee* and *Ruckelshaus,* any doctrinal distinctions have not resulted in different outcomes.

505 U.S. at 1027-28; *Franklin Mem. Hosp.,* 575 F.3d at 128; *United Wire Metal & Mach. Health & Welfare Fund v. Morristown,* 995 F.2d 1179, 1191 (3d Cir. 1993) (noting the "historically heavy and constant regulation of health care in New Jersey").

Plaintiffs' claims satisfy none of the criteria for a *per se* taking. The State does not appropriate or take title to Plaintiffs' property. Here, the charity care program and Medicaid rates of reimbursement do not affect a physical taking. Defendants have not condemned Plaintiffs' property. Defendants have not physically occupied the hospitals. The Appellate Division has interpreted N.J.S.A. 26:2H-18.64 to create "a statutory duty to provide care to anyone seeking treatment regardless of their ability to pay." *Newton Med. Ctr.,* 452 N.J. Super. at 622. Thus, the charity care program governs when Plaintiffs and other hospitals provide care to a particular patient. Before Plaintiffs' statutory duty kicks in, Plaintiffs must first determine whether to admit an individual as a patient. By deciding whether an individual is a "patient," which the challenged statute in no way constrains, Plaintiffs decide whether that individual may access their property for the limited purpose of receiving medical care. Once Plaintiffs confer the patient status and open their doors to the public, they cannot deny services based on inability to pay or source of payment. The monetary penalty and prohibitive billing regulations deter hospitals from discriminatorily denying medical care, but the decision of whether an individual may access Plaintiffs' property remains with Plaintiffs in the first instance. Unlike the affirmative rights of access granted by the law in *Cedar*

Point Nursery, 141 S. Ct. at 2074-75, or the required public easement hypothetical in *Nollan,* 483 U.S. at 831, the statute here does not instill some property right in patients to traverse Plaintiffs' property at will.

The statute does not limit Plaintiffs' right to exclude individuals from its premises like the cable installation law in *Loretto,* 458 U.S. at 439, and the public marina order in *Kaiser Aetna,* 444 U.S. at 167, 180. Rather, the statute only limits when Plaintiffs may deny medical care in one particular instance: Plaintiffs may not deny medical care to an individual determined to be a "patient" by Plaintiffs on the basis of ability to pay or source of payment. As the Supreme Court noted in *Yee*, "because [Plaintiffs] voluntarily open their property to occupation by others, [they] cannot assert a *per se* right compensation based on their inability to exclude particular individuals." 503 U.S. at 531. Plaintiffs may deny medical services for any other reason, and Plaintiffs may exclude individuals from the premises altogether if Plaintiffs determine the individual is not a "patient."

Additionally, the statute does not transfer actual medical supplies and equipment from Plaintiffs' hands to the patients' or the government's hands. Although Plaintiffs use medical supplies and equipment to treat charity care and Medicaid patients, the medical supplies and equipment were always going to be used: to treat patients. Plaintiffs retain the ultimate authority on how to dispose of its medical chattel. Plaintiffs decide the medical supplies and equipment to use in the course of treating any particular patient; Plaintiffs decide whether this

medication or that x-ray machine should be used to treat any given patient's medical condition. This is not like the situation in *Horne,* 576 U.S. at 361-62, and *Loretto,* 458 U.S. at 439, where the government determined the fate of a fixed percentage of plaintiff's raisins or that a portion of a landlord's property would house cable equipment. Here, the government has not mandated this medication or that equipment should be used to treat charity care and Medicaid patients specifically. Therefore, the charity care and Medicaid programs do not effect a physical taking. Plaintiffs' claims otherwise fail and do not withstand Defendants' summary judgment application.

Nor can Plaintiffs' complaint withstand Defendants' application for summary judgment on the regulatory takings claim. Deciding whether a regulatory taking has occurred is more "complicated. . . . As Justice Holmes stated, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Mansoldo v. State,* 187 N.J. 50, 58 (2006) (quoting Pa. *Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)). "'One example of a governmental regulation that has been held to go 'too far' is 'where [the] regulation denies all economically beneficial or productive use of [the] land.'" *Ibid.* (alterations in original) (quoting *Lucas,* 505 U.S. at 1015). "Regulatory takings are fact-sensitive, and the landowner has the burden of establishing that the regulations have destroyed all economically viable use of the property." *Moroney v. Mayor & Council of Old Tappan,* 268 N.J. Super. 458, 463 (App. Div. 1993) (citation omitted).

If "the regulation does not deny all economically beneficial use under *Lucas,* then the determination whether the regulation otherwise constitutes a compensable taking is governed by the standards set forth in *[Penn Central,* 438 U.S. at 124]." *Mansoldo,* 187 N.J. at 59. Under that analysis, "*Penn Central* provides '[a]n ad hoc factual inquiry . . . for regulatory action that diminishes but does not destroy the value of property by restricting its use.'" *Ibid.* (alteration in original) (quoting *Bronco Wine Co. v. Jolly,* 29 Cal. Rptr. 3d 462, 497 (Ct. App. 2005)). The Penn *Central* factors include: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action [e.g., physical invasion]." *Penn Central,* 438 U.S. at 124.

Nothing in the record allows Plaintiffs to survive Defendants' summary judgment application. Indeed, Plaintiffs not even allege that the charity care and Medicaid programs destroy all economically viable use of their property. The hospitals continue to engage in economically beneficial use and they do not assert otherwise. Thus, the statutes and rules do not go "too far."

Turning to the first prong of the *Penn Central* analysis, a property owner must establish more than "lost economic opportunities, forgone financing, and diminution in market value" to satisfy the economic impact prong. *Littman v. Gimello,* 115 N.J. 154, 164 (1989). The owner must demonstrate the regulation "'substantially destroys the beneficial use of private property,' or does not allow an

'adequate' or 'just and reasonable' return on investment." *Karam v. Dep't of Envtl. Prot.,* 308 N.J. Super. 225, 236 (App. Div. 1998) (quoting *Gardner v. N.J. Pinelands Comm'n,* 125 N.J. 193, 211 (1991)).

A regulation that merely results in a diminution in value, no matter how significant, or commercial impracticability is insufficient by itself to establish a regulatory taking. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993)*; *Pa. Coal*, 260 U.S. at 414-15 (finding that taking occurred when subsidence prevention law prohibited all mining of claimant's mining estate reserved as claimant's only estate in contracting with surface owners); *accord Newark Cab Ass'n v. City of Newark,* 901 F.3d 146, 152-53 (3d Cir. 2018) (concluding mere diminution in market value of taxi medallion from $500,000 to $220,000 due to city's contract with Uber that imposed less onerous regulations was insufficient to demonstrate taking occurred). For example, an ordinance limiting the depth below which a business could quarry basalt did not affect a taking even though it reduced the projected market value of plaintiff's property from $34 million to $2.7 million. *Bernardsville Quarry, Inc. v. Borough of Bernardsville,* 129 N.J. 221, 239-40 (1992). Despite the significant diminution in value, the property still retained substantial value and the non-quarry operations of plaintiff's business could still generate significant revenue. *Ibid.*

Here, the economic impact of the charity care and Medicaid programs on Plaintiffs' property does not destroy either the beneficial use of the property or

preclude a just and reasonable return on the hospitals' investment. As an initial matter, the subsidy shortfalls received by Plaintiffs may be more properly characterized as a diminution in value: the regulatory scheme decrease the value of the medical treatment provided by Plaintiffs from the amount Plaintiffs would have charged to the subsidy amount actually received. While the sums may be substantial, diminution in value alone is insufficient for Plaintiffs to establish a taking occurred.

Plaintiffs have not shown that the commercial impracticability effectively renders or will render their property economically idle. The D'Amelio certification and report explains how hospitals generally might suffer repeated and cyclical economic losses that cause tight operating margins and threaten closures. But the report is merely speculative and not specific to Plaintiffs. And nowhere in the filings do Plaintiffs elaborate on the impact the regulatory scheme has had on their bottom lines specifically. Just because Plaintiffs suffer a shortfall in reimbursements does not necessarily prove their entire business operates at a loss. Thus, unlike the law in *Pennsylvania Coal,* 260 U.S. at 414-15, which foreclosed the only commercial use of the claimant's mining estate, Plaintiffs here cannot show that the regulatory scheme renders their hospitals economically idle or will inevitably lead to that result. Plaintiffs' properties are commercially active and retain some market value because Plaintiffs currently use their property to treat non-charity care and Medicaid patients. Like the business in *Bernardsville Quarry* that could generate significant revenue from non-quarry aspects of its business already conducted on the

land, *see* 129 N.J. at 239-40, Plaintiffs here can generate significant revenue from treatment services provided to non-charity care and Medicaid patients that their facilities already provide.

Furthermore, Plaintiffs fail to survive Defendants' summary judgment application on their proofs concerning whether they took advantage of all opportunities available to mitigate any adverse economic consequences of the charity care and Medicaid programs. Plaintiffs took advantage of subsidy opportunities available to recoup millions of dollars in medical care provided to qualifying patients, just as the nursing homes in *In re Health Care Administration Board* and the hospitals in *Cooper Medical Center* could obtain state and federal reimbursements for mandated services. In neither case were the courts concerned that available subsidies and reimbursements would not cover the full cost of services. While Plaintiffs took advantage of the subsidies and reimbursements available, Plaintiffs may also recoup their alleged "lost" revenues by charging non-charity care and Medicaid patients more for services or diversifying their business endeavors. Therefore, the Court concludes that Plaintiffs fail to establish the existence of proofs on the first *Penn Central* prong.

Turning to the second prong, Plaintiffs must demonstrate interference with distinct investment-backed expectations. Those expectations must be reasonable. *E. Cape May Assocs. v. N.J. Dep't of Envtl. Prot.,* 300 N.J. Super. 325, 337 (App. Div. 1997). "Whether or not expectations are considered reasonable will depend to

a significant extent on whether the property owner had notice in advance of its investment decision that the governmental regulations which are alleged to constitute the taking had been or would be enacted." *Ibid.* Courts find insignificant interference with reasonable investment-backed expectations if a regulation permits a business to presently use its property as it primarily expected to and allows that business to obtain a reasonable return on its investment. *See Penn Central,* 438 U.S. at 136-37 (finding landmark preservation law did not effect taking because plaintiff could still use property as railroad terminal as it had for sixty-five years and did not totally diminish transferable interest in air rights above terminal). For example, the Court in *Bernardsville Quarry* reasoned no taking occurred where the plaintiff could still operate as a quarry and excavate basalt above the quarry depth limit set by law, could generate significant revenue with non-quarry activities plaintiff conducted since it began its business, and purchased the property because of its multi-purpose uses. 129 N.J. at 239-42. Similarly, in *JWC Fitness, LLC v. Murphy,* the court concluded that two executive orders temporarily closing plaintiff fitness center did not amount to a taking because, in part, it could have conducted other revenue-generating activities consistent with its primary use as a fitness center, such as offering live-stream fitness classes or limited individual in-person classes at the earliest opportunity. 469 N.J. Super. 414, 436 (App. Div. 2021).

Moreover, courts are less likely to find a regulation interferes with reasonable investment-backed expectations where the business operates in a heavily regulated

industry, it voluntarily chose to participate in such an industry or its experience in the industry would put it on notice that increased regulation is likely. *See Connolly v. Pension Benefit Guar. Corp.,* 475 U.S. 211, 226-27 (1986); *United Wire,* 995 F.2d at 1191. In *Connolly,* the Court concluded that a federal law imposing liability on employers for pension plan withdrawal did not interfere with investment-backed expectations because employers were on notice withdrawal "might trigger additional financial obligations," that is, they knew of the legislative concerns long before the law was enacted, pension plans were already highly regulated, and the employers nonetheless chose to participate in the plan. 475 U.S. at 226-27. Similarly, in *B&G Construction Co. v. Director,* the court found an amendment to the Coal Act did not interfere with investment-backed expectations. 662 F.3d 233, 262 (3d Cir. 2011). The amendment reinstated an earlier provision of the law that extended survivor benefits to dependents of miners receiving benefits during their lifetimes but dying from causes unrelated to black lung disease. *Ibid.* The court reasoned the history of labor unrest and government intervention made it reasonable to expect the government would expand its regulation of health benefits to the coal industry in the first instance, and the law had previously included the same exact benefits. *Ibid.*

Here, the Court finds the charity care and Medicaid programs do not interfere with Plaintiffs' reasonable investment-backed expectations. First, the regulatory scheme permits Plaintiffs to use their businesses as they always have: as a hospital. *See Penn Central,* 438 U.S. at

136-37; *Bernardsville Quarry,* 129 N.J. at 239-42. And the regulatory scheme here allows Plaintiffs to obtain a reasonable return on their investments. Not only do the regulatory programs provide opportunities for Plaintiffs to obtain subsidies and reimbursements, the programs also do not restrict the other ways Plaintiffs may increase their revenues consistent with the present use of the property, such as increasing charges to non-charity care and Medicaid patients or diversifying medical services offered.

Second, Plaintiffs voluntarily choose to participate in the heavily regulated healthcare industry. *See United Wire,* 995 F.2d at 1191 (stating New Jersey exhibits "historically heavy and constant regulation of health care"). Moreover, Plaintiffs' experience with the healthcare industry would reasonably put them on notice that increased regulation is likely. As Plaintiffs point out, they have operated as hospitals for decades or centuries. Like the employers in *Connolly,* 475 U.S. at 226-27, Plaintiffs here continue operating as hospitals despite the regulations imposed upon hospitals over time. The history of government involvement in the healthcare industry and particularly in regulating patient care and billing make it reasonable to expect the New Jersey government would expand such regulation.

The regulations here impose an affirmative duty to provide medical care to all patients regardless of ability to pay and a prohibition on billing charity care patients only on hospitals and not on other healthcare businesses. However, given that New Jersey has imposed similar

obligations on nursing homes to provide services to indigent patients, *see In re Health Care Admin. Bd.*, 83 N.J. at 73, 75-76, 81, and because Plaintiffs continue to operate in the already highly regulated healthcare industry, it was reasonable to expect that such a regulation might be expanded to hospitals such as Plaintiffs, *see B&G Construction,* 662 F.3d at 262.

Furthermore, Plaintiffs cannot reasonably expect that they will receive dollar-for-dollar payment from indigent patients via regular billing and collection procedures. In fact, hospitals historically turned away such patients because they knew the patients could not pay the costs of hospital services even through regular billing procedures—the very social problem addressed by the regulatory scheme. *See E. Enters.*, 524 U.S. at 529, 532-36. Therefore, the charity care subsidy and Medicaid reimbursement shortfalls are not substantially disproportionate to the Plaintiffs' lengthy experience in the healthcare industry treating indigent patient populations.

Because the charity care and Medicaid programs permit Plaintiffs to conduct their hospital businesses as they always have, allow Plaintiffs to obtain a reasonable return on their investments into their hospital by all other means besides billing charity care and Medicaid patients, and considering Plaintiffs' lengthy experience in the heavily regulated healthcare industry, the Court concludes the regulatory scheme does not interfere with Plaintiffs' reasonable investment-backed expectations.

The Court turns to the third prong of the *Penn Central* analysis. A "taking" is less readily found "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central,* 438 U.S. at 124. As the Court explained:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and [the] Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.
>
> [*Ibid.* (quoting *Pa. Coal,* 260 U.S. at 413).]

Laws reasonably necessary to effectuate a substantial public purpose may not constitute a taking, even if the law prohibits the most beneficial use of the property. *See id.* at 126-27.

Laws enacted to promote public health, safety, morals, or general welfare are less readily found to constitute a taking. *Id.* at 124-25 (stating taxes and zoning laws are obvious examples). The character of public health and healthcare regulations typically weigh against the conclusion that a law effects a taking. *See, e.g.*, *In re Health Care Admin. Bd.,* 83 N.J. at 73, 75-76, 81; *Cooper Med. Ctr.,* 214 N.J. Super. at 496-97 (upholding law requiring police deliver injured suspects to hospitals did not effect

taking because restriction on hospitals to treat patient furthered valid governmental purpose advancing public interest even if it resulted in economic disadvantage); *JWC Fitness,* 469 N.J. Super. at 436 (finding public health emergency context of executive orders temporarily closing businesses due to COVID-19 "strongly weigh[ed] against finding a taking" and constituted valid exercise of police power). The Court previously upheld a regulation requiring as a licensing condition that nursing homes either make available a reasonable number of beds to indigent patients or maintain all patients regardless of change in economic status. *In re Health Care Admin. Bd.,* 83 N.J. at 73, 75-76, 81. The Court emphasized "the regulations in question are directed at an acute social problem affecting the health and welfare of the needy aged and infirm, are well within the power and authority vested in the Department by the Legislature and do not constitute a taking of private property without just compensation." *Id.* at 81.

If the government appropriates property for its own use or calls upon a property owner to sacrifice all economically beneficial uses, then the character of the government action weighs more heavily toward a taking. *See, e.g., Connolly,* 475 U.S. at 225 (reasoning no taking occurred because interference with property rights arose from public program adjusting benefits and burdens of economic life to promote common good rather than government appropriating employer assets for its own use); *United Wire,* 995 F.2d at 1190-91 (quoting *ibid.*); *Lucas,* 505 U.S. at 1019, 1031-32 (finding law barring landowner from erecting any permanent habitable

structure on beachfront property effected taking because landowner had to sacrifice all economically beneficial uses and leave property economically idle).

Here, the character of the charity care and Medicaid programs is to protect public health and welfare and does not appropriate Plaintiffs' property for the government's own use nor call upon Plaintiffs to sacrifice all economically beneficial use of their property. Plaintiffs agree that the regulatory schemes serve a valid public purpose within the meaning of the Takings Clause. *See* Pls.' Br. 8-9, 18-19. In adopting the Health Care Reform Act, the Legislature found that "[i]t 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." N.J.S.A. 26:2H-18.51(a); *see also S. Jersey Family Med. Ctrs., Inc. v. City of Pleasantville*, 351 N.J. Super. 262, 276 (App. Div. 2002) (stating "[t]he State of New Jersey has identified ensuring access to medical care to its citizens as a public purpose"). Thus, any interference with Plaintiffs' property rights arises from two public programs enacted to adjust the burdens and benefits of economic life for the common good. The charity care and Medicaid programs ensure equal access to healthcare for indigent patients—a public health and healthcare purpose squarely in line with the public health laws upheld in *In re Health Care Administration Board,* 83 N.J. at 73, 75-76, 81, and *Cooper Medical Center,* 214 N.J. Super. at 496-97.

As previously explained, Defendants have not appropriated Plaintiffs' hospitals for their own use. *See*

Connolly, 475 U.S. at 225; *United Wire,* 995 F.2d at 1190-91. And the statute does not call upon Plaintiffs to sacrifice all economically beneficial uses of their property. *See Lucas,* 505 U.S. at 1019, 1031-32. Accordingly, Plaintiffs' first count fail to survive Defendants' application for summary judgment.

For substantially the same reasons, Plaintiffs fail to make a showing sufficient to defeat Defendants' application for summary judgment on Count Two of the amended complaint concerning Medicaid rates of reimbursement. Nothing in the Medicaid program or the Division's calculation and allocation of reimbursements appropriate Plaintiffs' hospitals for the government's own use. *See Connolly,* 475 U.S. at 225; *United Wire,* 995 F.2d at 1190-91. Nor does the Medicaid program call upon Plaintiffs to sacrifice all economically beneficial uses of their property. *See Lucas,* 505 U.S. at 1019, 1031-32. Federal courts have reached similar results in reviewing Medicaid implementation in other states with comparable administrative schemes. *See, e.g., Sierra Med. Svcs. All.,* 883 F.3d at 1225-26 (finding plaintiff failed to sustain burden that Medi-Cal program effectuating taking because law did not require sacrifice of all economically beneficial use nor place any limit on rates plaintiff could charge to non-Medi-Cal patients); *Franklin Mem. Hosp.,* 575 F.3d at 129-30 (rejecting takings challenge to MaineCare rates of reimbursement because hospitals could opt out of MaineCare to seek desired compensation for medical services). Similar to plaintiffs in those cases, Plaintiff hospitals here are not limited in what they could charge to non-Medicaid patients to seek the desired level

of compensation, and Plaintiff hospitals remain free to use their property as they fit, consistent with the federal and State regulatory schemes.

Accordingly, the Court denies Plaintiffs' application in its entirety and grants Defendants' application in full. Plaintiffs' complaint is dismissed.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED JUNE 27, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-2767-21

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, COOPER UNIVERSITY HOSPITAL, HACKENSACK MERIDIAN HEALTH PASCAK VALLEY MEDICAL CENTER, JFK MEDICAL CENTER, OUR LADY OF LOURDES MEDICAL CENTER, LOURDES MEDICAL CENTER OF BURLINGTON COUNTY, ST. FRANCIS MEDICAL CENTER, HACKENSACK MERIDIAN HEALTH—MOUNTAINSIDE MEDICAL CENTER, AND PRIME HEALTHCARE SERVICES—ST. MARY'S PASSAIC, LLC, D/B/A ST. MARY'S GENERAL HOSPITAL,

Plaintiffs-Appellants,

v.

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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, 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, AND DR. KAITLAN BASTON, IN HER CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HEALTH,

Defendants-Respondents.

Argued October 31, 2023—Decided June 27, 2024

Before Judges Rose, Smith and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket Nos. L-1434-17 and L-1397-18.

The opinion of the court was delivered by SMITH, J.A.D.

After cross-motions for summary judgment, plaintiffs appeal from the trial court's order granting defendants' motion for summary judgment on certain taking claims and dismissing certain plaintiffs' remaining takings claims

on ripeness grounds for failure to exhaust administrative remedies.

Plaintiffs, a group of hospitals licensed to do business in New Jersey and governed by the Health Care Cost Reduction Act, N.J.S.A. 26:2H-18.50 to -69, contend that N.J.S.A. 26:2H-18.64 (charity care), the State's Medicaid Plan, and corresponding regulations compel plaintiffs to use medicine, equipment, and services they control to provide patient care regardless of ability to pay, and without an adequate subsidy to make up the financial shortfall. Plaintiffs argue that this scheme represents an unconstitutional taking. Plaintiffs also claim the trial court erred when it dismissed certain plaintiffs' claims for a lack of ripeness due to their failure to exhaust administrative remedies.[1]

Considering the arguments and governing legal principles, we affirm the trial court's order dismissing all of the constitutional taking claims, but we do so for slightly different reasons.

I.

A.

A brief overview of Medicaid, the Health Care Cost Reduction Act, and related charity care provisions is

1. *See Do-Wop Corp. v. City of Rahway*, 168 N.J. 191, 199, 773 A.2d 706 (2001) (permitting an appellate court to affirm for other reasons because "appeals are taken from orders and judgments and not from opinions").

warranted. The Medicaid program, established in 1965 by Title XIX of the Social Security Act, is a joint federal-state program designed to provide medical care for indigent, disabled, and elderly persons. 42 U.S.C.A. § 1396; *United Hosps. Med. Ctr. v. State*, 349 N.J. Super. 1, 4, 793 A.2d 1 (App. Div. 2002). If a state chooses to join the Medicaid program, it "must operate its program in compliance with the federal statute and regulations," *United Hosps.*, 349 N.J. Super. at 4 (citing *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)), and must submit a Medicaid State Plan, describing the methods and standards for reimbursement to providers, for federal approval, 42 U.S.C.A. § 1396(b)(13); N.J.S.A. 30:4D-7.

In 1968, our State Legislature elected to participate in the Medicaid program when it passed the Medical Assistance and Health Services Act (N.J.S.A. 30:4D-1 to -19) for patients whose "resources are determined to be inadequate to secure necessary medical care at their own expense." *Bergen Pines County Hosp. v. N.J. Dep't of Human Servs.*, 96 N.J. 456, 465, 476 A.2d 784 (1984). As per the Act, the Medicaid program is administered by the Division of Medical Assistance and Health Services (the Division). *See United Hosps.*, 349 N.J. Super. at 5, 793 A.2d 1.[2]

2. Providers are reimbursed for care of Medicaid-eligible patients through the N.J. Medicaid Program fund, and the State is permitted to seek reimbursement for a portion of those costs. *See SSI Med. Servcs v. State of New Jersey*, 146 N.J. 614, 617-18, 685 A.2d 1 (1996).

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In 1992, as part of the Health Care Cost Reduction Act, N.J.S.A. 26:2H-18.50 to -69, the Legislature enacted N.J.S.A. 26:2H-18.64, which provides in part, "[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." Such care is referred to as charity care.[3] To qualify for charity care, individuals must have no health coverage, private or government sponsored (including Medicaid), and meet the income and asset eligibility requirements. N.J.A.C. 10:52-11.8. A hospital which violates the statute is subject to a fine of $10,000 per violation.[4] *See* N.J.S.A. 26:2H-18.64.

The Legislature recognized that disproportionate share hospitals (DSH)[5] bear a greater burden to sustain the interests of the Health Care Cost Reduction Act and established a Health Care Subsidy Fund (HCSF), N.J.S.A. 26:2H-18.58, to distribute subsidies to qualifying facilities. Each year, the Legislature appropriates funds to the HCSF via the annual Appropriations Act. The State of New Jersey Department of Health (DOH) then allocates subsidies for the current state fiscal year according to the

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3. Charity care is one aspect of New Jersey's Medicaid State Plan, which is approved by the Secretary of Health and Human Services. *See* N.J.S.A. 30:4D-6.

4. The corresponding regulation is N.J.A.C. 10:52-11.14, which prohibits hospitals from sending a bill for services to eligible persons or initiating collection actions against them.

5. A hospital qualifies as a DSH when it serves a disproportionate number of low-income patients with special needs.

statutory formula contained in N.J.S.A. 26:2H-18.59i—accounting for any instructions or modifications contained in the current year's Appropriations Act. N.J.S.A. 26:2H-18.55.

In *Univ. of Med. & Dentistry v. Grant*, we explained the subsidy program's operation in detail:

> The statutory distribution formula requires a determination of how much charity care an eligible hospital has provided, valued not at its usual and customary charges but rather on the amount Medicaid would pay for such services ("documented charity care").
>
> . . . .
>
> Therefore, the initial value must be converted or "priced" to the Medicaid value to determine ultimately the "documented charity care" for each eligible hospital.
>
> . . . .
>
> To this basic figure, other calculations are applied to determine eligibility for, and amount of, any subsidy. The "profitability factor" reduces the hospital's "documented charity care" if the hospital's operating margin is above the statewide median. Also considered is the "payer mix factor," determined by how much of the hospital revenues come from private payers.

> A hospital with a factor equal to or less than the statewide target would not receive a charity care subsidy.
>
> [343 N.J Super. 162, 165-68, 778 A.2d 473 (App. Div. 2001) (internal citations omitted).]

The Legislature's health care subsidy is not designed to be a full "reimbursement" covering a hospital's actual charity care expenses, but instead to provide each hospital with its "proportionate share of the total subsidy funded by the Legislature for that year." *Id.* at 165, 778 A.2d 473. Hospitals may challenge their assigned share of the HCSF in two ways. They may challenge the amount of their designated HCSF subsidy by filing an administrative appeal with the DOH. N.J.A.C. 10:52-13.4(f)(1)-(2). They may also seek an adjustment of the Medicaid rate issued each year by the Division. N.J.A.C. 10:52-14.17(c)(1).

B.

Against this backdrop, we review our unpublished opinions in *In re Medicaid Inpatient Hosp. Reimbursement Rate Appeals (In re Medicaid)*, No. A-3726-13, 2016 N.J. Super. Unpub. LEXIS 1175 (App. Div. May 20, 2016) and *IMO Englewood Med. Ctr.'s SFY 2014 Charity Care Subsidy Appeal* (*IMO Englewood*), No. A-1555-13, 2016 N.J. Super. Unpub. LEXIS 1172 (App. Div. May 20, 2016), which are directly related to the matter before us.[6] In each

6. References and citations to these unpublished appellate opinions herein are provided for the purpose of explaining the history of the hospitals' efforts to bring constitutional takings

case, the plaintiff hospitals raised taking claims as part of their rate challenges, and in each case final administrative decisions were issued dismissing the taking claims on jurisdictional grounds.

In *In re Medicaid*, plaintiff hospitals appealed to the Division disputing their assigned Medicaid rates pursuant to N.J.A.C. 10:52-14.17. (2016 N.J. Super. Unpub. LEXIS 1175 at *4). After the Division denied the appeals, plaintiffs sought an administrative hearing to make an as-applied constitutional challenge to each [h]ospital's 2009 Medicaid rates. 2016 N.J. Super. Unpub. LEXIS 1175 at *4. They argued the State failed to provide adequate compensation for its taking of [h]ospital property, "including . . . facilities, equipment, staff and services, for public use." *Ibid.* In its final administrative decision, the Director of the Division concluded that an administrative hearing was not the proper venue for the hospitals' "facial challenge to the charity care statute . . . administered by the [DOH] not [the Division]." *Ibid.* We affirmed, concluding the hospitals' takings claims were not foreclosed, and could "be developed and . . . adjudicated in another forum." 2016 N.J. Super. Unpub. LEXIS 1175 at *17.

In *IMO Englewood*, eight hospitals filed administrative appeals challenging the New Jersey Health Care Cost Reduction Act, including N.J.S.A. 26:2H-18.64. (2016 N.J.

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claims, and as such are not provided for any precedential purpose. *See Zahl v. Hiram Eastland, Jr.*, 465 N.J. Super. 79, 86 n.1, 239 A.3d 1063 (App. Div. 2020) ("Although citing an unpublished opinion is generally forbidden, [*see R.* 1:36-3], we do so here to provide a full understanding of the issues presented.").

Super. Unpub. LEXIS 1172 at *2). The plaintiffs projected losses for fiscal year 2015, alleging the losses were due to their statutory obligation to provide low or no-cost care to eligible persons. 2016 N.J. Super. Unpub. LEXIS 1172 at *6. The plaintiffs claimed this statutory obligation, combined with the alleged inadequate subsidies, constituted unconstitutional takings of their property without just compensation. 2016 N.J. Super. Unpub. LEXIS 1172 at *8. The Commissioner of the DOH concluded it lacked jurisdiction to consider the hospitals' constitutional claims. *Ibid.* We affirmed. 2016 N.J. Super. Unpub. LEXIS 1172 at *7. Noting the plaintiff hospitals received some subsidies in the disputed years, we declined to exercise original jurisdiction because of an insufficient factual record. 2016 N.J. Super. Unpub. LEXIS 1172 at *12. Similar to *In re Medicaid*, we instructed the plaintiff hospitals to bring their claims in the trial court, where a factual record appropriate to analyze their takings claims could be developed. 2016 N.J. Super. Unpub. LEXIS 1172 at *12.[7]

II.

We turn to the matter before us. Plaintiffs are fourteen licensed for-profit and non-profit general acute

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7. In both *In re Medicaid* and *IMO Englewood*, the plaintiff hospitals brought *as-applied* constitutional challenges, however, in both cases, the Director and Commissioner considered the challenges as *facial*. For example, the Commissioner in *IMO Englewood* noted the hospitals had not challenged the manner in which their charity care subsides had been calculated, but rather their statutory obligation to provided charity care in light of inadequate subsidies. 2016 N.J. Super. Unpub. LEXIS 1172 at *4.

care hospitals who all qualify as DSH.[8] Defendants include the State of New Jersey, the State of New Jersey Department of Human Services (DHS), the Division, DOH, and several state officials.[9]

Approximately six weeks after our decisions in *In re Medicaid* and *IMO Englewood*, plaintiffs filed suit against various state entities and individual officers, asserting constitutional takings claims dating back to 2004. Plaintiffs' two-count complaint alleged that under the Fifth and Fourteenth Amendments of the United States Constitution as well as Article I, Paragraph 20 of the New Jersey Constitution of 1947: "The obligations imposed by the [charity care] [s]tatute result in a taking of the . . . [h]ospitals' real and personal property in terms of space, supplies, and services"; and "[T]he mandates imposed on the . . . [h]ospitals by . . . [the charity care] [s]tatute along with the limited reimbursement provided by the Division and DOH for the . . . hospitals' treatment of Medicaid and charity care patients has resulted in an as-applied violation of the Takings Clauses of the United States and New Jersey Constitutions."

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8. After argument, JFK Medical Center was dismissed pursuant to stipulation on February 27, 2024.

9. Sarah Adelman is the current commissioner of DHS. Jennifer Langer Jacobs is the current Division Assistant Commissioner of the Division. As the Division is part of the Department of Human Services, respondents Commissioner Adelman, DHS, Assistant Commissioner Jacobs, and the Division are referenced collectively in this memo as "the Division." In addition, the current commissioner of the DOH is Dr. Kaitlan Baston as of July 25, 2023. All defendants are collectively referenced to herein as "the State."

Appendix B

After the close of discovery, both sides moved for summary judgment. Finding no disputed issues of material fact, the court granted defendants' motion for summary judgment on certain taking claims, and dismissed in part plaintiffs' remaining takings claims on ripeness grounds for failure to exhaust administrative remedies.

The court first considered the question of whether plaintiffs' claims constituted as-applied or facial constitutional challenges. The court found each plaintiff sought just compensation for their individual alleged shortfalls and did not seek to advocate for the rights of hospitals statewide. Hence, the court concluded plaintiffs' claims were as-applied constitutional takings claims.

The court's comprehensive statement of reasons supporting its order granting defendants summary judgment included findings of fact and conclusions of law. First, the court concluded certain plaintiffs' claims were not ripe, finding they failed to exhaust administrative remedies prior to filing suit. Next, the court analyzed the surviving plaintiffs' claims and concluded New Jersey's charity care statute and the Medicaid rates used for the HCSF distribution formula did not constitute a physical or regulatory taking. The court stated:

> [A]ny interference with [p]laintiffs' property rights arises from two public programs enacted to adjust the burdens and benefits of economic life for the common good. The charity care and Medicaid programs ensure equal access to healthcare for indigent patients—a public

> health and healthcare purpose squarely in line with the public health laws upheld in *In re Health Care Admin. Bd.*, 83 N.J. 67, 73, 75-76, 415 A.2d 1147 (1980), and *Cooper Medical Center v. City of Camden*, 214 N.J. Super. 493, 496-97, 520 A.2d 413 (App. Div. 1987).
>
> [(Citations reformatted).]

Plaintiffs appealed.

III.

Our review of a trial court's summary judgment order is de novo, applying the same legal standard, namely, the standard set forth in *Rule* 4:46-2. *Conley v. Guerrero*, 228 N.J. 339, 346, 157 A.3d 416 (2017). We consider, as did the trial court, whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Town of Kearny v. Brandt*, 214 N.J. 76, 91, 67 A.3d 601 (2013) (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." *Dickson v. Cmty. Bus Lines*, 458 N.J. Super. 522, 530, 206 A.3d 429 (App. Div. 2019) (citing *Prudential Prop. & Cas. Co. v. Boylan*, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div. 1998)). "We accord no deference to the trial judge's conclusions of law and review these issues de novo." *Ibid.*

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Both the Takings Clause of the Fifth Amendment and the New Jersey Constitution prohibit the taking of private property for public use "without just compensation." *U.S. Const.* amend. V; *N.J. Const.* art. I, ¶ 20. Our courts apply the same analysis for state and federal takings claims, viewing the constitutional provisions as "coextensive." *Klumpp v. Borough of Avalon*, 202 N.J. 390, 405, 997 A.2d 967 (2010).

While "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property," the Constitution also guards against certain uncompensated regulatory interference with a property owner's interest in their property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-48, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (noting most obvious examples of physical takings include when government condemns property, takes possession without acquiring title, or physically occupies property—such as "recurring flooding as a result of building a dam"). Regulations are considered per se takings where they "result[] in a physical appropriation of property." *Cedar Point*, 594 U.S. at 149, 141 S.Ct. 2063.

Where the regulation does not occupy or appropriate property, but still influences it, we must engage in a fact-specific inquiry. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 221, 232, 608 A.2d 1377 (1992).

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In *Penn Central*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Supreme Court identified certain factors to guide such a fact-sensitive analysis, observing there is no "set formula" for deciding regulatory takings cases. The three *Penn Central* factors are: the economic impact of the regulation on plaintiff; the extent to which the regulation has interfered with plaintiff's investment-backed expectations; and the character of the governmental action being challenged. *Ibid.*; *see also Mansoldo v. State*, 187 N.J. 50, 58-59, 898 A.2d 1018 (2006) (explaining "protection from governmental takings under the New Jersey constitution is coextensive with protection under the federal constitution" and that the *Penn Central* factors serve to resolve regulatory takings claims that are not per se physical takings).

A.

We first consider whether the trial court erred by dismissing some of plaintiffs' claims for failure to exhaust administrative remedies.

The court found plaintiffs' taking claims were as-applied claims. Having carefully reviewed the record, we reach a different conclusion. An as-applied constitutional challenge to a regulatory scheme necessarily involves the proffer of evidence to support the challenge. The administrative agency responsible for enforcement of the regulation must hear the claim first. *See Fred Depkin & Son, Inc. v. Dir., New Jersey Div. of Tax'n*, 114 N.J. Super. 279, 284-86, 276 A.2d 161 (App. Div. 1971). This principle does not apply to facial claims, which are purely questions

of law. *Ibid. see also Matter of Comm'r of Ins.'s Issuance of Ords. A-92-189 & A-92-212*, 274 N.J. Super. 385, 404, 644 A.2d 616 (App. Div. 1993).

Here, plaintiff hospitals challenge the Legislature's reimbursement system, including N.J.S.A. 26:2H-18.64, in its entirety. If successful, plaintiffs would have us declare charity care unconstitutional for failing to provide plaintiffs at-cost reimbursement. The 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 licensed to operate in the state. We conclude this represents a facial constitutional attack on the charity care statute, and that it would be futile to remand those claims to the agency.[10] We conclude that the trial court's order dismissing without prejudice certain plaintiffs' takings complaints between 2004 and 2015 for failure to first obtain individual decisions under the rate appeal process was issued in error.[11]

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10. Even if we accept that plaintiffs' constitutional claims were as-applied and not facial claims, a ripeness analysis would require judicial review of all the takings claims now. *See Platkin v. Smith & Wesson*, 474 N.J. Super. 476, 496, 289 A.3d 481 (App. Div. 2023). Plaintiffs have spent years attempting to bring constitutional taking claims as part of their administrative challenge to Medicaid rates and charity care subsidies. It follows that remand for an administrative hearing on any aspect of these claims after more than a decade of litigation would be fundamentally unfair.

11. The trial court dismissed without prejudice all takings claims for lack of ripeness except the following: Englewood Hospital & Medical Center and JFK Medical Center for fiscal

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B.

Plaintiffs' primary argument on appeal is that the trial court erred by concluding no taking occurred. They propose alternate theories. First, plaintiffs posit N.J.S.A. 26:2H-18.64's operation results in a per se taking of hospital property due to the "inadequate" state subsidies the statute generates. In the alternative, plaintiffs contend they met their burden to show a regulatory taking of the same property occurred when they presented to the trial court uncontroverted *Penn Central* evidence.

A constitutional takings analysis must first address the nature of the property at issue. Property need not be physical, tangible property to trigger a takings analysis. The term property

> is not used in the "vulgar and untechnical sense of the physical thing. . . . [Instead, it] [denotes] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."
>
> [*Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6, 100 S. Ct. 2035, 64 L. Ed. 2d 741

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years 2009-12 and 2014-15; Hoboken University Medical Center, Capital Health Regional Medical Center, and Capital Health Medical Center—Hopewell for fiscal years 2014-15 only; and Hackensack Meridian Health Pascack Valley Medical Center, Hackensack Meridian Health Mountainside Medical Center, and St. Mary's General Hospital for fiscal years 2009-12 only.

(1980) (second, third, and fourth alterations in original) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357, 89 L. Ed. 311 (1945)).]

The United States Supreme Court has identified property interests in both real property and in investment interests. *See*, *e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 351, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (finding property interest in raisins confiscated by government officials); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309-12, 109 S. Ct. 609, 102 L. Ed. 2d 646 (1989) (finding property interest in utility profits where rates were so stringent that they became confiscatory in nature). Our Supreme Court has also identified property interests in a landlord's expectation of rental income and the rendering of professional services. *See*, *e.g.*, *Prop. Owners Ass'n v. North Bergen*, 74 N.J. 327, 336, 378 A.2d 25 (1977) (finding rental subsidies confiscatory); *Madden v. Delran*, 126 N.J. 591, 602, 601 A.2d 211 (1992) (identifying legal services as property).

We now consider plaintiffs' contention that operation of N.J.S.A. 26:2H-18.64 results in a physical appropriation of their property, which effects a per se taking. Plaintiffs argue government-authorized entry onto their property and compelled provision of medical supplies and staff labor goes further than just a "regulatory restriction on use." They rely primarily on the standard set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), which was further developed by *Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

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In *Loretto*, New York passed a law requiring landlords to permit cable companies to install equipment on apartment buildings in exchange for a nominal fee. 458 U.S. at 421, 102 S.Ct. 3164. The Supreme Court held that where a physical occupation is permanent—no matter how small—it is a taking that must be compensated. *Id.* at 435, 102 S.Ct. 3164.

In *Nollan*, the Supreme Court applied *Loretto* where a government land use entity conditioned a use permit upon the property owner's grant of a public easement. 483 U.S. at 827, 107 S.Ct. 3141. The Court concluded the easement was a "permanent physical occupation" of the property, because the public was "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." *Id.* at 832, 107 S.Ct. 3141.

In contrast to the plaintiffs in *Loretto* and *Nollan*, plaintiffs here operate hospitals within the complex and highly regulated health care industry. Unlike the cable installation law in *Loretto*, N.J.S.A. 26:2H-18.64 does not limit the right to exclude individuals from their premises. Rather, it prohibits hospitals from turning away patients "on the basis of [their] ability to pay" without being subject to civil penalty, and further prohibits billing only those patients who qualify under charity care. Similarly, the contested scheme does not permit the public's unfettered access to plaintiffs' premises like the easement condition in *Nollan*. Instead, the Legislature crafted the charity care statute with specificity, requiring plaintiffs provide care only to those the act aims to benefit.

To further support their argument, plaintiffs contend their facts are analogous to the facts in *Cedar Point*, and distinguishable from *Pruneyard Shopping Ctr.*, 447 U.S. at 74, 100 S.Ct. 2035 (holding that the temporary occupation of a privately owned mall by pamphleteers was not a taking).

In *Cedar Point*, the Supreme Court concluded a regulation granting labor union organizers a three-hour right of access to agricultural employer's property 120 days a year, for the purpose of soliciting support for unionization was a per se physical taking. 549 U.S. at 143, 141 S.Ct. 2063. The nature of the property at issue was a private agricultural business—not open to the public. The disputed regulation required the plaintiff property owners to open their property to third-party union organizers. The plaintiffs claimed the imposition disturbed their operations. *Ibid.* The Court pointed out that *Pruneyard* was "readily distinguishable," as it involved a business generally open to the public unlike the farms at issue. *Id.* at 157, 141 S.Ct. 2063.

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*. Although plaintiffs contend that charity care as a whole has a negative economic impact on their investment interests, there is no evidence that the prohibition on turning away patients because of inability to pay *unreasonably* impairs the value of the premises. Charity care restricts how

hospitals use their property to provide medical services, not whether they do so. The property will be used as it was intended—to treat patients.

Finally, the hospitals' argument that the charity care provisions' requirements are an unconstitutional appropriation of their tangible personal property is without merit. To support their argument, plaintiffs cite the standard provided by *Horne*, 576 U.S. at 355, 135 S.Ct. 2419 (holding a law requiring raisin growers "to give a percentage of their crop to the government, free of charge," was a per se taking). However, unlike *Horne*, the statute here does not require a transfer of ownership of medical supplies or equipment into the government's or a third party's hands. The hospitals retain the majority of their agency as to their medical supplies and equipment. The record shows no per se taking, as plaintiffs have failed to show evidence of physical appropriation of the hospital property, real or personal, consistent with our jurisprudence.

C.

Having found no per se taking, we next balance "the private interests affected by the regulation against the public interests that are advanced." *Matter of Plan for Orderly Withdrawal of Twin City Fire Ins. Co.*, 129 N.J. 389, 417, 609 A.2d 1248 (1992). To accomplish this, we analyze the relationships among the *Penn Central* factors. Where there is no per se taking, and

> where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.
>
> [*Yee v. City of Escondido*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).]

Plaintiffs argue the uncontroverted record shows: adverse economic impact to the hospitals; undue infringement on their investment backed expectations; and per se confiscatory government action. They contend that, on balance, N.J.S.A. 26:2H-18.64's regulatory burden outweighs its public good. We discuss each factor in turn.

1. Economic Impact

Plaintiffs argue the subsidy shortfall causes a constitutionally burdensome economic impact. They offer expert testimony to show their hospitals fall below the national median in three main industry-wide criteria: profitability, liquidity, and debt-to-capitalization ratio.

A regulation's economic impact must be examined in the context of the property as a whole rather than by its parts or segmented uses. *See Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646. We look to the disparity between subsidies plaintiffs received and the cost they've incurred

for charity care medical services and determine the impact it has had on their property. Giving all favorable inferences to plaintiffs, *Kearny*, 214 N.J. at 91, 67 A.3d 601, the record shows they clearly established before the court evidence sufficient to support a finding that N.J.S.A. 26:2H-18.64 has had an adverse impact on their profitability. The record also shows that during the years of plaintiffs' compliance with N.J.S.A. 26:2H-18.64, they fell short of industry-wide profitability standards. Plaintiffs further contend that shortfall is wholly due to the charity care provisions. While plaintiffs have shown sufficient material issues of fact demonstrating they are less profitable than the average hospital nationally, they have not shown that N.J.S.A. 26:2H-18.64 deprives them of economic use of their properties as a whole, in effect, as hospitals. *See Yee*, 503 U.S. at 522-23, 112 S.Ct. 1522. A takings claim cannot be sustained on the sole ground that plaintiffs fail to financially perform on par with industry-wide norms. This framing fails to recognize other relevant regulatory factors at work which may be unique to a given hospital serving the community where it is located. *See Hutton Park Gardens v. Town Council of Town of W. Orange*, 68 N.J. 543, 570, 350 A.2d 1 (1975) ("The rate of return permitted need not be as high as prevailed in the industry prior to regulation nor as much as an investor might obtain by placing his capital elsewhere."). Giving all favorable inferences that this factor should weigh moderately in favor of finding a taking of plaintiffs' property, but we caution that this one factor is not dispositive.

2. Interference with Investment-Backed Expectations

Plaintiffs claim that the charity care statute unduly interferes with their investment-backed expectations. Here, the pertinent question is whether plaintiffs have a *reasonable* investment-backed expectation in receiving reimbursement at cost for their treatment of charity care patients. "[D]istinct, investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest." *Nekrilov v. City of Jersey City*, 45 F. 4th 662, 674-75 (3d Cir. 2022) (alteration in original) (quoting *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F. 2d 1023, 1033 (3d Cir. 1987)). Hospital investors in the highly regulated health care industry should expect that use of their property, in all its forms, is likely to be regulated by the state, and that such government regulation may diminish investment-backed expectations without resulting in an unconstitutional taking. *See also United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F. 2d 1179, 1191 (3d Cir. 1993) (rejecting a takings challenge to state system of setting hospital billing rates, in part, because plaintiffs' investment-backed expectations were reduced by "the historically heavy and constant regulation of health care" in the state).

The New Jersey health care industry has been consistently and comprehensively regulated within our state. Plaintiffs, as a condition of obtaining their hospital licenses, elected to provide subsidized medical services in the communities they serve. When a hospital seeks a license to operate in our state, it must consider the laws in

effect at that time as well as those which may be adopted by our Legislature. Given plaintiffs' choice to do business here, it is reasonable that they should expect such license conditions to affect business profits. In turn, we conclude 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. Plaintiffs have failed to satisfy this *Penn Central* factor.

3. Character of the Government Action

Our courts have repeatedly stated that the character of public health and healthcare regulations typically weighs against the conclusion that a law acts as a taking. *See JWC Fitness, LLC v. Murphy*, 469 N.J. Super 414, 436, 265 A.3d 164 (2021) (recognizing the nature of the regulation weighed against finding a taking as it was not specific to plaintiff and was a valid exercise of police power); *In re Health Care Admin. Bd.*, 83 N.J. at 81, 415 A.2d 1147 (finding no taking where the "regulations in question are directed at an acute social problem affecting the health and welfare of the needy aged and infirm, are well within the power and authority vested in the [DOH] by the Legislature").

The requirements of the charity care statute and its subsidy scheme are specific to its aims—to ensure equal access to healthcare for indigent patients, and we conclude that such regulation fits squarely within the police power vested in our Legislature. The Legislature, in turn, has delegated authority to the respective agencies to oversee

the appeal processes for both Medicaid reimbursement rates and the charity care subsidy. To this end, the character of the government action reflects a reasonable adjustment to the benefits and burdens of economic life for the common good and weighs strongly against finding a taking.

D.

After a thorough review of all plaintiffs' constitutional taking claims, we conclude that the record shows no per se taking, nor does a balancing of the *Penn Central* factors reveal a regulatory taking. We affirm the trial court's order granting defendants' motion for summary judgment against all plaintiffs.

Affirmed.

APPENDIX C — OPINION OF THE SUPREME COURT OF NEW JERSEY, FILED JULY 16, 2025

SUPREME COURT OF NEW JERSEY
A-16 September Term 2024
089696

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, 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, ST. FRANCIS MEDICAL CENTER, HACKENSACK MERIDIAN HEALTH—MOUNTAINSIDE MEDICAL CENTER, AND PRIME HEALTHCARE SERVICES—ST. MARY'S PASSAIC, LLC, D/B/A ST. MARY'S GENERAL HOSPITAL,

Plaintiffs-Appellants,

v.

THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES, SARAH ADELMAN IN HER

Appendix C

CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HUMAN SERVICES, 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, AND DR. KAITLAN BASTON, IN HER CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF HEALTH,

Defendants-Respondents.

Argued April 1, 2025;
Decided July 16, 2025

JUSTICE FASCIALE delivered the opinion of the Court.

Under New Jersey's charity care program, hospitals cannot turn away a patient for inability to pay, N.J.S.A. 26:2H-18.64, and patients who qualify for charity care shall not be billed for services rendered, N.J.A.C. 10:52-11.4. Instead, "disproportionate share hospitals" (DSHs), or hospitals that serve a disproportionate number of low-income patients, *see* N.J.S.A. 26:2H-18.52, receive annual subsidies from the Health Care Subsidy Fund (HCSF) in exchange for providing charity care, *see* N.J.S.A. 26:2H-18.52, .58, .58d.

In this appeal, plaintiffs—a group of DSHs—argue that the charity care program compels them to "provide charity care patients access to their facilities" and

to utilize "hospital space, supplies, and services" for treatment, but that the subsidy amounts "fail[] to even cover the basic cost of the care." That system, plaintiffs argue, violates federal and state constitutional protections against unlawful takings by the government.

Under the facts as presented in this case, we hold that charity care is not an unconstitutional "per se" physical taking of private property without just compensation. It does not grant an affirmative right of access to occupy hospitals; it does not give away or physically set aside hospital property for the government or a third party; and it does not deprive hospitals of all economically beneficial use of their property. We also hold that charity care is not an unconstitutional "regulatory" taking of private property without just compensation. That is due to the highly regulated nature of the hospital industry and the legislatively declared paramount public interest that the charity care program serves.

Hospitals remain free to challenge their annual subsidy allocations through administrative channels and to lobby the Legislature to make policy changes that would address more broadly the concerns they raise. But the charity care program does not run afoul of the Takings Clause, and we therefore affirm the Appellate Division's judgment, as modified.

I.

The medical tradition of providing free care to indigent patients dates back at least 178 years. Indeed,

at the time of its founding in 1847, the American Medical Association (AMA) created the Code of Medical Ethics, which stated that "[p]overty . . . should always be recognized as presenting [a] valid claim[] for gratuitous services." Am. Med. Ass'n, *Code of Med. Ethics* 105-06 (1847). In an exercise of its police powers to protect the general health and welfare of its citizens, the New Jersey Legislature has codified that tradition and provided a mechanism to address the financial burden it poses for medical service providers.

In 1986, the Legislature declared that "access to quality health care shall not be denied to residents of the State because of their inability to pay." *L.* 1986, *c.* 204, § 1. It formed the Uncompensated Care Trust Fund, which enabled hospitals to "collect their reasonable cost of approved uncompensated care." *See L.* 1991, *c.* 187, § 1(b) (describing that Fund, which expired at the end of 1990). In 1991, as part of the "Health Care Cost Reduction Act," *L.* 1991, *c.* 187, § 85, the Legislature created the "New Jersey Health Care Trust Fund" as a "nonlapsing fund . . . to distribute payments for the cost of uncompensated care," *id.* at § 4.

In 1992, in anticipation of the expiration of the New Jersey Health Care Trust Fund, *see Sponsor's Statement to A. 2100* 41 (*L.* 1992, *c.* 160), the Legislature created the current charity care program through the Health Care Reform Act, *see L.* 1992, *c.* 160, § 39. In doing so, the Legislature declared that "[i]t 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." N.J.S.A. 26:2H-18.51(a).

The statute accordingly requires 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." *Id.* at .64. Although the statute bars only the denial of admission, the regulations specify that "[p]ersons determined to be eligible for charity care shall not receive a bill for services or be subject to collection procedures," and that "[p]ersons determined to be eligible for reduced charity care shall not be billed or subject to collection procedures for the portion of the bill that is reduced charge charity care." N.J.A.C. 10:52-11.14. Consequently, "every acute care hospital in this State is required to provide care to anyone who seeks care without regard to the ability to pay." *Kuchera v. Jersey Shore Fam. Health Ctr.*, 221 N.J. 239, 254, 111 A.3d 84 (2015). A hospital that violates that requirement is subject "to a civil penalty of $10,000 for each violation." N.J.S.A. 26:2H-18.64. And a new health care facility—unless the facility is of a type exempted by statute, N.J.A.C. 8:33-3.5—can be established only if it will "provide services to medically underserved populations" and "comply with State and Federal laws regarding its obligation not to discriminate against low income persons." *Id.* at -4.9.

The charity care program requires that hospitals "provide all patients with an individual written notice of the availability of charity care and Medicaid/NJ FamilyCare . . . at the time of service, but no later than the issuance of the first billing statement to the patient."

N.J.A.C. 10:52-11.5(a). Hospitals must apply the criteria set forth in the relevant regulations to determine whether a patient is eligible for charity care. *Id.* at (b) to (d). To qualify, a patient must meet certain income and asset eligibility requirements. For income criteria, there are two tiers, charity care and reduced charity care:

> 1. A person whose individual or, if applicable, family income . . . is less than or equal to 200 percent of the [U.S. Department of Health and Human Services (HHS)] Poverty Guidelines shall be eligible for charity care for necessary health services without cost.
>
> 2. A person whose individual, or, if applicable, family, income . . . is greater than 200 percent of the HHS Poverty Guidelines but not more than 300 percent of these guidelines is eligible for charity care at a reduced rate. . . .
>
> [*Id.* at -11.8(b).]

Applicants must provide proof that, as of the date of service, (1) their individual assets do not exceed $7,500 and, if applicable, that (2) their family assets do not exceed $15,000. *Id.* at -11.10(a).

Recognizing that charity care burdens DSHs—designated in accordance with federal laws and regulations, *see* N.J.S.A. 26:2H-18.52—more than other hospitals, the Legislature created the HCSF in the New Jersey Department of Health (DOH) to distribute annual

subsidies. *Id.* at .58(a) ("The fund shall be a nonlapsing fund dedicated for use by the State to: (1) distribute charity care and other uncompensated care disproportionate share payments to hospitals. . . ."); *see also id.* at .52 ("'Charity care' means care provided at disproportionate share hospitals that may be eligible for a charity care subsidy pursuant to this act."). As to the necessity of creating the HCSF, the Legislature explained,

> Access to quality health care shall not be denied to residents of this State because of their inability to pay for the care; there are many residents of this State who cannot afford to pay for needed hospital care and in order to ensure that these persons have equal access to hospital care, it is necessary to provide [DSHs] with a charity care subsidy supported by a broad-based funding mechanism.

[*Id.* at .51(c).]

The Legislature appropriates funds from the General Fund to the HCSF. *Id.* at .58d. New Jersey hospitals are also required to pay 0.53% of their total operating revenue to the DOH each year for deposit into the HCSF. *Id.* at .62(c)(1). The DOH then allocates subsidies for the State fiscal year using the complex formula set forth in N.J.S.A. 26:2H-18.59i, discussed below, and transfers the funds to the Department of Human Services (DHS) for distribution to DSHs. *Id.* at .59(a).

But charity care subsidies are not a direct, dollar-for-dollar reimbursement of the costs hospitals expend in

providing charity care. "[R]ather, a hospital receives only its proportionate share of the total subsidy funded by the Legislature for that year." *Univ. of Med. & Dentistry v. Grant*, 343 N.J. Super. 162, 165, 778 A.2d 473 (App. Div. 2001); *see* N.J.S.A. 26:2H-18.59i(b). Further, charity care is reimbursed to DSHs at Medicaid-priced dollar amount rates. N.J.S.A. 26:2H-18.59i(a); N.J.A.C. 10:52-13.4. In other words, "[h]ospitals record the value of the charity care they provide at their usual and customary charges, but . . . the charity care subsidy is based on the amount Medicaid would pay for such services." *Grant*, 343 N.J. Super. at 166-67. N.J.S.A. 26:2H-18.59i(c) directs that, to ensure subsidies "remain viable and appropriate, the State shall maintain the charity care subsidy at an amount not less than 75 percent of the Medicaid-priced amounts of charity care provided by hospitals in the State."

In order to determine how DSHs receive their proportionate share of reimbursements, each hospital is "ranked in order of its hospital-specific, relative charity care percentage, or RCCP, by dividing the amount of hospital-specific gross revenue for charity care patients by the hospital's total gross revenue for all patients." N.J.S.A. 26:2H-18.59i(b)(1). Hospitals receive charity care subsidies on a sliding scale based on that ranking: each of the ten with the highest RCCP receives a subsidy equal to 96% of its "hospital-specific reimbursed documented charity care." *Id.* at .59i(b)(2). The eleventh gets 94%, and each hospital ranked twelfth or below gets two percent less than the hospital immediately above it. *Ibid.* But no hospital should get less than 43%. *Id.* at .59i(b)(4). The State acknowledges that it has not always been able to

maintain the reimbursement floor at the 43% rate and that some hospitals have received only 1% reimbursement.

The ranking system aside, "each of the hospitals located in the 10 municipalities in the State with the lowest median annual household income according to the most recent census data, shall be ranked" from highest to lowest for "hospital-specific reimbursed documented charity care." *Id.* at .59i(b)(3). "The hospital in each of the 10 municipalities, if any, with the highest documented hospital-specific charity care" gets 96%. *Ibid.*

A DSH can appeal its subsidy amount because of a calculation error or other reason to the DOH, N.J.A.C. 10:52-13.4(f)(1) to (2), and can seek an adjustment to its Medicaid final rate through the Division of Medical Assistance and Health Services within the DHS (the Division), *id.* at -14.17(c).

II.

Here, plaintiffs are several for-profit and non-profit general acute hospitals that qualify as DSHs. Defendants include the State of New Jersey (State), the DHS, the Division, the DOH, and several state officials. In their complaint, plaintiffs "contend that in multiple years from 2002 to present they were required to provide medical treatment including space, supplies, and services, to charity care and Medicaid patients," but that, "[i]n all relevant years, the payments provided by Defendants for the treatment of these patient populations have covered only a small fraction of the costs incurred by the Plaintiff

Hospitals in treating these patient populations in those years." Plaintiffs thus allege that the charity care program effected a "taking of private property for public use without just compensation being paid," in contravention of "[t]he Fifth and Fourteenth Amendments of the United States Constitution as well as Article I, Paragraph 20 of the New Jersey Constitution."

After discovery, plaintiffs and defendants filed cross-motions for summary judgment. The trial judge dismissed some of plaintiffs' takings claims on ripeness grounds for failure to exhaust administrative remedies and granted summary judgment to defendants on the remaining takings claims. The judge concluded that plaintiffs advanced "as-applied" rather than "facial" challenges because they did "not argue the statute as written is unconstitutional or seek to vindicate the rights of hospitals statewide" and because their "prayers for relief, if ultimately granted, would require . . . individualized declaratory paragraphs." Analyzing plaintiffs' claims accordingly, the trial judge found that they "satisfy none of the criteria for a per se taking" and likewise did not constitute regulatory takings.

On appeal, the Appellate Division categorized plaintiffs' claims as facial rather than as-applied challenges and found that it would be futile to remand the dismissed claims to an agency. *Englewood Hosp. & Med. Ctr. v. State*, 478 N.J. Super. 626, 641-42, 317 A.3d 967 (App. Div. 2024). The appellate court determined, however, that the charity care program effected neither a "per se" nor a regulatory taking and therefore affirmed the grant of summary judgment in favor of defendants. *Id.* at 649.

We granted plaintiffs' petition for certification. 258 N.J. 556, 324 A.3d 426 (2024). We then granted motions by Legal Services of New Jersey (LSNJ) and Disability Rights New Jersey (DRNJ) to appear jointly as amici curiae.

III.

Plaintiffs argue that the charity care program and its related regulations compel them to "provide charity care patients access to their facilities" and to utilize "hospital space, supplies, and services" for treatment, but that the subsidy amounts "fail[] to even cover the basic cost of the care." Plaintiffs describe those obligations as a "per se" appropriation, i.e., a taking of physical property for public use without just compensation. Plaintiffs also contend that the State has deprived them "of their right to exclude others from their property." Although plaintiffs argue that they should prevail on the basis of a "per se" analysis, they contend that the trial judge and Appellate Division erred in finding no regulatory taking, arguing that participation in a regulated industry cannot be deemed to waive their Fifth Amendment right to be free from governmental takings without just compensation. Either way, plaintiffs seek "just compensation," beyond the amount made available under the HCSF controlled by annual legislative appropriations. Plaintiffs contend that their takings challenges are "as-applied."

Defendants argue that charity care is not a "per se" taking because it does not deprive plaintiffs of "their right to exclude others from their property," physically

appropriate plaintiffs' real or personal property, or "remove all economically beneficial uses of [their] property." Instead, defendants assert that charity care regulates how plaintiffs use their property as to qualified indigent patients. Thus, defendants contend that plaintiffs have essentially made a regulatory takings challenge, which fails under the "flexible, context-specific test" outlined by the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Defendants agree with the Appellate Division that plaintiffs present facial challenges.

LSNJ/DRNJ emphasize that charity care "provides bedrock access to health care for the state's lowest-income residents." They support defendants' contentions that charity care does not constitute a "per se" or "regulatory" taking. LSNJ/DRNJ also contend that charity care continues New Jersey's long tradition of making medical care available for those in need of financial assistance. They note that in 1847, at the time of its founding, the AMA itself recognized a physician's duty to provide care for such patients. LSNJ/DRNJ provide statistics demonstrating that New Jersey hospitals have cared for charity patients going back at least as far as 1906 and that, as early as 1979, it has been New Jersey's public policy to provide health care at hospitals regardless of ability to pay. And finally, amici stress that charity care ensures that plaintiffs "receive substantial compensation" through annual subsidies.

IV.

"[A] motion for summary judgment must be granted 'if . . . there is no genuine issue as to any material fact challenged and . . . the moving party is entitled to a judgment or order as a matter of law.'" *Hyman v. Rosenbaum Yeshiva of N. Jersey*, 258 N.J. 208, 228, 317 A.3d 1260 (2024) (quoting *R.* 4:46-2(c)). Here, we decide a legal question: whether requiring plaintiff hospitals, during the years relevant to the complaint, not to bill patients eligible for charity care and to instead receive the program subsidies provided pursuant to statute and regulation constituted a Takings Clause violation.[1] Our

1. The parties dispute whether plaintiffs' takings challenges are facial or as-applied. Although both types of claims can arise from the same legislative or regulatory mandates, *see*, *e.g.*, *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 330 n.4, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (noting that the plaintiffs in that case had presented facial and as-applied Takings Clause violations that were "predicated on the same rationale"), the claims are fundamentally distinct. In non-First Amendment federal law "cases, a plaintiff cannot succeed on a facial challenge unless he 'establish[es] that no set of circumstances exists under which the [law] would be valid,' or he shows that the law lacks a 'plainly legitimate sweep.'" *Moody v. NetChoice, LLC*, 603 U.S. 707, 723, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024) (first quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); and then quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)). Under New Jersey law, it is "clear" that a statute "'is not facially unconstitutional if it operates constitutionally in some instances.'" *In re Contest of Nov. 8, 2011 Gen. Election*, 210 N.J. 29, 47, 40 A.3d 684 (2012) (quoting *Whirlpool Props., Inc. v. Dir., Div. of Tax'n*, 208 N.J. 141, 175, 26 A.3d 446 (2011)). Unlike a facial

review of questions of law is de novo. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995).

A.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use,

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challenge, "[a]n as applied challenge 'requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the [plaintiff] to whom it was applied of a protected right'"—here, the protections afforded under the Takings Clause. *See Goe v. Zucker*, 43 F.4th 19, 30 (2d Cir. 2022) (alteration in original) (quoting *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006)); *see also City of Los Angeles v. Patel*, 576 U.S. 409, 415, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application.").

Plaintiffs in this case do not argue that the charity care program is inherently unconstitutional even if it were to fully fund costs, and they declined, at oral argument, to take a position as to whether some level of subsidy below 100% reimbursement but above the level of compensation they received could pass constitutional muster, preferring to focus their argument on the alleged insufficiency of the subsidies that they received. This case comes before us cloaked as a freestanding legal question about whether there is a taking because that is the point on which plaintiffs' challenge was decided against them by the trial judge and Appellate Division. Our response to the legal question, to the extent that all hospitals provide care and thus supply space, supplies, and services similarly, will undoubtedly have application beyond this case. Regardless of whether the challenge is facial or as-applied, we hold that the charity care program in its current form does not constitute an unconstitutional per se or regulatory taking. Nevertheless, plaintiffs maintain they are asserting as-applied challenges.

without just compensation." *U.S. Const.* amend. V. "The Clause applies to the States through the Fourteenth Amendment." *257-261 20th Ave. Realty, LLC v. Roberto*, 259 N.J. 417, 437-38, 327 A.3d 1177 (2025). The New Jersey Constitution provides similar protections. *See N.J. Const.* art. I, ¶ 20 ("Private property shall not be taken for public use without just compensation."). The protection in our State Constitution is "coextensive with the Takings Clause of the Fifth Amendment of the United States Constitution." *Klumpp v. Borough of Avalon*, 202 N.J. 390, 405, 997 A.2d 967 (2010).

In a takings analysis, a court asks: (1) whether the plaintiff has a protected property interest; (2) if so, whether the government's action constituted a taking; (3) if yes, whether that taking was for a public use; and (4) if yes to all of the above, whether the statute adequately provides for just compensation. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).

Here, no one contests that plaintiffs have a property interest in their facilities and materials, or that the charity care program constitutes a public use. What the parties dispute is whether the allocation of space, services, and care products necessary to comply with the charity care program constitutes a government taking.

Case law recognizes two varieties of takings: "per se" takings and "regulatory" or "use-restriction" takings. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147-49, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). The distinction

between the two "is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Id.* at 149. Rather, 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." *Ibid.*

There are two main subcategories of "per se" takings. First, the "'clearest sort of taking'" is through "physical appropriation." *Id.* at 148 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)). A physical appropriation occurs when the government directly takes private property for its own use or use by a third party, as through the exercise of "its power of eminent domain to formally condemn property" or by "physically tak[ing] possession of property without acquiring title to it," such as "by taking possession and operating control" of a mine. *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17, 71 S. Ct. 670, 95 L. Ed. 809, 119 Ct. Cl. 851 (1951) (plurality opinion cited as example in *Cedar Point*).

The second category of a physical "per se" taking occurs when there is a "government-authorized physical invasion[]" or a physical occupation of private property. *Cedar Point*, 594 U.S. at 148, 150-51. Such invasions are "per se" takings because of "the central importance to property ownership of the right to exclude." *Id.* at 150. "The right to exclude is 'one of the most treasured' rights of property ownership." *Id.* at 149 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)). Examples of government-authorized invasions of property include "recurring flooding as the result of building a dam"; "frequently [flying] military aircraft low over [a] farm"; "the appropriation of an easement" allowing access to a privately owned marina; "requiring landlords to allow cable companies to install equipment on their properties"; the "appropriation of an easement" requiring private property owners to allow the public to utilize their property to access the beach; and allowing union organizers to "take access" to private property. *Id.* at 148, 150-52.

A regulatory taking, in contrast, occurs when the government restricts "an owner's ability to use his own property." *Id.* at 148. In some cases, that restriction can rise to the level of a "categorical" taking by leaving the property owner "without economically beneficial or productive options for [the property's] use." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1018, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). "As Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.'" *Ibid.* (quoting *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1980) (Brennan, J., dissenting)). Thus, when there is a "practical equivalence . . . of negative regulation and appropriation," a use restriction may constitute a "per se" taking as surely as

one of the forms of physical takings. *See id.* at 1018-19; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

In other cases, however, "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found," *Murr v. Wisconsin*, 582 U.S. 383, 393, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017), under the "flexible test developed in *Penn Central*," *Cedar Point*, 594 U.S. at 148. The Penn Central test balances "factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Cedar Point*, 594 U.S. at 148 (citing *Penn Cent.*, 438 U.S. at 124). As the Supreme Court most recently explained, "[a] use restriction that is 'reasonably necessary to the effectuation of a substantial government purpose' is not a taking unless it saps too much of the property's value or frustrates the owner's investment-backed expectations." *Sheetz v. County of El Dorado*, 601 U.S. 267, 274, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024) (quoting *Penn Cent.*, 438 U.S. at 127).

B.

Here, plaintiffs argue that the charity care program resulted in a "per se" taking during the years for which they seek relief. Plaintiffs asserted at oral argument that N.J.S.A. 26:2H-18.64, which they refer to as the

> "Take-All-Comers Statute" is a physical taking. It requires the hospital to take its own property

> and use it in a particular way. The statute is not a restriction on the use of the property. It requires the actual taking and transferring to other people the property of the hospital . . . for example, medications or IV fluids. It includes other medical supplies; it includes the facilities of the hospital; it includes the property interest in the people that are working there, who are providing these services.

We consider in turn each of the categories of property plaintiffs allege have been subject to a taking—supplies, services, and facilities—to determine whether a "per se" taking has occurred. We therefore analyze plaintiffs' claims to determine whether charity care involves the government physically taking a hospital's real or personal property, whether for itself or a third party—an inquiry relevant to the hospitals' claims that supplies and services have been taken—or whether it causes physical occupation of private property—an inquiry relevant to the claim that charity care constitutes a taking of the hospitals' facilities.[2]

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2. The hospitals do not argue that the charity care program deprives them of "all economically beneficial use" of their property, *see Lucas*, 505 U.S. at 1015, and, indeed, it does not: they continue to treat insured patients and receive subsidies for providing charity care.

We recognize that some cases group use restrictions that culminate in the loss of all economically beneficial use of a property as a regulatory taking. *See Horne v. Dep't of Agric.*, 576 U.S. 351, 361, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015); *Sheetz*, 601 U.S. at 274; *Palazzolo*, 533 U.S. at 617. But because *Lucas* refers to such a taking as "categorical," 505 U.S. at 1015; *see also Lingle*, 544 U.S. at 538, we address it in the context of "per se" takings.

Appendix C

1.

a.

We first consider whether the use of medical supplies in the course of providing charity care is tantamount to the government physically acquiring hospitals' property for public use. We find that it is not.

The program here is distinguishable from *Horne v. Department of Agriculture*, in which the U.S. Supreme Court held that an order requiring a certain percentage of a raisin crop to be physically set aside for the government "free of charge" was an unconstitutional taking. 576 U.S. 351, 354, 361, 364-65, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015). In explaining how the order was "a clear physical taking," the Court stated that "[a]ctual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. The Committee's raisins must be physically segregated from free-tonnage raisins. Reserve raisins are sometimes left on the premises of handlers, but they are held 'for the account' of the Government." *Id.* at 361 (citations omitted). According to the opinion, "[t]he Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market." *Id.* at 354. The Raisin Committee sometimes sells the raisins "in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by 'any other means' consistent with the

purposes of the raisin program," all in the discretion of the Raisin Committee. *Id.* at 355.

In contrast to the Raisin Marketing Order at issue in *Horne*, the charity care program does not require hospitals to "physically set aside" any portion of their property for either the government or for qualified indigent patients. The statute and regulation are not written from the perspective of obtaining certain real or personal property, and no transfer of title or ownership occurs. If plaintiffs were required to hand over boxes of bandages or to surrender medical devices to the government or a third party, which could then sell or dispose of those bandages or devices at will, this case would fall neatly into *Horne's* analysis.

Instead, the charity care program prevents hospitals from denying admission or appropriate services to patients because of their inability to pay and from billing patients eligible for charity care. *See* N.J.S.A. 26:2H-18.64; N.J.A.C. 10:52-11.4. A hospital retains both ownership and control of its own facilities and equipment, and it makes choices about the allocation of those resources based on its assessment of patient needs. *Contrast Horne*, 576 U.S. at 360 (explaining that "depriving the owner of 'the rights to possess, use and dispose of' the property," whether personal or real, "'is perhaps the most serious form of invasion of an owner's property interests'" (quoting *Loretto*, 458 U.S. at 435)).

As to consumables like medications, bandages, and other single-use or exhaustible items supplied in

conjunction with providing treatment as required by the charity care program, we do not make light of their cost. But the provision of such consumables incidental to compelled medical care is, in our view, not the same as the compelled cession of property that retains its economic value and can be sold or disposed of at the transferee's discretion. If a hospital provides pain medication or applies a cast on a broken bone, patients have not taken possession or been transferred ownership of those supplies in the same way the government took possession of the raisins in *Horne*. *See* 576 U.S. at 361-62.

The hospitals argue that the medical supplies they use in treating patients are their property just as the raisins were the property of the growers in *Horne*, and we do not disagree. But Justice Oliver Wendell Holmes noted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322 (1922); *accord Penn Cent.*, 438 U.S. at 124 (quoting *Mahon* and explaining that the Court "has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values").

In our view, that reasoning holds true for the incidental consumption of medical supplies, furnished in accordance with the hospitals' own determinations of what supplies are needed and how they should be used, while providing care. Thus, we reject the notion that the charity care program specifically constitutes a "per se"

taking by requiring hospitals to treat patients whose care may entail the use of items from the hospitals' inventory, such as "medications, intravenous solutions, bandages, food, . . . [and] medical devices such as surgical implants."

b.

We reach a similar conclusion as to the services offered in the course of providing mandated charity care. Plaintiffs rightly note that this Court determined, in considering a challenge to the assignment by municipal courts of attorneys to represent defendants unable to pay for counsel, that although "some cases . . . question whether a lawyer's services are 'property' within the constitutional protections involved[,] we believe that they are." *Madden v. Township of Delran*, 126 N.J. 591, 602, 601 A.2d 211 (1992). Although the *Madden* Court expressed concern about the burden created by assigned pro bono representation and took administrative steps to reduce that burden, the Court ultimately—and leaving open the question of its authority to do so—declined to "order government to pay attorneys who are assigned by the municipal court to represent defendants too poor to pay for counsel." *Id.* at 594. It did so relying in part on *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966).

In *Rush*, we held that assigning counsel "to defend indigents charged with crime" did not violate constitutional provisions including the Takings Clause. *Id.* at 402, 408. The *Rush* Court stated that "[n]one of [the constitutional] contentions [raised by the plaintiffs challenging mandatory pro bono representation] is new, and if one accepts the

premise that the duty to defend the poor is a professional obligation rationally incidental to the right accorded a small segment of the citizenry to practice law, these claims fall away." *Id.* at 408. The Court did determine, however, that "in fairness," as an "important policy issue," "the bar alone should [not] be required to discharge a duty which constitutionally is the burden of the State." *Id.* at 402, 408-09. To address that unfairness, the Court "suggest[ed] compensation at 60% of the fee a client of ordinary means would pay an attorney of modest financial success." *Id.* at 413. The Court explained that the members of the bar would share in the burden as taxpayers but also "for the time being at least . . . should contribute something more." *Ibid.*

Like the Court found with respect to unpaid attorney assignments in *Rush*, and given both the nature of the medical profession and its long tradition of providing care to those in need without regard to their ability to pay, we find unavailing the argument that charity care constitutes a taking as to services furnished by the hospitals. That said, just as we held it unfair—though not unconstitutional—to require attorneys to bear the entirety of the burden of serving indigent clients in *Rush*, we do not suggest it is fair for medical professionals and hospitals to bear, alone, the cost of providing services to those who cannot pay for them. But, in contrast to administration of the legal field, over which our State Constitution grants this Court exclusive jurisdiction, *N.J. Const.* art. VI, § 2, ¶ 3, we have no authority to propose, as a matter of policy, what a fair-though-not-constitutionally-mandated ratio of burden-bearing would be with respect

to hospital services. That question is for the Legislature, and its response to that question appears in the charity care subsidization formula it adopted; if that response is not sufficient, in the hospitals' view, potential redress lies with the Legislature.

2.

Finally, as to the hospitals' claim that charity care constitutes a taking of their facilities, we find that charity care does not constitute an unconstitutional physical invasion or occupation of private property.

Charity care imposes no right to take access to the hospitals, which are in the business of generally providing medical care to patients and are open to the public. The charity care program does not, as the trial judge aptly stated in his written opinion, "instill . . . property right[s] in patients to traverse [plaintiffs'] property at will." Any use of the hospitals' facilities in treating charity care patients is not the specific objective or mandate of the program, but rather is incidental to the hospitals' determination of how to provide the care the program requires. As with the supplies, which are distinguishable from the raisins in *Horne* in part because the hospitals determine when and how to use them, the hospitals use and allow access to their facilities in providing charity care according to their own determinations of patients' needs.

Charity care is thus distinguishable from circumstances in which the U.S. Supreme Court has found a physical taking by invasion or occupation. In *Cedar Point*, the

Court held that a regulation granting labor organizers a "right to take access" to the property of an agricultural employer for three hours a day, up to 120 days a year, was a "per se" taking. 594 U.S. at 143, 152. And in *Nollan v. California Coastal Commission*, the Court held that a permit condition requiring private property owners to grant the public an easement across their beachfront property was an unconstitutional taking as a permanent physical occupation. 483 U.S. 825, 828, 832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). Unlike the regulation at issue in *Cedar Point* and the permit condition in *Nollan*, however, charity care only limits hospitals' right to exclude and ability to bill patients who cannot pay for treatment; it does not involve an affirmative "right of access" that would allow any individual to physically invade or occupy the hospital.

Further, in contrast to the properties at issue in *Cedar Point* and *Nollan*, hospitals, even when privately owned, are open to the public. In Cedar Point, the Court recognized that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." 594 U.S. at 157. It is on that basis that the Court distinguished the takings at issue in *Cedar Point, Horne*, and *Nollan* from the state constitutional provision challenged in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 77, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

In *PruneYard*, the Court held that requiring the owners of "a privately owned shopping center to which the

public is invited" to allow high school students "to exercise state-protected rights of free expression and petition on shopping center property" by distributing leaflets "clearly does not amount to an unconstitutional infringement of [the owners'] property rights under the Taking Clause." 447 U.S. at 76-78, 84. It reached that conclusion after analyzing the alleged taking as a regulatory, rather than a per se, taking. *See id.* at 83. The Court did so even though "one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a 'taking' of that right. . . ." *Id.* at 82. The Court explained that "it is well established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'" *Ibid.* (quoting *Armstrong v. United States*, 364 U.S. 40, 48, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). *PruneYard* thus makes clear that, although a property owner has a right to exclude, not every government infringement on that right is a taking requiring just compensation. We find that language instructive and more applicable to plaintiffs' challenge here than the holdings in *Cedar Point* and *Nollan*, which involved invasions of property not otherwise open to the public.

In sum, we find that charity care does not amount to a per se taking as to any of the property listed by plaintiffs. The program does not work a physical invasion of hospital facilities or a physical appropriation of hospital supplies and materials under controlling U.S. Supreme Court case law, and it does not constitute a taking of the services provided, despite this Court's recognition of professional services as a form of "property" in *Madden*, for the reasons extrapolated from *Rush*.

Because charity care does not involve the appropriation of a hospital's private property under any of the "per se" takings categories, we consider whether the program effects a regulatory taking.

C.

To determine whether charity care constitutes the kind of regulatory taking that does not deprive the owner of all economically beneficial use, we consider, essentially, whether the manner in which it restricts the hospitals' use of their property goes "too far." *See Mahon*, 260 U.S. at 415 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). We hold that it does not. Although charity care prohibits hospitals from turning away qualified patients solely on the basis of their inability to pay for health care, it is not an unconstitutional "regulatory" taking under the balancing test announced in *Penn Central* because the highly regulated nature of the hospital industry and the paramount public interest it serves outweigh the program's adverse economic impact on the hospitals.

1.

As to the first *Penn Central* factor—the economic impact of the regulation—the Appellate Division recognized that plaintiffs had "clearly established . . . evidence sufficient to support a finding that [charity care] has had an adverse impact on their profitability." *Englewood Hosp. & Med. Ctr.*, 478 N.J. Super. at 647. But

the court concluded that such an adverse economic impact was "not dispositive." *Ibid.* We agree with the appellate court's conclusion. Although plaintiffs have demonstrated an adverse economic impact, that alone does not mean that charity care amounts to a regulatory taking. We must also analyze the second and third factors.

2.

The second *Penn Central* factor—whether the regulation has "interfered with distinct investment-backed expectations," 438 U.S. at 124—focuses on whether the restriction that causes the adverse economic impact of the first factor came as a surprise, a change that reasonable investors could not have anticipated and therefore did not factor into their choice to invest. *See*, *e.g.*, *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007) (explaining that, "as the Supreme Court pointed out in *Lucas*, [505 U.S. at 1027-28,] the owner of any form of personal property must anticipate the possibility that new regulation might significantly affect the value of his business. . . . This is all the more true in the case of a heavily regulated and highly contentious activity such as video poker. The pendulum of politics swings periodically between restriction and permission in such matters, and prudent investors understand the risk."); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., concurring) (explaining that pharmacy benefit managers (PBMs) "should . . . have expected the possibility that they would have to disclose to their covered entity customers information. . . . PBMs are undoubtedly aware of the heavily regulated nature

of the healthcare industry; in fact, as the district court noted, they are already subject to extensive regulation under federal and state law. If PBMs truly assumed that they would be free from disclosure requirements of the sort set forth in the Maine law here, this would be more wishful thinking than reasonable expectation.").

Here, plaintiffs operate in a highly regulated industry that has a long practice of providing charity care in some form. Thus, their "investment-backed expectations" are diminished.

It is undisputed that healthcare is a highly regulated industry, even beyond the elaborate regulations associated with charity care. For example, the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 to -26, enacted in 1971, created a comprehensive system to regulate New Jersey health care facilities. To secure an operating license, change ownership, or make other significant changes, a hospital must apply for a Certificate of Need (CN). *See* N.J.S.A. 26:2H-5.8(c); N.J.A.C. 8:33-3.5. To obtain a CN, a hospital must commit "to provide services to medically underserved populations," N.J.A.C. 8:33-4.9(c), and describe how much charity care it will provide, *id.* at .10(a)(6). "[N]o certificate of need shall be granted to any facility that fails to comply with State and Federal laws regarding its obligation not to discriminate against low income persons, minorities, and disabled individuals." *Id.* at .9(c). Requirements like those reflect that, in New Jersey, hospitals are subject to long-standing, "extensive regulation in the public interest." *Desai v. St. Barnabas Med. Ctr.*, 103 N.J. 79, 90, 510 A.2d 662 (1986). The

Legislature's "extensive supervisory and regulatory control over hospital functions" demonstrates our "State's profound concern with public health care." *Id.* at 88.

In addition to state regulation, hospitals that participate in and receive payments from Medicare must opt into the Emergency Medical Treatment and Active Labor Act (EMTALA), which requires a hospital with an emergency department to provide "an appropriate medical screening examination" to anyone on whose behalf a request for examination or treatment is made and to either treat or transfer any individual the hospital determines to have "an emergency medical condition," regardless of their ability to pay, 42 U.S.C. § 1395dd; 42 C.F.R. § 489.24(a). Similarly, hospitals seeking tax-exempt status must meet the care and billing requirements of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 9007, 124 Stat. 119, 855 (2010); 26 U.S.C. § 501(r).

Participation in a heavily regulated industry lessens investment-backed expectations. For example, in rejecting an as-applied takings claim to a hospital billing rate scheme by several employee benefit plans, the U.S. Court of Appeals for the Third Circuit held that the scheme did not "interfere[] with the plans' 'investment-backed expectations'" "given the historically heavy and constant regulation of health care in New Jersey." *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F.2d 1179, 1188, 1191 (3d Cir. 1993). Additionally, the U.S. Court of Appeals for the First Circuit held that Maine's "free care" law—which created

a program similar to charity care that also prohibited hospitals from denying services based on ability to pay and provided reimbursement through its Medicaid program—was not a taking. *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 123-24 (1st Cir. 2009). The court reasoned in part that a hospital's "investment-backed expectations are tempered by the fact that it operates in the highly regulated hospital industry." *Id.* at 128. We agree that, because hospitals operate in such a highly regulated industry, their investment-backed expectations, to the extent they exist in that context, *see United Wire*, 995 F.2d at 1191, are "tempered," *Franklin Mem'l Hosp.*, 575 F.3d at 128.

Beyond the extensive regulation of the healthcare industry, we also find that the long tradition of providing medical care to indigent patients and the tax benefits that flow from such care further cut against the argument that the charity care program's requirements could frustrate reasonable investment-backed expectations.

It is axiomatic that a hospital "exercises its [healthcare] powers 'in trust,' 'for the benefit of the public,' and 'in aid of [its] service to the public.'" *Comprehensive Neurosurgical, P.C. v. Valley Hosp.*, 257 N.J. 33, 68, 312 A.3d 243 (2024) (alterations in original) (quoting *Berman v. Valley Hosp.*, 103 N.J. 100, 106, 510 A.2d 673 (1986)). "[T]his Court has continuously emphasized the important societal role hospitals play when enacting healthcare policies." *Ibid.* In that context, "a hospital, in providing health-care services and facilities, is to be considered 'a quasi-public entity to serve the public.'" *Berman*, 103 N.J. at 106 (quoting *Doe*

v. Bridgeton Hosp. Ass'n, Inc., 71 N.J. 478, 486, 366 A.2d 641 (1976)). Because they are quasi-public institutions, hospitals "must serve the public without discrimination." *Doe*, 71 N.J. at 487. Indeed, the "primary purpose" of a hospital is "to serve the public." *Desai*, 103 N.J. at 88 (quoting *Belmar v. Cipolla*, 96 N.J. 199, 208, 475 A.2d 533 (1984)).

As quasi-public entities, hospitals' investment-backed expectations as to charity care reimbursements are lessened because of the long-standing and well-known tradition of providing care to indigent patients. The essential attributes of the charity care program are not unexpected or new to the hospital industry. Although the current program was enacted in 1992, investors understand that well before then, it had been a practice for hospitals to provide care to low-income patients. Since 1847, the AMA ethics statement has explained that "[p]overty . . . should always be recognized as presenting [a] valid claim[] for gratuitous services." Am. Med. Ass'n, at 105-06. Investors know this. Indeed, "[t]he provision of charity care is a core function of a hospital." *Kuchera*, 221 N.J. at 254.

Additionally, hospitals derive tax benefits from their participation in charity care. Investors are certainly aware of those benefits when starting to do business as a hospital, and those benefits are part of the exchange for providing services to the public, including services for indigent patients. First, nonprofit hospitals in New Jersey are exempt from state income, property, and sales taxes. *See N.J. Const.* art. VIII, § 1, ¶ 2 ("Exemption from

taxation may be granted only by general laws."); N.J.S.A. 54:10A-3(e); N.J.S.A. 54:4-3.6; N.J.S.A. 54:32B-9(b). Nonprofit hospitals that comply with the requirements of 26 U.S.C. § 501(r) are exempt from federal income taxation as well. *See* 26 U.S.C. § 501(c)(3). The degree of charity care a hospital provides is a factor the Internal Revenue Service (IRS) may use when it determines if the hospital qualifies for 501(c)(3) tax-exempt status, and hospitals receive federal tax benefits in part "[t]o help offset the costs" of charity care. Cong. Rsch. Serv., *Hospital Charity Care and Related Reporting Requirements Under Medicare and the Internal Revenue Code* (June 18, 2018), https://sgp.fas.org/crs/misc/IF10918.pdf. And for-profit hospitals can take tax deductions for charity care costs. Zachary Levinson et al., *Hospital Charity Care: How it Works and Why it Matters, KFF* (Nov. 3, 2022), https://www.kff.org/health-costs/issue-brief/hospital-charity-care-how-it-works-and-why-it-matters.

We note the tax benefits that accompany charity care not as part of any just compensation inquiry—we do not reach the question of just compensation here—but to underscore that such benefits, expressly tied to the provision of charity care, demonstrate generalized awareness of charity care requirements and serve to temper any impact on reasonable investment-backed expectations.

In sum, a number of factors undermine any contention that the charity care program frustrates reasonable investment-backed expectations. The heavily regulated nature of the healthcare industry, the long-standing

tradition of hospitals caring for indigent patients, and the existence of tax benefits specifically tied to such care all diminish expectations that hospitals might be free of charity care obligations. Thus, the second *Penn Central* factor weighs against finding a taking.

3.

The third *Penn Central* factor—"the character of the governmental action," 438 U.S. at 124—strongly favors finding no unconstitutional "regulatory" taking. Importantly, a taking will rarely be found "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citation omitted); *see also Nebbia v. New York*, 291 U.S. 502, 523, 54 S. Ct. 505, 78 L. Ed. 940 (1934) ("Equally fundamental with the private [property] right is that of the public to regulate it in the common interest."). Because charity care furthers the State's police power by promoting the general health and welfare of its citizens, *see Lucas*, 505 U.S. at 1027; furthers the legislatively declared paramount public interest to guarantee equal access to health care, *see* N.J.S.A. 26:2H-18.51(a); and clearly "adjust[s] the benefits and burdens of economic life to promote the common good," *Penn Cent.*, 438 U.S. at 124, factor three weighs heavily in the State's favor in concluding that the charity care program does not amount to an unconstitutional "regulatory" taking. Similarly, this Court held that regulations that required a nursing home as a condition of licensure "to make available a reasonable number of its beds to indigent persons" did not constitute a taking

and explained that such regulations were "directed at an acute social problem affecting the health and welfare of the needy aged and infirm." *In re Health Care Admin. Bd.*, 83 N.J. 67, 81, 415 A.2d 1147 (1980).

Although the program's requirement that hospitals provide care regardless of ability to pay impacts hospitals financially, the character of the government action here must receive the greatest weight due to the importance of charity care in our State. In enacting the charity care program, the Legislature declared that "[i]t 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." N.J.S.A. 26:2H-18.51(a) (emphasis added). As amici explain, charity care "provides bedrock access to health care for the state's lowest-income residents" and "is a core component of New Jersey's promise to its residents that basic health care services will always be available." And as stated above and in detail in the discussion of factor two, providing charity care in New Jersey "is a core function of a hospital." *Kuchera*, 221 N.J. at 254.

The flexible *Penn Central* test aims to "strike[] a balance between property owners' rights and the government's authority to advance the common good." *Murr*, 582 U.S. at 408 (Roberts, C.J., dissenting). And here, on balance, the character of the government action providing for the common good outweighs any adverse economic impact and reasonable investment-backed expectations on the part of the hospitals. Accordingly, charity care does not go "too far" so as to become an

unconstitutional "regulatory" taking requiring just compensation. Rather, it "adjust[s] the benefits and burdens of economic life to promote the common good," *see Penn Central*, 438 U.S. at 124, but it "leave[s] the core rights of property ownership intact," *Franklin Mem'l Hosp.*, 575 F.3d at 129.

D.

Because we hold under the facts as presented in this case that charity care does not amount to a taking, there is no need to address just compensation. *See Ruckelshaus*, 467 U.S. at 1000-01.

V.

Finally, although we conclude that the charity care program is not an unconstitutional taking, we recognize that the program *does include* subsidy payments for the hospitals' services. In an industry that is heavily regulated to begin with, investment-backed expectations recognize that as well. Hospitals are therefore entitled to subsidy payments as part of the program.

Some of the hospitals believe that the Legislature provided insufficient charity care subsidies during any given fiscal year. The charity care program has a mechanism to address such grievances: once the hospital-specific subsidies have been calculated, a hospital can challenge its subsidy allocation by, for example, filing an administrative appeal with the DOH, N.J.A.C. 10:52-

13.4(f)(1) to (2), or seeking adjustment of the Medicaid rate issued annually by the Division, *id.* at -14.17(c).

As the First Circuit has stated, to the extent a hospital is dissatisfied with the subsidy it receives, or if it receives an amount below the base set by the Legislature, that dissatisfaction "is a dispute with the policy choices made by the state's political branches." *Franklin Mem'l Hosp.*, 575 F.3d at 130. On that note, the "better course of action is to seek redress through the state's political process" rather than under the Takings Clause. *See ibid.*

VI.

The judgment of the Appellate Division is affirmed as modified.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, PIERRE-LOUIS, WAINER APTER, NORIEGA, and HOFFMAN join in JUSTICE FASCIALE's opinion.