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COURT OF APPEALS

STATE OF NEW YORK

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THE BRIGHTONIAN NURSING HOME, et al.

Respondents,

-against-

No. 161

RICHARD F. DAINES, et al.

Appellants.

-----

20 Eagle Street  
Albany, New York 12207  
September 11, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 161.

2 Counselor, do you want any rebuttal time?

3 MR. PALADINO: Three minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Three minutes, sure.

5 Go ahead.

6 MR. PALADINO: The State has good reasons  
7 for restricting the withdrawal of equity by nursing  
8 homes, even in situations when the nursing homes - -  
9 -

10 CHIEF JUDGE LIPPMAN: What's the theory,  
11 counsel? What's the public policy theory behind this  
12 legislation?

13 MR. PALADINO: Well, the State has an  
14 interest in ensuring that the nursing homes remain  
15 financially viable and able to provide quality care  
16 to their patients.

17 JUDGE GRAFFEO: Why doesn't the reg about  
18 where they fall below the financial viability - - -  
19 why isn't that reg alone sufficient? Why did they  
20 need to do this other provision?

21 MR. PALADINO: I believe Your Honor is  
22 referring to Section 5(a) of the statute.

23 JUDGE GRAFFEO: Yeah, the first provision.

24 MR. PALADINO: The short answer is that a  
25 nursing home, even if it has positive equity after

1 the withdrawal, can be in a precarious financial  
2 position. You have to remember that positive equity  
3 simply means that total assets exceed total liability  
4 - - -

5 CHIEF JUDGE LIPPMAN: Counselor, but there  
6 are lots of entities that have a precarious financial  
7 situation. Why here? What's the policy reason that  
8 this is important to go beyond, as Judge Graffeo  
9 says, just the requirement that - - - of notice, you  
10 know?

11 MR. PALADINO: Nursing homes take care of  
12 the elderly and the infirm, and the State pours  
13 billions of dollars a year into their operations, so  
14 a nursing home that has technically positive equity  
15 but withdraws all of the working capital or cash from  
16 the facility might not be able to make payroll or - -  
17 -

18 JUDGE PIGOTT: Has there been a history of  
19 that in the past, of - - - you know, I know the  
20 nursing home scandals of yesteryear; was that some of  
21 what was going on, was draining of the assets from  
22 the nursing home?

23 MR. PALADINO: Well, yes, and certainly  
24 there's a legislative history to that effect.  
25 There's no specific finding, to that effect, related

1 to this legislation.

2 CHIEF JUDGE LIPPMAN: What is the state of  
3 the industry now? I think, you know, we all were  
4 aware of those days when that was all over the public  
5 media. What's the state of the nursing industry  
6 today?

7 MR. PALADINO: Well, currently, forty-five  
8 percent of the entire industry is operating in the  
9 red.

10 CHIEF JUDGE LIPPMAN: Is it increased  
11 expenses, economic expenses?

12 MR. PALADINO: Part of it, I'm sure - - -

13 CHIEF JUDGE LIPPMAN: Medical expenses, is  
14 that it?

15 MR. PALADINO: Part of it is the reduction  
16 in Medicaid reimbursement, is in part. But the - - -

17 JUDGE GRAFFEO: I thought, initially, the  
18 Health Department was trying to encourage nursing  
19 homes to take Medicaid patients, so that was one of  
20 the rationales for the original statute. But that  
21 rationale wouldn't still hold water for the 2010  
22 amendment when they went to general revenue, would  
23 it?

24 MR. PALADINO: No, and I don't even think  
25 that's really a correct statement of the original

1 purpose of the statute.

2 JUDGE GRAFFEO: So it's just financial  
3 viability? That's what it's targeted at?

4 MR. PALADINO: And the effect that the  
5 viability has on the ability to provide quality care.  
6 But the Appellate - - -

7 JUDGE SMITH: Isn't revenue - - - a  
8 percentage of net revenue a reasonable measure of  
9 economic viability?

10 MR. PALADINO: No, and it's not intended to  
11 be. It's merely intended to be the threshold or  
12 trigger that raises the red flag and tells the Health  
13 Department to take a look at the facility's  
14 situation.

15 JUDGE GRAFFEO: Because you could have a  
16 nursing home with very high net revenue but also  
17 really high debt load, a huge mortgage. So three  
18 percent there wouldn't equate to, say, a much smaller  
19 facility that, say, doesn't have a mortgage, and they  
20 could take more than three percent and still be  
21 perfectly - - - you know, they could pull out more  
22 profit and still not endanger the economic wellbeing  
23 of the operation of the facility. I'm trying to  
24 understand what the - - - what this three percent  
25 relationship has to do with viability.

1 MR. PALADINO: Well, I completely agree.  
2 And again, it's not the measure of viability. The  
3 evaluation of the financial condition of the facility  
4 occurs when they look at the application and collect  
5 the financial information from the facility. It's  
6 really just a proxy or a clear, easy way to  
7 differentiate between substantial and small equity  
8 withdrawals. Imagine if there was no threshold; you  
9 would have to have a review every time they take out  
10 - - -

11 CHIEF JUDGE LIPPMAN: What - - -

12 MR. PALADINO: - - - a hundred dollars from  
13 the facility.

14 CHIEF JUDGE LIPPMAN: What's the  
15 significance of this "other factors" language?

16 MR. PALADINO: It can be construed narrowly  
17 to allow the commissioner to consider factors of the  
18 same type or kind - - -

19 CHIEF JUDGE LIPPMAN: They relate back, is  
20 that what you're saying, to the - - -

21 MR. PALADINO: Well, yes.

22 CHIEF JUDGE LIPPMAN: - - - to the other  
23 factors that are in there, the specific factors that  
24 are in there already?

25 MR. PALADINO: Yes, you can - - - it's



1 don't agree, the statute can operate fine without it.  
2 The other factors perm - - -

3 CHIEF JUDGE LIPPMAN: Need its purpose, you  
4 mean; it could operate fine without it?

5 MR. PALADINO: Yes, there's no reason to  
6 believe the legislature would not have enacted this  
7 law had there not been this - - -

8 JUDGE SMITH: How - - -

9 MR. PALADINO: - - - "other factors"  
10 provision.

11 JUDGE RIVERA: Do the regulations set the  
12 outer limits for the "other factors" category?

13 MR. PALADINO: I wouldn't say the outer  
14 limits, but they certainly cite or provide examples  
15 of other factors. But the other factor that I just  
16 cited, temporal proximity of withdrawal to request,  
17 relates very closely to financial condition of the  
18 facility.

19 JUDGE SMITH: So are you saying that as he  
20 or she may deem appropriate - - - or "as the  
21 commissioner may deem appropriate", should be taken  
22 to mean as the commissioner may deem appropriate to  
23 protect the financial viability of nursing homes?

24 MR. PALADINO: Yes, or such - - - or other  
25 similar factors, if you just add in the word



1 "similar".

2 JUDGE RIVERA: So that category is simply  
3 to allow some flexibility with respect to these other  
4 two - - - well, there's four other categories - - -  
5 these other four factors in the two broader  
6 categories they fall into. Is that correct? That's  
7 the way you interpret it?

8 MR. PALADINO: Yes, it's impossible - - -

9 JUDGE RIVERA: The regulations don't bind  
10 you to only what's listed in the regulations, is what  
11 you're also arguing?

12 MR. PALADINO: Right. We wouldn't allow  
13 the commissioner to approve or deny a request because  
14 he doesn't agree with the personal spending choices  
15 of the nursing home. The plaintiffs say that's what  
16 the commissioner could do, but the commissioner  
17 doesn't even ask for that information. The  
18 commissioner doesn't care whether the nursing home is  
19 going to spend the money on college tuition or taking  
20 a trip around the world.

21 CHIEF JUDGE LIPPMAN: Are these - - - this  
22 provision - - - is there other ways to do this, or do  
23 you feel this is - - - do you argue that this is  
24 reasonably related to achieving the police power  
25 purposes? In other words, is there any other way to

1 do this?

2 MR. PALADINO: I'm sure that there are  
3 other ways to do it, but the analysis for substantive  
4 due process purposes is not whether someone can  
5 suggest an alternative way it could have been done,  
6 but whether the way chosen by the legislature is  
7 reasonable.

8 JUDGE GRAFFEO: What's the - - -

9 CHIEF JUDGE LIPPMAN: And in this case it  
10 is?

11 MR. PALADINO: Oh, certainly.

12 JUDGE GRAFFEO: What's the standard that  
13 you want us to apply for evaluating the due process?

14 MR. PALADINO: The substantive due process,  
15 I think we're in agreement that the statute merely  
16 has to be reasonably related to or further a  
17 legitimate State interest. The Appellate Division  
18 seemed to think that the statute didn't further the  
19 interest because the provision was unnecessary, that  
20 somehow the requirement to make withdrawal requests  
21 when the facility is in the red or goes further into  
22 the red, combined with the requirement to provide  
23 advance notice, was good enough to further the  
24 State's interests.

25 But that doesn't cover the situation that I

1 mentioned earlier, which is the facility technically  
2 has positive equity, the value of the facility and  
3 the equipment exceed its liabilities, but the - - -  
4 but the owner withdraws all of the operating capital,  
5 it's cash-poor, it's illiquid, and it can't possibly  
6 meet its payroll or other expenses. That wouldn't be  
7 covered by either of the two pre-existing provisions.  
8 Once the money is withdrawn, the damage can be done.  
9 We have the power to order them to put the money  
10 back, but if the money is spent, you know, the  
11 genie's out of the bottle.

12 JUDGE GRAFFEO: Do we know where the three  
13 percent came from? Why three percent, not five or  
14 ten percent or something?

15 MR. PALADINO: No, but I know what it  
16 produces in the real world. There's data in the  
17 record that we have, as the named plaintiffs  
18 represent examples of small, medium and large  
19 facilities. The thresholds wind up being anywhere  
20 from 150,000 dollars for the small facility to a half  
21 a million dollars for a large facility. Add on top  
22 of that the salaries they're allowed to pay  
23 themselves that do not count as equity withdrawals.  
24 So if you had 100,000 dollars as a reasonable salary,  
25 the facilities are allowed to withdraw anywhere from

1 a quarter of a million to 600,000 dollars in a given  
2 year.

3 CHIEF JUDGE LIPPMAN: Was this the issue in  
4 what Judge Pigott referred to earlier about some of  
5 these scandals? Was that the issue, that the nursing  
6 home owners were dissipating the assets and didn't  
7 have enough money to provide proper care? Was that -  
8 - -

9 MR. PALADINO: That - - -

10 CHIEF JUDGE LIPPMAN: - - - what that was  
11 all about, or what was that all about?

12 MR. PALADINO: It was, but it primarily had  
13 to do with facilities going into the red or going  
14 further into the red. That was the first provision  
15 that was enacted. The nursing homes ignored that  
16 provision, so that's why over time the - - - the  
17 requirements have been ratcheted - - -

18 CHIEF JUDGE LIPPMAN: Well, you're  
19 ratcheting it up - - -

20 MR. PALADINO: - - - tighter and tighter.

21 CHIEF JUDGE LIPPMAN: - - - each step,  
22 yeah.

23 MR. PALADINO: Oh, admittedly, but the  
24 cash-poor example that I give is a very real  
25 possibility. And it's not - - -

1                   JUDGE SMITH: Is that an example of when  
2 the catch-all clause is needed, or is that - - - no,  
3 give an example of when the catch-all clause would be  
4 needed.

5                   MR. PALADINO: It's the example that I gave  
6 about the nursing home makes a request, next year I'd  
7 like to take out a million dollars. The nursing home  
8 - - - pardon me, the Health Department says come back  
9 to us three months before you want to make the  
10 withdrawal; we need to evaluate your current  
11 condition. And this is important is the - - - and  
12 why we have a prior approval requirement, the Health  
13 Department has on hand a lot of financial information  
14 about the facilities, but it doesn't have the current  
15 financial information. Depending on when the equity  
16 withdrawal request is made, the data available to the  
17 Health Department can be one to two years old. For  
18 example - - -

19                  JUDGE GRAFFEO: So the audit information  
20 that they have could be years - - -

21                  MR. PALADINO: It's outdated.

22                  JUDGE GRAFFEO: - - - from years prior?

23                  MR. PALADINO: Yes. Like, the 2012 cost  
24 reports weren't filed until the end of August of this  
25 year, so if the equity withdrawal request was made

1 in, like, May, the earliest available data they have  
2 is two years old.

3 JUDGE PIGOTT: Do they need your permission  
4 to get a mortgage?

5 MR. PALADINO: No, and if they do have a  
6 debt relating to the facility operations, they don't  
7 need our permission to pay it; it doesn't count as an  
8 equity withdrawal.

9 JUDGE PIGOTT: But if they were applying  
10 for a mortgage, aren't they taking out some of their  
11 equity?

12 MR. PALADINO: They might be pledging some  
13 of their equity, but if it relates to facility  
14 operations, they don't have to ask our permission.  
15 But sometimes they're not - - - I see my red light is  
16 on. Do I need to - - -

17 CHIEF JUDGE LIPPMAN: No, no, no, answer  
18 the question. Sure.

19 MR. PALADINO: I mean, there are - - -  
20 sometimes there are uncertainties, or sometimes the  
21 proceeds from the withdrawal requests can relate to  
22 multiple purposes. They want to use a portion of it  
23 to pay college tuition. They want to use a portion  
24 of it for capital improvement. The Health Department  
25 needs to know, okay, a portion of it relates to

1 facility operations, that doesn't even count; we're  
2 just going to look at the effect of the amount that  
3 you want to otherwise withdraw on your ability to  
4 meet your obligations, make your payroll - - -

5 JUDGE GRAFFEO: And how long does it take  
6 for the Health Department to approve these requests?

7 MR. PALADINO: Sixty days, unless you  
8 request additional information. If the sixty days  
9 comes and goes and no additional information is  
10 requested, under the pre-existing regulation, the  
11 application is deemed approved.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MR. PALADINO: Thank you.

14 CHIEF JUDGE LIPPMAN: Thanks. You'll have  
15 rebuttal.

16 Counselor?

17 MR. SMITH: Good morning. Chief Judge  
18 Lippman, you asked what the state of the industry is.

19 CHIEF JUDGE LIPPMAN: Yes.

20 MR. SMITH: The clients I represent, the  
21 members of the New York State Health Facility  
22 Association, for the most part, are for-profit  
23 nursing homes. By state law, publicly traded  
24 companies can't own nursing homes in New York State,  
25 so these nursing homes are largely family businesses.

1 CHIEF JUDGE LIPPMAN: Right.

2 MR. SMITH: They're owned as partnerships  
3 or closed corporations.

4 CHIEF JUDGE LIPPMAN: How does that play  
5 into the public purpose of all of it?

6 MR. SMITH: They have a mission, obviously,  
7 of taking care of the elderly poor. And these  
8 facilities that I'm representing, who are complaining  
9 about this statute, they are able, because they're  
10 well-run facilities, to not only meet the standards  
11 of care demanded of them, but to generate earnings,  
12 positive earnings.

13 CHIEF JUDGE LIPPMAN: But why would it be a  
14 problem, though, assuming that they were timely in  
15 what they're doing, or that you get approval if  
16 they're not timely, why is it a problem to your  
17 clients to - - - for the State to exercise its police  
18 power, and yet if you get timely service, and you're  
19 giving them notice anyway, right, under - - -

20 MR. SMITH: Giving them notice, Judge.

21 CHIEF JUDGE LIPPMAN: - - - under (b), why,  
22 under (c), does this create some new problem - - -

23 MR. SMITH: Yeah, the new problem here - -

24 -

25 CHIEF JUDGE LIPPMAN: - - - that causes



1 concern to your client?

2 MR. SMITH: Good question, Judge. The new  
3 problem here is we contend a huge leap from merely  
4 providing notice of an equity withdrawal that still -  
5 - -

6 CHIEF JUDGE LIPPMAN: Why? The notice is  
7 for some reason, though, right?

8 MR. SMITH: Well, the notice is to give the  
9 Department an opportunity to look - - -

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. SMITH: - - - into the home, et cetera.

12 CHIEF JUDGE LIPPMAN: Right. Right.

13 MR. SMITH: What this statute does, this  
14 subsection (c), is to create an immutable unwavering  
15 freeze for sixty days, as the Attorney General has  
16 conceded, on the ability of an owner of a nursing  
17 home to spend more than three percent of last year's  
18 revenue.

19 JUDGE GRAFFEO: That's why I asked about  
20 the time period. What is it about the sixty days  
21 that causes a problem for your clients?

22 MR. SMITH: The problem, Your Honor, is  
23 that these nursing homes cannot plan for events  
24 beyond sixty days. They're not sure whether they're  
25 going to be approved or not because the regulations

1           that are - - -

2                         JUDGE ABDUS-SALAAM: Well, counsel, the  
3           State just said that you get approval - - - automatic  
4           approval if the sixty days goes by and there is no  
5           request for additional information. So would you  
6           presume, if you gave them the information that they  
7           asked for, that within sixty days - - - or on the  
8           sixty-first day you could do something that you  
9           wanted to do?

10                        MR. SMITH: That'd be nice to assume that,  
11           Your Honor, but the State has shown that in some  
12           cases they ask for more information. And the crucial  
13           - - -

14                        CHIEF JUDGE LIPPMAN: Aren't they  
15           overwhelmingly approved, though, in practice?

16                        MR. SMITH: Yeah, they are, Judge, they  
17           have been. But - - -

18                        CHIEF JUDGE LIPPMAN: So what's the beef?

19                        MR. SMITH: Well, the beef is - - -

20                        CHIEF JUDGE LIPPMAN: That's what I'm  
21           trying to get at.

22                        MR. SMITH: - - - this, Judge.

23                        CHIEF JUDGE LIPPMAN: What's the beef?

24                        MR. SMITH: I'm a nursing home owner and I  
25           have a family emergency, a need to pay for medical

1 expenses immediately to save a - - - I can't spend it  
2 if I'm beyond the three percent. I've got to go to  
3 the commissioner, wait sixty days for the ability to  
4 spend my own money.

5 CHIEF JUDGE LIPPMAN: So it's really the  
6 emergency situation that - - -

7 MR. SMITH: It's - - -

8 CHIEF JUDGE LIPPMAN: - - - your people are  
9 concerned with?

10 MR. SMITH: It's that, in large part. It's  
11 the ability to plan for the future, make an  
12 investment - - -

13 JUDGE SMITH: But then why - - -

14 MR. SMITH: - - - an investment  
15 opportunity.

16 JUDGE SMITH: - - - why is that - - - I  
17 mean, obviously there are going to be cases in which  
18 this causes some hardship, but why is that hardship  
19 not - - - not - - - couldn't it rationally be found  
20 to be justified by the need to protect the solvency  
21 of the institutions?

22 MR. SMITH: They have shown not one  
23 scintilla of evidence, Your Honor, since the scandals  
24 - - -

25 JUDGE SMITH: Whose - - -

1 MR. SMITH: - - - of 1970 - - -

2 JUDGE SMITH: - - - burden is it? I mean,  
3 you're challenging the constitutionality of a  
4 statute.

5 MR. SMITH: I'm saying, Your Honor - - -  
6 we're saying that the statute, first of all, has no  
7 evidentiary basis, unlike the no-fault statute.

8 JUDGE SMITH: Since when do statutes have  
9 to have a evidentiary basis? I thought a statute had  
10 a heavy presumption of constitutionality.

11 MR. SMITH: It's a presumption, but it's  
12 not a - - - it's a rebuttable presumption. We've  
13 asked them to - - -

14 JUDGE SMITH: Well, go ahead and rebut it.

15 MR. SMITH: We've come forward and said,  
16 show us why you need this, show us where the  
17 horrors are occurring, where nursing homes are - -  
18 -

19 JUDGE SMITH: I mean, maybe - - - maybe  
20 we're bantering words, but show us where you need it  
21 doesn't sound like a rebuttal to me. Don't you have  
22 to - - - don't you have to demonstrate that they  
23 don't need it?

24 MR. SMITH: I don't believe so, Your Honor.  
25 I believe that what - - - what has occurred here is a

1 government exercise of police power when they have no  
2 justification - - -

3 JUDGE PIGOTT: What's - - - can you give us  
4 - - -

5 MR. SMITH: - - - there's no reasonable  
6 necessity for it, Judge.

7 JUDGE PIGOTT: Can you give us, like, a  
8 horror story or something? I was trying to think of,  
9 you know, where - - - and you've mentioned a couple,  
10 but let's assume, for a minute, you've got a daughter  
11 who gets accepted to Notre Dame and it's going to  
12 cost you - - -

13 MR. SMITH: A lot of money.

14 JUDGE PIGOTT: - - - 50,000 dollars to send  
15 her there, and you want to get that money. Do you  
16 have to go to the - - - to the - - -

17 MR. SMITH: Yes.

18 JUDGE PIGOTT: - - - Department of Health?

19 MR. SMITH: I would have to go, or a home  
20 mortgage, as you pointed out, Judge Pigott.

21 JUDGE PIGOTT: But would they say, then,  
22 well, you know, we can approve it for the first year,  
23 because that's within a year, but we're not going to  
24 give you approval - - -

25 MR. SMITH: Yeah.

1 JUDGE PIGOTT: - - - for all four.

2 MR. SMITH: We'll give you a quarter - - -  
3 on a quarterly basis, we'll let you withdraw a excess  
4 of three percent. For the Russ family, owned as a  
5 partnership, the Attorney General says, well, if  
6 they're - - - if they're working in the business,  
7 they can draw salaries. You can't draw a salary if  
8 you're an owner in a partnership. Their sole source  
9 of income is the equity that they generate. And this  
10 statute says, even though they've never come close to  
11 being insolvent or - - - they, and all other homes  
12 making - - - successful homes making profits, are  
13 treated as children here, needing in loco parentis  
14 permission to spend their own money.

15 And the case law is really clear on this, I  
16 believe, Your Honor, that - - - that well-meaning  
17 statutes, as here, well-intentioned to protect  
18 residents, okay, have to still have a necessity to go  
19 so far as to intrude and take away - - -

20 CHIEF JUDGE LIPPMAN: Well, they don't have  
21 - - -

22 MR. SMITH: - - - a constitutional right.

23 CHIEF JUDGE LIPPMAN: - - - to be perfectly  
24 suited - - -

25 MR. SMITH: No.

1 CHIEF JUDGE LIPPMAN: - - - to achieve the  
2 policy and the police power. And they have to be  
3 reasonably related. By what standard would you say  
4 this is not reasonably related? And again, not - - -

5 MR. SMITH: Sure.

6 CHIEF JUDGE LIPPMAN: - - - the most  
7 perfect way that anyone could do it. Why isn't it -  
8 - -

9 MR. SMITH: Well, they - - -

10 CHIEF JUDGE LIPPMAN: - - - reasonably - -  
11 - it would seem, if you think about the purpose, it's  
12 not crazy in terms of, gee, let's make sure that  
13 there's not going to be a problem. Why isn't that a  
14 rational, reasonable approach?

15 MR. SMITH: Yeah, it's not - - - first of  
16 all, it's not necessary in this case; the evidence  
17 doesn't show that it's necessary. But beyond that,  
18 this is their money, Judge, and - - - and they've  
19 earned it. And the State - - -

20 JUDGE ABDUS-SALAAM: Is that, though - - -

21 MR. SMITH: - - - has every right to - - -

22 JUDGE ABDUS-SALAAM: Is that why you - - -  
23 you're bringing a facial constitutional challenge to  
24 this statute, but I noticed you didn't bring an  
25 applied challenge. Is that why didn't, because it is

1 - - -

2 MR. SMITH: No, we have an applied  
3 challenge; the Attorney General doesn't recognize it,  
4 but as applied here, the statute freezes bank  
5 accounts of private persons who haven't checked their  
6 constitutional rights at the door when they become  
7 nursing home owners. It freezes their ability to  
8 freely spend their money, which is a fundamental  
9 constitutional right under the due process clause.  
10 If the harm exceeds the good - - - and that's in  
11 answer to your question, Judge - - - if the harm  
12 exceeds the good - - -

13 CHIEF JUDGE LIPPMAN: Who - - -

14 JUDGE GRAFFEO: There's no nursing home  
15 facilities in the last couple of years that have  
16 become insolvent?

17 MR. SMITH: If they're in the red, as Mr.  
18 Paladino suggested, then they are subject to the  
19 earlier provisions. They can't spend money without  
20 permission. We're talking about facilities that are  
21 successful.

22 CHIEF JUDGE LIPPMAN: Yeah, but isn't it  
23 logical, again, rational and reasonable to say yes,  
24 if you're in the red that's an obvious situation; if  
25 you're in the black, gee, it would be a good thing



1 that it stays that way, and maybe we ensure that it  
2 stays that way, you know, by having this provision.  
3 Again, why is that - - -

4 MR. SMITH: Well, the combination - - -

5 CHIEF JUDGE LIPPMAN: - - - not make some  
6 sense?

7 MR. SMITH: Judge, first of all, the three  
8 - - -

9 CHIEF JUDGE LIPPMAN: Is it such an  
10 intrusion on your - - -

11 MR. SMITH: It absolutely - - -

12 CHIEF JUDGE LIPPMAN: I don't mean to make  
13 your arguments, I'm just trying to figure out what is  
14 the - - - what is the rationale here that you're  
15 objecting - - -

16 MR. SMITH: It's the kind of blanket,  
17 sweeping restriction that this court invalidated in  
18 the Jiovan case, in terms of liberties, in the curfew  
19 case out of Rochester. It goes far beyond what's  
20 necessary, far beyond what's reasonable, because it  
21 affects every nursing home in the state that earns a  
22 profit has to now freeze those profits for sixty days  
23 and then wait for the commissioner to - - -

24 CHIEF JUDGE LIPPMAN: What would be  
25 reasonable to you? The other provision - - -

1 MR. SMITH: The no - - -

2 CHIEF JUDGE LIPPMAN: - - - the notice  
3 provision is reasonable?

4 MR. SMITH: The notice is reasonable. And  
5 I'd suggest - - - we did in our earlier papers, Judge  
6 - - - for instance, what the securities laws provide,  
7 a broker-dealer must maintain a certain amount of  
8 capital in his bank account. I forget if it's  
9 100,000 or 500 or whatever it is. And you go below  
10 that and bang, you're in trouble, you're out of  
11 business, okay? Here, that could be done; there  
12 could be a minimum level of assets, of earnings that  
13 have to be retained in the - - - but here, this three  
14 percent, as Your Honor suggested, has nothing to do  
15 with earnings. Three percent of revenues of a home  
16 that has huge expenses, they could withdraw a whole  
17 lot of money without that three percent kicking in.  
18 The Russes can withdraw 170,000 dollars in a year for  
19 both of their services to the nursing homes and then  
20 they're frozen beyond that.

21 JUDGE SMITH: Can I ask you a question  
22 about the catch-all clause?

23 MR. SMITH: Sure, Judge.

24 JUDGE SMITH: It's true, isn't it, that if  
25 we can find a narrowing construction that will uphold

1 the legislation, we have to adopt it? So why can't -  
2 - - what's wrong with Mr. Paladino's suggestion that  
3 we essentially - - - that we take what the  
4 commissioner thinks appropriate to mean what the  
5 commissioner thinks appropriate, deems appropriate to  
6 fulfill the purposes of the statute, which is to  
7 protect the solvency of the nursing homes?

8 MR. SMITH: The catch-all clause, Your  
9 Honor, follows three specific factors. Those factors  
10 are very broad: the financial wellbeing of the home  
11 - - -

12 JUDGE SMITH: Well, try answering my  
13 question directly. What's wrong with that narrowing  
14 construction that I just suggested?

15 MR. SMITH: Because the catch-all clause is  
16 defined by the commissioner to include the  
17 regulations he's adopted to enforce the - - - apply  
18 that. And one of those regulations says the  
19 commissioner must look at the necessity for the  
20 withdrawal. Now, as the Attorney General is  
21 conceding, if you're withdrawing money, the nursing  
22 home - - -

23 JUDGE SMITH: How does this make the  
24 statute invalid? If you don't like the  
25 commissioner's regulation, then the regulation is

1           invalid.

2                   MR. SMITH:   Because the legislature has  
3           delegated to the commissioner this enormous,  
4           unlimited authority.

5                   JUDGE SMITH:   I mean, I see your point.  
6           It's obviously, on its - - - if you take it  
7           literally, it's totally unlimited.  What's wrong with  
8           the argument you don't take it literally, you have to  
9           read into it a reasonable limitation?

10                  JUDGE RIVERA:   And isn't it cabined by the  
11           other factors and of course the legislative history  
12           behind the statute?

13                  MR. SMITH:   Well, there is no legislative  
14           history behind the statute, except in 1977, Your  
15           Honor.

16                  JUDGE RIVERA:   But there's a series of  
17           statutes.  Obviously, you can look across those  
18           statutes, can you not, to give you some sense of what  
19           the legislature intended here?

20                  MR. SMITH:   Well, the legislature had no  
21           history in 2009, 2010, or even 2008, when they made  
22           some changes.  They just decided we're going to keep  
23           ratcheting this up to the point where you have this  
24           encroachment now - - -

25                  CHIEF JUDGE LIPPMAN:   Yeah, but obviously

1 the legislature thinks this is an important area  
2 where, as you started your remarks saying you're  
3 dealing with the health and wellbeing of elderly  
4 citizens.

5 MR. SMITH: It's an important area, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: If it is critically  
8 important, what's wrong with the legislature saying  
9 we want to make sure that of all things that we  
10 oversee, that this particular area goes right and  
11 that people aren't abused and don't have the care  
12 that they need. I mean, what's wrong with that?

13 MR. SMITH: What's wrong - - -

14 CHIEF JUDGE LIPPMAN: And I say that in the  
15 most sincere way. What's - - -

16 MR. SMITH: I understand that, Judge.

17 CHIEF JUDGE LIPPMAN: Why is that a bad  
18 thing that they're - - -

19 MR. SMITH: It's not a bad thing that they  
20 care about that, Judge.

21 CHIEF JUDGE LIPPMAN: But they're going too  
22 far in terms of your personal finances? Is that the  
23 basic - - -

24 MR. SMITH: They're going too far - - -

25 CHIEF JUDGE LIPPMAN: - - - thrust of your

1 argument?

2 MR. SMITH: Exactly. This is not the  
3 Department of Health's money or the State's money  
4 once it's lawfully earned as profits. It belongs to  
5 the owners and their families. And for the State to  
6 freeze that - - - those accounts for sixty days or  
7 more and to then apply factors that include the  
8 necessity for the withdrawal, which has to be a  
9 personal decision, because it doesn't matter - - - as  
10 the Attorney General said, if you need to withdraw to  
11 fix the roof of the nursing home, that's not an  
12 equity withdrawal.

13 JUDGE SMITH: Would you be happier if they  
14 disregarded the necessity for the withdrawal?

15 MR. SMITH: Happier than - - - than I am  
16 with - - -

17 JUDGE SMITH: I mean, I thought - - -

18 MR. SMITH: - - - the statute, Judge.

19 JUDGE SMITH: - - - your whole problem was  
20 that - - - I mean, not the whole problem, but the  
21 most poignant problem is when you've got a really - -  
22 - a real dire necessity, you want to be able to  
23 withdraw it. I mean, now you're saying the  
24 commissioner can't even look at your necessity.

25 MR. SMITH: No, I'm saying - - - well, the

1 commissioner says he can. He says he can look at the  
2 necessity withdrawal. It's written in the  
3 regulation.

4 JUDGE SMITH: My question is why would you  
5 complain about that?

6 MR. SMITH: Because what business does a  
7 commissioner have how you spend your own money? It's  
8 your - - -

9 JUDGE GRAFFEO: Is there a record of what  
10 they've denied? Is there some problem with the  
11 denials?

12 MR. SMITH: No, we had this enjoined in  
13 November of 2009, a few months after it went into  
14 effect; we got a preliminary injunction and then a  
15 permanent injunction. And they had eighty-eight  
16 applications; there were forty still in the pipeline.  
17 Okay. They had approved all but a couple of them at  
18 that point. But the problem is that - - - the  
19 fundamental problem here is you've got a sixty-day  
20 taking by the government, in the terms of you can't  
21 spend your own money for a family emergency, for an  
22 investment opportunity, to pay taxes that come upon  
23 you suddenly, you have a son or daughter that gets in  
24 trouble, you need bail money. Whatever it is, that's  
25 your money, and that's the fundamental constitutional

1 right that this court has consistently honored over  
2 the years, to not let the police power exceed what's  
3 reasonably necessary. And you can say, well, it's  
4 related. Of course it's related to patient care.

5 JUDGE SMITH: When - - -

6 MR. SMITH: They can say you can't spend  
7 any money - - -

8 JUDGE SMITH: When's the last time - - -  
9 when's the last time we held unconstitutional, under  
10 substantive due process, a statute restricting what  
11 people can do with their property?

12 MR. SMITH: Gosh, I don't know, Your Honor.  
13 All I know is that there's a long history in this  
14 court - - -

15 CHIEF JUDGE LIPPMAN: You would concede  
16 that that's a pretty rare event, isn't it?

17 MR. SMITH: It's rare, and it's rare - - -  
18 there's no other state that's gone so far as to  
19 impose a sixty-day freeze on bank accounts of nursing  
20 home owners. We've checked. Nobody's come close,  
21 other states, to doing this. And as I point out,  
22 there's no basis. In 1977, in the early '80s, there  
23 were nursing home abuses, et cetera.

24 CHIEF JUDGE LIPPMAN: Okay, counselor,  
25 thanks.



1 MR. SMITH: Thank you.

2 CHIEF JUDGE LIPPMAN: Appreciate it.

3 MR. SMITH: You're welcome.

4 CHIEF JUDGE LIPPMAN: Thank you.

5 Rebuttal, counselor?

6 MR. PALADINO: Your Honor, as you've heard  
7 Mr. Smith say repeatedly, this is our money, this is  
8 our profits, we want to take it out of our business.  
9 Nursing homes do not have a property interest in  
10 unfettered access to their - - -

11 JUDGE SMITH: It is their money, isn't it?

12 MR. PALADINO: It is their money, but  
13 they're in the most heavily regulated industry  
14 imaginable.

15 JUDGE PIGOTT: Yeah, but what about - - -  
16 Mr. Smith talked about the fact that, you know, if  
17 you're a partnership you don't - - - you don't get an  
18 income. So in a corporation you can say I'm going to  
19 take 300,000 dollars a year for my salary; in a  
20 partnership you can't, all you've got is draws, and  
21 you can't do that.

22 MR. PALADINO: Well, first, I think they  
23 can be - - - name themselves administrators, but even  
24 if - - - even if they have no other source of income,  
25 150,000 to a half a million dollars is not an

1 unreasonable amount to set as a threshold. Insurance  
2 companies, for example, which aren't even as heavily  
3 regulated as nursing homes, are not allowed to take  
4 out all of their profits. They have to keep - - -

5 JUDGE PIGOTT: But I would think you're  
6 encourag - - - I don't think this way all the time,  
7 but I mean, if I've got this problem, I think we're  
8 going to hire every single one of my kids and  
9 probably a couple of relatives that I never met so  
10 that they could - - - you know, so that I can get  
11 some money out of my company.

12 MR. PALADINO: It happens all the time,  
13 Your Honor.

14 JUDGE PIGOTT: Sorry I brought it up.

15 MR. PALADINO: But in other words - - -

16 JUDGE ABDUS-SALAAM: What's - - -

17 MR. PALADINO: - - - heavily regulated - -  
18 -

19 JUDGE ABDUS-SALAAM: Counsel, what's wrong  
20 with just having a minimal amount below which the  
21 nursing homes cannot go before something like this  
22 kicks in?

23 MR. PALADINO: I'm trying to think how that  
24 would actually work in practice. Even if - - - we  
25 still have to know whether they're going below it. I

1 would have to see - - -

2 JUDGE GRAFFEO: You'd have to set different  
3 levels of cash reserved, based on the size and the  
4 profit of the nursing home, wouldn't you?

5 MR. PALADINO: Right, and again, we would  
6 have to be able to obtain current information, see  
7 whether they're complying with the law. It's all too  
8 easy to spin off the top of your head.

9 JUDGE GRAFFEO: Why does the ag - - - why  
10 is the Health Department able to ask about necessity?  
11 I can understand they want to ensure financial  
12 viability because they want to avoid displacement of  
13 the patients in the nursing home that could happen if  
14 the nursing home ends up in insolvency. But where  
15 does the authority for reviewing what they want to  
16 use that money for come from?

17 MR. PALADINO: That requirement is in a  
18 pre-existing reg, and I think Judge Smith is correct,  
19 that's a problem with the reg, not the statute.  
20 Whatever necessity means - - - I think it means  
21 business necessity - - - it doesn't allow for review  
22 of the personal spending choices. The Health  
23 Department is not saying we'll let you pay your  
24 college tuition but we won't let you go on vacation.  
25 All they care about, once they figure out the amount

1 of money that's involved, is its effect on the  
2 ability of the facility to operate and provide  
3 quality care.

4 JUDGE SMITH: So you would acknowledge - -  
5 - if the guy wants it for his daughter's life-saving  
6 operation, or if he wants to buy a new boat, you  
7 treat it exactly the same way?

8 MR. PALADINO: Yes, Your Honor. Obviously,  
9 if they need the money for an operation or to pay a  
10 ransom or something like that, they can ask for an  
11 expedited review of their request. But the analysis  
12 is not supposed to evaluate what they're doing with  
13 the money.

14 JUDGE GRAFFEO: Do they have to tell you  
15 what they plan to use the money for, or can they just  
16 say we want to withdraw 90,000?

17 MR. PALADINO: The application form, which  
18 is in the record, pages 623 to 624, asks, "Is any  
19 part of the withdrawal going to be used for facility  
20 operations?" In other words, if a portion of the  
21 amount that's being taken out is going to be used for  
22 facility operations, they ask for information,  
23 because if the answer is yes, it doesn't count.

24 JUDGE PIGOTT: But so if Mr. Smith owns a  
25 nursing home and he wants to take money, he can hire

1 his wife and say, sweetie, I need you to be the  
2 deputy director of my nursing home because we need  
3 that fifty grand, and we're going to pay it to you  
4 all at once.

5 MR. PALADINO: Well, there are limits. If  
6 they pay themselves excessive compensation, the  
7 excessive compensation will be treated as an equity  
8 withdrawal. They're allowed to pay themselves  
9 reasonable salaries.

10 JUDGE PIGOTT: But this is not - - - this  
11 is not the owner; this is the wife of the owner.

12 MR. PALADINO: Right, but there still - - -  
13 there are limits on how much they can get away with  
14 to draw money out of the business and have it not  
15 qualify as an equity withdrawal. But I see my time  
16 is up.

17 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

18 MR. PALADINO: I just want to finish the  
19 answer. Obviously - - -

20 CHIEF JUDGE LIPPMAN: Finish now. Go  
21 ahead, counselor.

22 MR. PALADINO: If it's for facility  
23 operations, you don't have to ask, but sometimes it's  
24 unclear whether the expenditure is for facility  
25 operations or not. There are other times where

1 portions of the proceeds are going to be used for  
2 facility operations and portions for private persons.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.  
4 Thank you.

5 MR. PALADINO: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you.

7 JUDGE RIVERA: Counselor, could you - - -  
8 I'm sorry.

9 CHIEF JUDGE LIPPMAN: Oh, I'm sorry. Judge  
10 Rivera.

11 JUDGE RIVERA: I'm sorry, just very  
12 quickly. Where - - - is it on the application - - -  
13 I'm sorry, the - - - where you can request the  
14 expedited review, or is that a separate form?

15 MR. PALADINO: That's just reality; that's  
16 not - - - there's nothing that says that anywhere.

17 JUDGE SMITH: You just pick up the  
18 telephone?

19 MR. PALADINO: Yes, and despite what people  
20 might claim, the people at the Health Department do  
21 have hearts.

22 JUDGE RIVERA: Is there some regulatory  
23 provision that lets them know they can do that, or do  
24 you otherwise let them know they can do that?

25 MR. PALADINO: They - - - that's just the

1 way it is operating.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. PALADINO: It's not written down  
4 anywhere.

5 CHIEF JUDGE LIPPMAN: Thanks, counselor.

6 JUDGE RIVERA: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you both.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The Brightonian Nursing Home, et al. v. Richard F. Daines, et al. No. 161 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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