Nos. 25-749 and 25-751

IN THE

Supreme Court of the United States

JANSSEN PHARMACEUTICALS INC.,
Petitioner,

v.

ROBERT F. KENNEDY, JR., SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

BRISTON MYERS SQUIBB COMPANY,
Petitioner,

v.

ROBERT F. KENNEDY, JR., SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF MANHATTAN INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE[1]

The Manhattan Institute is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. It has historically sponsored scholarship and filed briefs opposing regulations that interfere with constitutionally protected liberties, including the property rights and speech rights at issue in this case.

SUMMARY OF ARGUMENT

"Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." *Horne v. Dep't of Agric.*, 576 U.S. 350, 366 (2015). What's true for produce is true for prescription drugs. Although subject to reasonable government regulation, selling prescription drugs may not be held hostage by the federal government. But that is precisely what the government has done in passing the misnamed Medicare Drug Price Negotiation Program (the "Program"), part of the Inflation Reduction Act ("IRA"), effectively commandeering a portion of the most widely prescribed prescription drugs for government use without just compensation, while simultaneously compelling untrue speech

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or their counsel made any monetary contribution to its preparation or submission. The parties received timely notice of intent to file this brief.

about such commandeering (i.e., requiring that pharmaceutical companies describe that commandeering as "negotiations" for "fair prices").

The government wields immense power over nearly every sector of the American economy. The amount of pressure it can apply to different industries is essentially impossible to calculate. The incentives to apply that pressure arise in innumerable ways in order to satisfy voter demands. Simply put, allowing programs like this is dangerous to a free and transparent democracy.

To obtain positive optics with the public the government compels pharmaceutical companies to affirm that they have "engaged in negotiation" with the government to determine the "maximum fair price" of selected prescription drugs, and they "agree" to provide access to these drugs at less than fair market value. In short, the government pretends through these forced declarations that the Program's requirements are instead a voluntary arms-length negotiation. Pharmaceutical companies are also required to state, falsely, that they are engaging in such negotiations. Such compelled speech is a First Amendment violation and has zero legitimate public interest.

The Third Circuit rejected petitioners' Fifth Amendment takings and First Amendment free speech claims on the grounds that petitioners' overall participation in Medicare and Medicaid is voluntary. In so doing, the Third Circuit substituted fiction for fact, and theory for reality. Having first created government programs in which the government becomes the purchaser for nearly 50% of the

prescription drug market and encourages pharmaceutical companies to sell their important life-saving drugs for use by over a hundred million Americans, the government necessarily created for itself great market power. Pharmaceutical companies became willing participants in Medicare and Medicaid based on settled expectation interests that the government would be an arms-length good faith purchaser. However, once having achieved its market position, rather than using its market power to in fact attempt to negotiate for lower prices respecting particular drugs, the government passed the IRA and the Program, which is unconstitutional as applied, as explained herein.

The Program *mandates* that Medicare recipients be given access to prescription drugs at below market prices, with the only alternative being that the pharmaceutical companies withdraw entirely from both Medicaid and Medicare programs[2], but *also* simultaneously the government requires that the pharmaceutical companies state, in writing, that the below market prices are not actually mandates, but instead the product of fictional negotiation. The Program is a series of economic thumbscrews that the recipient is required to describe as a "negotiation."

This case presents multiple important questions, including:

- Does the *Nollan-Dolan* unconstitutional-conditions test only apply to takings claims

[2] This supposed withdrawal ability is neither practical nor lawful under the terms of the IRA for the reasons set forth by petitioners, and because CMS has no power to alter the meaning of the statutory termination provisions by way of regulation.

involving land-use permits, as determined by the Third Circuit?

- Is economic coercion/dragooning only constitutionally problematic under the Tenth Amendment when federalism concerns are at play, or is the federal government also barred from violating private constitutional rights through economic coercion?
- Does the alleged voluntary participation in Medicare and Medicaid foreclose petitioners' constitutional arguments?

Congress has enacted a novel law that has no direct precedent. Although the reach of the Program is limited to drug companies, the underlying constitutional theory adopted by the Third Circuit is broad and has far-reaching consequences. If Congress can require access to (i.e., take) the most successful and profitable prescription drugs at pennies on the dollar, and compel the drug-makers' speech in the process, it is not hard to imagine how Congress could dodge constitutional scrutiny in many other areas impacting individuals, nonprofits, and businesses. It's also not difficult to imagine why Congress would increasingly use this method if this Court allows it. The people want a lot of "affordable" things, and they also don't want to pay extra taxes in the form of direct subsidies. Elected representatives want to "give" their voters affordable things, and laws like this allow them to do so by forcing companies to essentially give away products—and then not be allowed to accurately describe what happened.

Because participation in the Program is not in reality voluntary, because the Program compels false

speech, and because the so-called agreements that knit the Program together are a product of undue influence and are against public policy, the Court should grant certiorari in both cases and reverse the Third Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. Participation In the Program Is Not Voluntary.

A. The Government's and Third Circuit's Reasoning.

Because participation in Medicare is completely voluntary, the Third Circuit concluded, the Program does not violate the Constitution. There are fundamental flaws with this reasoning. First, even if participation in Medicare may initially and *generally* be voluntary, it does not follow that participation in a *specific* Medicare program is voluntary. By way of example, one may enter another's home voluntarily, but then be coerced to stay because of the homeowner's threats. A manufacturer's decision to participate in Medicare prior to the enactment of the Program should not be used to declare the Program constitutional by voluntary consent. Instead, this Court must analyze whether participation in this *specific Program* is voluntary.

This leads to a second problem: participation in the Program is *not* voluntary under any legal or colloquial understanding of the term. Consider how the Program works. *First*, CMS alone decides which initial 10 drugs are selected for the Program, and which drugs are selected in each applicable period thereafter. *Second*, manufacturers must enter into agreements with CMS to negotiate "maximum fair

prices." By the terms of the Program, the "negotiation" is a one-way discussion. The price of a selected drug cannot go up; instead, the price is capped at between 40% and 75% of market benchmarks. *Third*, manufacturers must disclose confidential information to CMS for purposes of helping CMS "achieve the lowest maximum fair price for each selected drug." 42 U.S.C.A. § 1320f-3(b)(1)-(2)(A). *Fourth*, manufacturers must negotiate with CMS on an expedited and mandated schedule, with the Secretary unilaterally setting the maximum fair price for the drug by August 1, 2024. 42 U.S.C. § 1320f(d)(5). *Fifth*, manufacturers must "provide access to a price that is equal to or less than the maximum fair price for such drug" to Medicare recipients and to pharmacies, hospitals, physicians, and others who dispense the drug to Medicare recipients. 42 U.S. Code §§ 1320f–2(a)(1)(A)-(B), 1320f-6(a).

None of these five steps are voluntary. They are all statutorily mandated provisions. And notably, these provisions do not apply based on a *manufacturer's participation* in Medicare, or to any other action by a manufacturer. Instead, they apply based on the *government's* expenditures in the applicable time frame.

According to the government, a manufacturer has not one, but four choices: 1) it can pay an excise tax, 26 U.S.C. §§ 5000D(b)(1); 2) pay civil penalties, 42 U.S.C. § 1320f-6(a), (c); 3) divest itself completely of its most profitable prescription drugs, Revised Guidance at 131-32; or 4) withdraw *all of its drugs* from federal healthcare programs, 26 U.S.C. §§ 5000D(c).

These "choices" are not voluntary. To be voluntary, a choice must be "[d]one by design or intention," and [u]nconstrained by interference [or] impelled by outside influence." *Black's Law Dictionary* (11th ed. 2019). In contrast, an involuntary choice is one "[n]ot resulting from a free and unrestrained choice." *Id.*

Frost & Frost Trucking Co. v. Railroad Comm'n of Cal. is instructive. 271 U.S. 583 (1926). There, the Court considered whether a State could condition a private carrier's use of public highways on the requirement that it submit to all the conditions of being a common carrier. The Court held that this regulation was unconstitutional, reasoning "[i]t would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Id.* at 593–94. Like here, the government argued that there was no constitutional violation, because private carriers had a choice. The Court rejected the illusory choice, reasoning that although with "regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject," but "[i]n reality, the carrier is given no choice, except a choice between the rock and the whirlpool--an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." *Id.* at 593.

A similar reality is present here. The government claims "no constitutional violation, because manufacturer's have a choice." But the choice is not voluntary—it's the rock or the whirlpool—and thus no choice at all.

B. The Program Must Be Evaluated Under the Law Concerning Consensual Agreements.

If, as the Third Circuit concluded, the agreements are ordinary commercial contracts, then these agreements and the Program must be evaluated under the law concerning consensual agreements. When looked at from this angle, the constitutional infirmity of the Program is clear.

It is true that the government is not obligated to contract with a specific individual or entity. The government can choose to enter or leave a market or form a contract with one entity but not another. But when it does enter a market and form contracts, it is not identical to other, solely private entities. Instead, it is constrained by the Constitution in ways that private entities are not.

For example, federalism principles dictate that the federal government cannot coerce "a State to adopt a federal regulatory system as its own." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012) ("*NFIB*"). This is a structural limitation on the power of the federal government mandated by the Constitution.

Likewise, under the First Amendment no-compelled-speech doctrine, the government cannot compel a "grant recipient to adopt a particular belief as a condition of funding." *Agency for Int'l Dev. v. All.*

for Open Soc'y Int'l, Inc., 570 U.S. 205, 218 (2013) ("*AID*"). If the federal government cannot compel speech in exchange for grant funding, then it logically follows that it cannot compel speech in exchange for a government contract.

The key here is that simply calling a condition a contractual term or part of an ordinary agreement between two free entities—manufacturers on the one hand, and the government on the other—does not solve the constitutional problem. Columbia Law School professor Philip Hamburger rightly rejects the argument that "what government does in its private capacity (notably, purchasing) is not confined by the constitutional limits on what it does in its public or governmental capacity (such as regulation)," because "the Constitution's provisions for legislative and judicial powers and its guarantees of rights do not come with an exception for whatever the government can characterize as done in its contractual or otherwise private capacity." Philip Hamburger, *Purchasing Submission: Conditions, Power, and Freedom* 63 (2021). Instead, "the Constitution limits government generally, without any such exception." *Id.*

In other words, just as the government cannot, by *regulation*, require a person or entity to give up a constitutional right in exchange for a discretionary benefit, *see Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), neither can it evade constitutional limitations through supposed contractual consent. Simply put, the "government may not do indirectly what it may not do directly," Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 Harv. L. Rev. 1413,

1415 (1989), whether through regulatory or contractual conditions.

At the very least, "[w]hen the government employs private consensual arrangements to evade the Constitution's limits on public power, the government should . . . be subject to the law regarding consensual arrangements." Burger, *supra* at 217. As relevant here, consensual agreements may be found void or voidable by undue influence or because they are against public policy.

1. The Agreements Are Voidable Because of Undue Influence.

A contract or other consensual agreement may be void on account of undue influence. Hamburger, *supra* at 213. This is basic black letter law. *See, e.g.*, *Taylor v. Bemiss*, 110 U.S. 42, 45 (1884); *Black's Law Dictionary* ("Consent either to conduct or to a contract, transaction, or relationship is voidable if the consent is obtained through undue influence."); 17A C.J.S. Contracts § 260 ("Undue influence invalidates contracts obtained thereby, although such contracts are subject to subsequent ratification.").

Although "undue influence is notoriously difficult to reduce to a simple rule," it is "apt to be found where one party is overbearing in relation to another[.]" Hamburger, *supra* at 213. *Black's Law Dictionary* defines "undue influence" as the "improper use of power or trust in a way that *deprives a person of free will* and *substitutes another's objective*; the exercise of enough control over another person that a questioned act by this person *would not have otherwise been performed*, the person's free agency

having been overmastered." (emphasis added). Although the concept is not "susceptible of unitary definition," nonetheless the "essence of the idea is the subversion of another person's free will in order to obtain assent to an agreement." *Francois v. Francois*, 599 F.2d 1286, 1292 (3d Cir. 1979). "The proper inquiry is not just whether persuasion induced the transaction but whether the result was produced by the domination of the will of the victim by the person exerting undue influence." *Id.*

If, as argued by the government (and as concluded by the Third Circuit), the Program's agreements are ordinary commercial contracts, they are void under the doctrine of undue influence. Consider the following relevant facts:

- The legislature enacted Medicare, which is now the largest federal drug benefit program, covering "nearly 60 million aged or disabled Americans." *Azar v. Allina Health Servs.*, 87 U.S. 566, 569 (2019);
- The federal government "dominates" the U.S. prescription drug market, accounting "for almost half the annual nationwide spending on prescription drugs." *Sanofi Aventis U.S. LLC v. HHS*, 58 F.4th 696, 699 (3d Cir. 2023);[3]

[3] Notably, "[t]he maximum fair prices set by CMS will have effects far beyond Medicare. State Medicaid programs follow a 'best price' that sets Medicaid prices at the lowest available to any U.S. entity, including Medicare. Many private insurers provide prescription drug coverage to Medicare Part D beneficiaries and will also look to the maximum fair prices for their non-Medicare subscribers." Daniel E. Orr, *Congress Must Fix the Inflation Reduction Act Before Millions Lose Treatment for Rare Diseases*, 42 Yale L. & Pol'y Rev. 1, 6 (2023).

- When it enacted Medicare Part D (and until it enacted the Program) Congress expressly prohibited the Government from "interfere[ing] with the negotiations between drug manufacturers and pharmacies and [private plan sponsors]." 42 U.S.C. § 1395w-111(i);
- Manufacturers reasonably rely on patents and receiving fair market prices to recoup the investment costs of bringing a new drug to market, which on average is more than $2 billion;[4]
- A manufacturer can either sign the agreement to negotiate and agree to a "maximum fair price" below the fair market value, or a) pay substantial excise taxes, b) divest itself of the selected drug, c) withdraw *all of its drugs* from federal healthcare programs, or d) pay extensive civil penalties.

These facts establish that the aim of the Program is "subversion of another person's free will in order to obtain assent to an agreement." *Francois*, 599 F.2d at 1292. Without the inherent—and intentional—coerciveness of the Program, manufacturers would never sign the Program's agreements. *See Kentucky v. Biden*, 23 F.4th 585, 595–96 (6th Cir. 2022) ("The federal government of course knows that these reliance interests exist, which is why it seeks to

[4] Stephen Ezell, *Ensuring U.S. Biopharmaceutical Competitiveness, Info. Tech. & Innovation Found.* 30 (July 2020), https://www2.itif.org. One economic analysis "predicts that because of IRA price controls, 40% fewer new drugs will come to market by 2035." Orr, *supra* at 8.

purchase states' submission by leveraging those interests to force their acquiescence to the contractor mandate.") (citing Hamburger, *supra* at 18).

NFIB is instructive. The Court emphasized that it has "repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract.'" *NFIB*, 567 U.S. at 576–77 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). "The legitimacy of Congress's exercise of the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 577 (quotation omitted). Treating Spending Clause legislation as akin to a contract has led the Court "to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a 'power akin to undue influence.'" *Id.* (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Although "Congress may use its spending power to create incentives for States to act in accordance with federal policies," if "pressure turns into compulsion . . . the legislation runs contrary to our system of federalism." *Id.* (quotation omitted).

Admittedly, *NFIB* concerned Spending Clause legislation that coerced State participation in Medicare, whereas here the Spending Clause legislation involves the coercion of private entities. The federalism principles at play in *NFIB* are thus not relevant here. Nonetheless, the case and the principles enunciated there are analogous. Both concern the Spending Clause, government health insurance programs, and alleged undue influence. If threatening a mere ten percent of states' budgets

constitutes undue influence—or, as the Supreme Court quipped, "a gun to the head," *NFIB*, 567 U.S. at 581—then it reasonably follows that a threat to ban a manufacturer from fifty percent of the prescription drug market passes the point "at which pressure turns into compulsion." *Id.* (quotation omitted).

The agreements vital to the Program are voidable as obtained by undue influence. Because the constitutionality of the Program rests on the alleged voluntariness of the agreements, but the agreements themselves are unenforceable, this Court should strike down the law.

2. The Agreements Are Void as Against Public Policy.

In addition to undue influence, a contract or agreement against public policy is void and unenforceable. Hamburger, *supra* at 214; *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 431–32 (1998) (Breyer, J. concurring) (stating that a contract against "law or public policy" is void); *Evans v. Jeff D.*, 475 U.S. 717, 759 (1986) (Brennan, J., dissenting) (discussing the "well-established principle that an agreement which is contrary to public policy is void and unenforceable") (citing cases). This doctrine is "firmly rooted in precedents accumulated over centuries." 2 E. Allan Farnsworth, *Farnsworth on Contracts* 910 n. 4 (3d ed. 2004). The Constitution trumps any other claimed "public policy" asserted by the government, such as the policy to lower prescription drug costs or provide affordable health insurance to seniors. As Professor Hamburger notes, "the Constitution is a public policy that rises

above mere conditions, whether stipulated by Congress or agencies." Hamburger, *supra* at 216. In other words, a contract that impairs constitutional rights is against public policy and void: "the Constitution protects rights such as the freedom of speech, and it is against the Constitution's public policy for the government to use conditions to impose restrictions that abridge the freedom of speech or other constitutional rights." *Id.* at 216–17.

This seemingly obvious premise—that the government cannot evade the Constitution through contract or agreement because such agreements are void (not simply voidable) as against public policy—nonetheless is often ignored by the government:

> On the theory that conditions are merely consensual arrangements, the government has gone far in unraveling much of the Constitution's structures and its protections for freedom, including its rights. This is a profound danger, and it is therefore essential to recognize that the law itself addresses this threat from consensual transactions.

Hamburger, *supra* at 217.

What Professor Hamburger highlights in this passage is precisely what the government tries to do here. The government makes the claim that participation in Medicare is voluntary, and therefore there is no constitutional problem with the Program. But the voluntariness of an agreement against public policy is irrelevant. *Id.* at 216. If a condition to an agreement is unconstitutional, the agreement is void.

The government wants to have its cake and eat it too. On the one hand, it treats the Program's agreements as ordinary and voluntary commercial contracts. But on the other hand, it does not apply the basic rules of the law controlling consensual transactions, including the doctrines invalidating agreements formed by undue influence or those against public policy.

As this Court has repeatedly said, "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996). This applies if the particular benefit at issue is an agreement or contract with the government. The government is under no obligation to contract with a person or a particular company, but it does not follow that the conferral of a contract may be conditioned on the surrender of a constitutional right.

Consider the consequences if it could be. The government could establish a caste society, one in which the government could purchase the surrender of an individual's or corporation's constitutional rights, with devastating consequences. *See* Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 Va. L. Rev. 479, 490 (2012) ("government by contract tends to create an unofficial caste system, which offers the formalities of equal freedom, but which actually deprives the financially weak of their liberty, thus reinforcing financial vulnerabilities with legal inequalities").

A world in which the government could evade the structure and limits of the Constitution through coercive agreements is not one imagined by the Founders. Indeed, resistance to government coercion was at the center of the founding. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 885 (1978) (arguing that Britian's Coercive Acts of 1774 "led to the calling of the First Continental Congress in 1774, to the arming of the backcountry men of Massachusetts, and thence to Lexington and Concord, Bunker Hill, and war").

That the government "has broad powers," cannot seriously be disputed. *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015). Nonetheless, "the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Id.* (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)). The Court should reject the government's argument that it can evade constitutional norms through the means of alleged voluntary agreements.

II. The Program Violates Both the Fifth and First Amendments.

A. The Program Is a Fifth Amendment Takings.

"Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021); *Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015) (same). The question in a *per se* taking case is "whether the government has

physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.*

Under *Horne*, the government cannot require a raisin grower to set aside a certain percentage of its crop for government use without just compensation. 576 U.S. at 354. Under *Cedar Point Nursery*, the government cannot require an employer to grant a labor organization the "right to take access" to the employer's property to solicit support for unionization. 594 U.S. at 143. The Program here combines the constitutional flaws in *Horne* and *Cedar Point Nursery*. First, it requires drug manufacturers to set aside a portion of selected drugs to later be dispensed and administered to Medicare recipients at below fair market value (i.e., without just compensation). As in *Horne*, the prescription drug companies will receive some compensation, but at below fair market value. Thus, a Fifth Amendment takings has occurred.

Second, the Program requires drug manufacturers to "provide access to a price that is equal to or less than the maximum fair price for such drug" to Medicare recipients and to pharmacies, hospitals, physicians, and others who dispense the drug to Medicare recipients. 42 U.S. Code §§ 1320f–2(a)(1)(A)-(B), 1320f-6(a). Providing "access to a price" is no different than being required to provide access to a prescription drug (or access to raisins or space in a barn). The product comes with the price. There can be no price without a product. By requiring "access to a price" that is below fair market value, the government is requiring drug companies to sell selected drugs without just compensation.

Notably, the Program's access provision has nearly identical language to the regulation in *Cedar Point Nursery*, which appropriated "a right to physically invade the growers' property—to literally 'take access.'" 594 U.S. at 152 (quoting the California regulation). Under *Cedar Point Nursery*, there can be no dispute that providing "access" to a prescription drug implicates the Fifth Amendment.

Means are important. "The Constitution . . . is concerned with means as well as ends." *Id.* at 152 (quoting *Horne*). When the government physically takes property for itself or someone else "*by whatever means*," it violates the Fifth Amendment. *Id.* at 149 (emphasis added). The means the government employs here are no more constitutional than the means employed in *Horne* and *Cedar Point Nursery*.

And again, the alleged voluntariness of the Program does not save it. This Court held as much in *Horne*. In response to the government's contention that farmers could avoid the regulation by growing another crop (or selling their land), the Court noted that "[t]he taking here cannot reasonably be characterized as part of a . . . voluntary exchange." *Horne*, 576 U.S. at 366. The same reasoning applies here.

B. The Program Violates the No-Compelled-Speech Doctrine.

1. The Compelled Speech is Not Incidental to Regulated Conduct.

The Program here compels speech, not just commercial conduct. The Third Circuit's reliance on *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.* to

conclude otherwise is misplaced. 547 U.S. 47 (2006). The Program mandates speech that cannot be characterized "conduct."

In *Rumsfeld*, the Court analyzed a restriction on conduct. In response to law schools restricting the access of military recruiters to law students because of disagreement with the Government's policy on homosexuals in the military, Congress enacted the Solomon Amendment, which denied federal funding to institutions of higher education that denied military recruiters access equal to that provided other recruiters. *Id.* at 51. This Court concluded that "the Solomon Amendment regulates conduct, not speech," and "affects what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. Further, the amendment "neither limits what law schools may say *nor requires them to say anything*." *Id.* at 60 (emphasis added). Although the Court recognized that "recruiting assistance provided by the schools often includes elements of speech,"—e.g., sending emails or posting notices on bulletin boards—the Court concluded this sort of recruiting assistance "is *plainly incidental* to the Solomon Amendment's regulation of conduct." *Id.* at 61–62 (emphasis added).

The Program at issue here is distinguishable from the Amendment at issue in *Rumsfeld*. Unlike the Amendment, the Program *does* mandate speech. Drug manufacturers *must* affirm that the price at which they *must* sell their product is the "maximum fair price." The government knows the American public does not support stunting research and development of new, lifesaving medications by

capping the sale of patented drugs. The government therefore developed a scheme whereby it could effectively cap its spending (and also avoid possible tax increases) by compelling drug manufacturers to "negotiate," agree, and affirm that they are selling their valuable products at the "maximum fair price"—which is not constitutionally permissible. If the Program simply required manufacturers to negotiate with the government in good faith under the same terms and conditions it negotiates with private insurers, that would be different.

Rather than *Rumsfeld*, the more analogous case is *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017). There, the Court considered whether a New York law that forbade merchants from imposing a surcharge for the use of a credit card regulates speech, or only commercial conduct. *Id.* at 39. The Court held that the law did regulate speech, reasoning that it was different than typical price regulation, which simply regulates the amount that a store can collect and that only "*indirectly dictate* the content of that speech." *Id.* at 47 (emphasis added). By contrast, New York's law regulated "how sellers may communicate their prices." *Id.*

The Program does both here, regulating not only the price of certain prescription drugs, but also directly regulating how manufacturers may communicate about their prices. Specifically, manufacturers must affirm that the price for their prescription drugs are the result of negotiations and an agreement between the manufacturer and the government for the maximum fair price. *Expressions Hair Design* not *Rumsfeld* should guide this Court's analysis.

2. The Program Unconstitutionally Compels Viewpoint-Based Speech.

Compelling manufacturers to describe the non-voluntarily imposed price as a "maximum fair price" means that the manufacturers can't say what they believe: that the Program and the resulting price is not meaningfully fair. Moreover, it makes the manufacturers imply that their previous charged prices were *not fair*. This implies past malfeasance, a dangerous thing for a company to say at a time when many people believe that greed and unfair practices are the guiding principles of many large companies, especially drug manufacturers.

"Speech compulsions, the Court has often held, are as constitutionally suspect as are speech restrictions." Eugene Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355, 355 (2018). Although there are various categories of compelled-speech cases, the most egregious violation of the no-compelled-speech doctrine is when the government compels viewpoint-based speech; indeed, "[t]he Supreme Court has never upheld a viewpoint compulsion of speech." Richard F. Duncan, *Viewpoint Compulsions*, 61 Washburn L.J. 251, 272–73 (2022). As shown by Professor Volokh, "Government coercion is presumptively unconstitutional . . . when it compels people to speak things they do not want to speak." Volokh, supra at 368–70; *see, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (holding that a compelled-notice provision "is a content-based regulation of speech" because "[b]y compelling individuals to speak a particular message, such notices alter the content of their speech") (cleaned up).

The Court's three most relevant compelled-speech cases are *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) ("*AID*"). These cases prohibit the government from compelling speech as a condition of a government privilege. In *Barnette*, the Court held that schoolchildren could not be required to pledge allegiance to the flag because "compulsion . . . to declare a belief" unconstitutionally compelled "affirmation of a belief and an attitude of mind." *Id.* at 631–33. In *Wooley*, the Court concluded that New Hampshire could not compel drivers to display the state motto—"Live Free or Die"—on their vehicle license plates. 430 U.S. at 717. The Court reasoned that the Constitution forbade making this display "a condition to driving an automobile," which is "a virtual necessity for most Americans." *Id.* at 715. Finally, in *AID*, the Court struck a federal law requiring the recipient of federal HIV/AIDS funding to affirm that it "is opposed to 'prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 570 U.S. at 210. The Court stated that the case was "not about the Government's ability to enlist the assistance of those with whom it already agrees," but "about compelling a grant recipient to adopt a particular belief as a condition of funding." 570 U.S. at 218.

These cases reveal that the government cannot compel speech—speech which conveys a particular viewpoint—by making the speech a *condition* on receipt of a benefit. But that's exactly what the Program requires pharmaceutical companies to do

here. To obtain the benefit of selling to Medicare recipients, drug companies are compelled to make statements that they don't agree with, including that the "maximum fair price" of their drug is less than its fair market value—implying that the price the company sold its drugs at prior to the Program was *not fair*.

It is hard to see how this case differs from *AID* in any material respect. *AID* concerned billions of dollars in government aid; the Program concerns billions of dollars in government spending on Medicare. The regulation in *AID* required that the recipient of any funding under the Act agree in the funding agreement—which could be a "contract," 45 C.F.R. § 89.1, subd. a—that it is opposed to prostitution and sex trafficking. The agreement giving pharmaceutical companies access to the government-sponsored health insurance market requires them to affirm that a drug is being sold at its "maximum fair price." And notably, both *AID* and this case involve political optics. In *AID*, the government wanted funding recipients "*to adopt* a similar stance" to the government's purpose of eradicating prostitution and sex trafficking. 570 U.S. at 218. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern," the program by its very nature affected "protected conduct outside the scope of the federally funded program." *Id.* (quotation omitted). So too here. The government didn't simply set prices in a take it or leave it manner. Instead, it aimed to commandeer the companies' mouthpieces in order to spread the government's view on Medicare drug pricing, a matter of clear public concern.

As in *AID*, were the agreements "enacted as a direct regulation of speech," they "would plainly violate the First Amendment." *Id.* at 213. And as in *AID*, the Government may not evade the Constitution by imposing that requirement as a condition on the receipt of federal funds.

CONCLUSION

For the foregoing reasons and the reasons stated in petitioners' briefs, the Court should grant the petitions for writ of certiorari and reverse the decision below.

Respectfully submitted,

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