

No.

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**In the Supreme Court of the United States**

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PHARMACEUTICAL RESEARCH AND  
MANUFACTURERS OF AMERICA, PETITIONER,

*v.*

SEAN O'DAY, IN HIS OFFICIAL CAPACITY AS  
DIRECTOR OF THE OREGON DEPARTMENT  
OF CONSUMER AND BUSINESS SERVICES.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

An Oregon statute, commonly known as HB 4005, requires a pharmaceutical manufacturer to create reports that include narrative justifications for the prices at which the manufacturer has chosen to offer its products for sale. A state agency then must publish all such reports on its website. Even if a report includes confidential information, the agency must publish it—destroying the value of any trade secrets that it contains—whenever the agency deems publication to be in “[t]he public interest.”

A divided Ninth Circuit panel upheld HB 4005 under the First Amendment. The court held that intermediate—rather than strict—scrutiny applies to all “government reporting requirements” that compel the disclosure of “product-specific” information. In purporting to apply such intermediate scrutiny, the court further held that Oregon’s asserted interest in correcting “information asymmetries” was sufficient, by itself, to sustain the law.

The Ninth Circuit also rejected a challenge under the Takings Clause to HB 4005’s requirement that trade secrets must be published whenever the State deems publication to be in “the public interest.” The court held that a drug manufacturer has no investment-backed expectations in the secrecy of its trade secrets—and thus can never assert takings claims—because it “chooses” to operate in a “highly regulated” market.

The questions presented are:

1. Whether a government reporting requirement is subject to intermediate First Amendment scrutiny, and satisfies such scrutiny, so long as it aims to correct “information asymmetries” that are “product-specific.”

2. Whether entities that operate in “highly regulated” industries categorically lack reasonable investment-backed expectations in their trade secrets for purposes of the Takings Clause.

**RULE 29.6 STATEMENT**

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent corporations and no publicly held corporations own 10 percent or more of its stock.

## RELATED PROCEEDINGS

United States District Court (D. Or.):

*Pharmaceutical Research and Manufacturers of America v. Stolfi*, No. 19-cv-1996 (Mar. 19, 2024)

United States Court of Appeals (9th Cir.):

*Pharmaceutical Research and Manufacturers of America v. Stolfi*, No. 24-1570 (Aug. 26, 2025)

*Pharmaceutical Research and Manufacturers of America v. Stolfi*, No. 24-1570 (Oct. 23, 2025)

Supreme Court of the United States (U.S.):

*Pharmaceutical Research and Manufacturers of America v. O'Day*, No. 25A806 (Jan. 12, 2026)

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**OPINIONS BELOW**

The opinion of the court of appeals (App. 1a-109a) is reported at 153 F.4th 795. The decision of the district court (App. 110a-151a) is reported at 724 F. Supp. 3d 1174.

**JURISDICTION**

The judgment of the court of appeals was entered on August 26, 2025. App. 152a-154a. On October 23, the court denied petitioner's timely rehearing petition. App. 155a. On January 12, 2026, Justice Kagan extended the time to file a petition for a writ of certiorari to February 20, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**STATUTORY PROVISIONS INVOLVED**

Relevant provisions are reproduced in the Appendix. App. 156a-165a.

## INTRODUCTION

The Ninth Circuit has become a stark outlier in its approach to constitutional protections for the free speech and private property rights of businesses. Departing from this Court’s precedents, and from other courts of appeals’ approaches, the divided court below held that laws mandating content- and viewpoint-based speech escape heightened scrutiny whenever they are labeled “product-specific” reporting requirements. It also held—again, contrary to other Circuits’ decisions—that a business operating in a “highly regulated” market must accept the loss of its confidential, proprietary information. If allowed to stand, the Ninth Circuit’s novel approach would give regulators a roadmap for forcing businesses to speak and to surrender their valuable trade secrets, while evading meaningful First Amendment scrutiny or protection for property under the Takings Clause.

The Ninth Circuit crafted this unprecedented rule in upholding Oregon House Bill 4005, one of a growing number of State “transparency” measures targeting disfavored industries. HB 4005 compels pharmaceutical manufacturers to create and submit narrative justifications for their medicine prices and to divulge confidential, proprietary information about those products—including trade secrets. A state agency then must publish the information online whenever it deems disclosure to be in the “public interest.” The statute thus presents a stark choice to manufacturers: Either they must speak as the State commands, and thereby sacrifice the secrecy (and hence the value) of their intellectual property, or else their medicines may not be sold in the State.

On the speech side, over Judge Bea’s dissent, the Ninth Circuit “discard[ed] the well-established legal tests articulated by” this Court for evaluating laws that compel speech by businesses. App. 76a. In place of this Court’s commercial-speech doctrine, the Ninth Circuit created a

“newly minted” framework that “skirt[s] the commercial speech inquiry” whenever the government describes its forced-speech law as a “reporting” mandate concerning “product-specific” information. App. 92a. Worse still, under this new test, the court declared that Oregon may force manufacturers to generate and submit narrative explanations of their pricing and internal business judgments—which are then published—merely because Oregon believes that doing so will reduce “information asymmetries” in the market. App. 49a.

That reasoning cannot be squared with this Court’s precedents, or with the decisions of other courts of appeals. This Court has made clear that compelled speech is presumptively subject to strict scrutiny, and it allows reduced scrutiny only for laws that compel “commercial speech”—a narrow category that even the court below recognized is an “inapt” fit with Oregon’s law. App. 33a.

Moreover, by treating the State’s asserted goal of correcting “information asymmetries” as sufficient—by itself—to sustain the law under intermediate scrutiny, the decision below renders First Amendment scrutiny for such laws meaningless. *All* disclosure laws, by definition, reduce informational asymmetries. The Ninth Circuit’s approach is effectively nothing more than rational basis review, in conflict with decisions from other Circuits, which hold that “consumer concern is not, in itself, a substantial interest,” *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73 n.1 (2d Cir. 1996), and that intermediate scrutiny requires actual proof, not mere assertions about “common sense,” *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 525 (D.C. Cir. 2015) (“NAM”).

The Ninth Circuit’s approach has sweeping implications. HB 4005 is part of a broader legislative wave of “transparency” mandates being used to pressure disfavored businesses to speak on controversial issues. Under the framework adopted below, there will be “no end to the

information that states could require manufacturers to disclose.” *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 31-32 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (quoting *Amestoy*, 92 F.3d at 74). States could compel businesses to draft narrative explanations for their pricing—or any other business strategy—decisions simply by labeling those demands “reporting requirements” designed to reduce “information asymmetries.” As the Circuits rejecting this “free-wheeling government power” have recognized, governments “would love to have such a free pass to spread their preferred messages on the backs of others.” *Ibid.* The Ninth Circuit’s rule grants them that power, at the expense of First Amendment freedoms.

On the takings side, the Ninth Circuit recognized that trade secrets are protected property and that public disclosure extinguishes the property right. But it held that drug manufacturers lack “reasonable investment-backed expectations” in keeping their information secret, and thus can claim no protection under the Takings Clause, because they “choose” to operate in what the court deemed a “highly regulated” industry. App. 67a. On that logic, any company selling products in a market that a court finds sufficiently regulated must accept the risk that the government may later mandate public disclosure of the very information that gives those products their competitive value—and incentivizes participation in the market in the first place.

Such a “highly regulated industry” carve-out to property rights is irreconcilable with this Court’s teaching that the government may *not* condition participation in commerce on surrendering constitutional rights. Selling lawful products, this Court has explained, 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). The decision below conflicts with decisions of other courts

of appeals, which have rejected similar efforts to justify the compelled disclosure of trade secrets merely because the affected businesses operate in “regulated” fields. See, e.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (en banc).

The Ninth Circuit’s new takings exception, too, has no logical limit, threatening to end takings protections for all kinds of businesses (not just drug companies) and all kinds of property (not just trade secrets). Any business selling products or services in a regulated sector—from healthcare, to energy, to financial services—would forfeit any reasonable expectation that its property will remain its own. And under the decision below, States could impose these consequences extraterritorially, untethered from any meaningful “choice” to do business in the State: Oregon’s law is not limited to companies that actively *sell* their products in Oregon, but rather extends to any manufacturer whose product “*is sold in th[e] state.*” Or. Rev. Stat. § 646A.689(1)(e) (emphasis added).

This case presents the constitutional questions cleanly. The issues were squarely raised and fully resolved in a published decision over a vigorous dissent on the First Amendment claim, and the Ninth Circuit denied rehearing. The decision below embraces novel and expansive theories of both the First Amendment and Takings Clause that conflict with this Court’s decisions and create divisions among the lower courts. The Court should grant the petition to restore the settled First Amendment framework for compelled speech; reaffirm that participation in commerce does not extinguish property rights; and prevent States from using transparency mandates as an end-run around constitutional protections.

## STATEMENT

### A. Legal Background

In February 2018, Oregon enacted HB 4005, the Prescription Drug Price Transparency Act. HB 4005 applies to any company that “manufactures a prescription drug that is sold in th[e] state,” regardless of whether the manufacturer sells its products in Oregon or seeks a license to do business there. Or. Rev. Stat. § 646A.689(1)(e). When introducing a new drug, or raising the price of existing drugs above certain thresholds, a manufacturer must file a “report” with Oregon’s Department of Consumer and Business Services. The report must include information about the product’s price, revenue, and costs of development and distribution. *Id.* § 646A.689(2)-(3).

Relevant here, HB 4005 requires manufacturers to disclose “[t]he factors that contributed to the price increase” of each covered drug, *id.* § 646A.689(3)(c), including “a *narrative description and explanation* of all major financial and nonfinancial factors that influenced the decision to increase the wholesale acquisition cost of the drug product and to decide on the amount of the increase,” Or. Admin. R. 836-200-0530(2)(h) (emphasis added). The agency must “post to its website” all the information that manufacturers report. Or. Rev. Stat. § 646A.689(9)(b).

The internet-posting requirement applies even to confidential information—including trade secrets—unless the agency determines that “the public interest does not require disclosure of the information.” *Id.* § 646A.689(10)(a). Under this “public-interest” exception, the agency *must* publish a manufacturer’s trade secrets whenever the agency deems publication to be in “the public interest.” C.A. E.R. 138. Violations trigger fines up to \$10,000 per day. Or. Rev. Stat. § 646A.692(2).

## B. Factual Background and Procedural History

1. Pharmaceutical Research and Manufacturers of America (“PhRMA”) is a trade association whose members develop cutting-edge medicines used by patients nationwide. PhRMA challenged HB 4005 as unconstitutional under both the First Amendment and Takings Clause. The district court granted partial summary judgment for PhRMA. App. 122a-127a, 140a-151a.

The district court first held that HB 4005’s reporting requirement fails First Amendment scrutiny. Applying intermediate scrutiny, the court determined that Oregon failed to satisfy its burden because it “cite[d] no studies or anecdotal evidence” about the law’s anticipated effects, instead relying on “little more than speculation.” App. 149a.

The district court further held that HB 4005’s public-interest exception takes manufacturers’ property—their trade secrets—“every time it is invoked.” App. 122a. Applying factors articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court determined that “all the factors” supported PhRMA’s takings claim. App. 125a.

2. The Ninth Circuit reversed. App. 5a-74a.

a. On PhRMA’s First Amendment claim, the Ninth Circuit determined “that HB 4005’s reporting requirement qualifies as a commercial speech regulation,” subject only to “intermediate scrutiny.” App. 34a. The court acknowledged that the required reports do not implicate “the ‘core notion of commercial speech,’” which is speech that “does no more than propose a commercial transaction.” App. 35a (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (cleaned up)). The court similarly admitted that the reports were “not a clear fit” with the “so-called *Bolger* factors: (1) whether the speech is an advertisement, (2) whether the speech refers to a particular product, and (3) whether the speaker has an economic motivation.” App. 35a-36a. The court nevertheless

determined that “policy considerations” warrant extending the commercial-speech doctrine to any government-compelled disclosures that “communicate product-specific economic information.” App. 36a-38a (citation omitted).

Purporting to apply intermediate scrutiny, the Ninth Circuit upheld HB 4005’s reporting requirement. It acknowledged that “the State failed to cite any empirical evidence linking drug pricing transparency laws to lower drug prices.” App. 49a. But the court deemed that failure irrelevant, on the ground that the law advances Oregon’s interest in “reduc[ing] information asymmetries” and “provid[ing] drug purchasers with leverage in negotiations with manufacturers.” App. 49a. According to the court, “[i]t is common sense that collecting and publishing information about drug pricing, costs, and pharmaceutical market conditions directly advances this goal.” App. 49a (cleaned up).

**b.** On PhRMA’s takings claim, the Ninth Circuit accepted that trade secrets constitute private property, the value of which is destroyed by forced public disclosure. App. 59a-60a, 70a-71a. The court also acknowledged that HB 4005 “explicitly authorizes the disclosure of trade secrets submitted to the State if disclosure is in the public interest.” App. 67a.

Nevertheless, analyzing PhRMA’s takings claim under the *Penn Central* factors, the Ninth Circuit held that drug manufacturers lack any “reasonable investment-backed expectations” in the confidentiality of “trade secrets submitted to the State.” App. 67a. In the court’s view, companies categorically lack any such reasonable expectations—and thus cannot succeed under *Penn Central*—if they “choose” to “do business in [a] highly regulated ... industry.” *Ibid.* If drug manufacturers “decide the value of protecting their trade secrets from potential disclosure to be more valuable than the right to sell in

Oregon,” the court reasoned, “they can decide to forego pharmaceutical sales in the state.” App. 68a.

c. Judge Bea dissented from the First Amendment ruling. HB 4005 requires a manufacturer to disclose its *internal* pricing strategy, he noted, which is “a far cry from a proposal for commercial transactions.” App. 80a. Indeed, the law “compels drug manufacturers to opine implicitly on how their drugs *should be* priced,” requiring disclosure of their “opinions and judgments.” App. 95a (emphasis altered). As a result, “[s]trict scrutiny should apply.” App. 81a. But even if this were a “close case,” he explained, the court should have applied the *Bolger* factors, which further “counsel against finding commercial speech here.” App. 82a.

Judge Bea also criticized the majority’s “newly minted test” for product-related disclosures, which “discard[s] the well-established legal tests” for commercial speech. App. 76a. The majority’s approach thus “skirt[s] the commercial speech inquiry where, as here, a government reporting requirement is at issue.” App. 97a. Instead, the disclosure requirement should be subject to strict scrutiny, he explained, “because it compels drug manufacturers to engage in non-commercial speech on an intensely debated and politically fraught topic: prescription drug prices.” App. 109a.

### REASONS FOR GRANTING THE PETITION

The decision below created a novel First Amendment framework for evaluating compelled-speech laws, and also invented a “highly regulated industry” exception to the Takings Clause. In so ruling, the Ninth Circuit departed markedly from decisions of this Court and other courts of appeals. Its ruling—issued amid the proliferation of state attempts to create “transparency” regimes that seek to influence market outcomes through compelled speech and the exposure of trade secrets—threatens to nullify the constitutional rights of businesses across a wide variety of industries. This Court’s guidance is needed for legislatures, regulators, and regulated parties nationwide.

#### I. THE NINTH CIRCUIT’S APPROACH TO COMPELLED DISCLOSURES WARRANTS REVIEW

The Ninth Circuit’s new First Amendment test for government-compelled disclosures is wrong in two independent respects. In combination, moreover, the court’s errors reinforce one another—creating a ready playbook for the government to mandate speech by companies about their internal decision-making in an effort to implement the government’s preferred policy choices.

First, the decision below ignored this Court’s guidance for determining whether government-compelled speech qualifies as “commercial” in nature. Under the Ninth Circuit’s novel approach, such speech is *automatically* deemed commercial—and hence subject only to intermediate scrutiny—so long as the information demanded is “product-specific.” That approach has no grounding in history or this Court’s commercial-speech doctrine.

Second, in applying intermediate scrutiny, the Ninth Circuit upheld HB 4005 based solely on Oregon’s assertion that the law will reduce “information asymmetries.”

But that test is circular: *All* disclosure requirements reduce informational asymmetries. As a result, the ruling below removes any guardrails against governmental overreach.

Both features of the Ninth Circuit’s approach diverge significantly from other courts of appeals, which faithfully apply this Court’s commercial-speech framework and recognize that the government may not compel speech under the First Amendment merely because the listener lacks the information being compelled. Review is warranted now to rein in the Ninth Circuit’s overly permissive approach, which States are already exploiting.

**A. The Decision Below Created a Novel Test for Government-Compelled Disclosures**

Laws that compel speech, no less than other content-based regulations, allow the government to “manipulate the public debate through coercion rather than persuasion.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994). Consequently, such laws are “subject to strict scrutiny.” *Nat’l Inst. of Family & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (“*NIFLA*”); see *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (state law that “compelled statements” was a “content-based regulation ... subject to exacting First Amendment scrutiny”). The Ninth Circuit nonetheless applied only intermediate scrutiny to HB 4005’s disclosure requirement, on the ground that the speech it compels is “commercial” in nature because it is “product-specific.” App. 39a. That newly minted test flouts this Court’s commercial-speech framework and conflicts with the application of that framework by other Circuits.

1. This Court has accorded a lower level of protection—applying intermediate, rather than strict, scrutiny—to “commercial speech.” *Cent. Hudson Gas & Elec. Corp. v.*

*Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 571-72 (1980).<sup>1</sup> Because the standard is relatively permissive, the Court has “defined” that category narrowly as “speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). Time and again, the Court has confirmed that “the proposal of a commercial transaction” is “*the test* for identifying commercial speech.” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (citation omitted); see, e.g., *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“Commercial speech ... is ‘linked inextricably’ with the commercial arrangement that it proposes”) (citation omitted).

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court identified factors for resolving cases that present “closer question[s]” about speech that is not traditional advertising. *Id.* at 66. At issue in *Bolger* was a federal statute that prohibited mailing unsolicited advertisements for contraceptives. *Id.* at 61-62. The plaintiff there, a contraceptives distributor, challenged the law’s application to its mailings, some of which “promote” its products and others that “discuss the desirability and availability of prophylactics in general.” *Id.* at 62. The promotional mailings, the Court explained, “fall within the core notion of commercial speech—speech which does no

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<sup>1</sup> This case presents the Court with an opportunity to reconsider the dubious “premise ... that, in the commercial-speech context, the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 751 (2024) (Thomas, J., concurring in the judgment) (citation omitted); see *Matal v. Tam*, 582 U.S. 218, 254 (2017) (Thomas, J., concurring in part and concurring in the judgment). Were this Court to afford commercial speech the same protection as other speech, the Ninth Circuit’s decision could not stand: HB 4005 targets speech on the basis of its content, viewpoint, *and* speaker; and Oregon has never asserted that it could satisfy strict scrutiny. App. 109a.

more than propose a commercial transaction.” *Id.* at 66 (quotation marks omitted).

The company’s “informational pamphlets,” however, required further analysis. *Bolger*, 463 U.S. at 66. Though they were “conceded to be advertisements,” that “mere fact” alone did “not compel the conclusion that they [we]re commercial speech.” *Ibid.* “Similarly,” their “reference to a specific product d[id] not by itself render the pamphlets commercial speech.” *Ibid.* And “the fact that [the plaintiff] ha[d] an economic motivation for mailing the pamphlets” was “clearly ... insufficient by itself to turn the materials into commercial speech.” *Id.* at 67. It was only “[t]he combination of *all* these characteristics,” the Court held, that rendered them “properly characterized as commercial speech.” *Ibid.* (emphasis in original). These *Bolger* factors are routinely used to determine whether speech is sufficiently linked to “commercial transactions” so as to merit lesser First Amendment protection. *Id.* at 68.

For instance, *National Institute of Family & Life Advocates v. James*, 160 F.4th 360 (2d Cir. 2025), involved a challenge to New York regulations regarding sharing information about a protocol intended to counteract the effects of a medication-induced abortion. *Id.* at 363-64. “[C]entral to th[e] appeal,” the Second Circuit observed, was whether the plaintiffs’ speech was “commercial speech or noncommercial speech.” *Id.* at 374. To answer that question, the court started with the recognized “core notion of commercial speech”—namely, speech that “does no more than propose a commercial transaction.” *Ibid.* (cleaned up). And for “mixed communications” that “combine commercial and noncommercial elements,” the court explained, the status of the speech depends on the *Bolger* “factors.” *Ibid.* Applying those factors to New York’s law, the court determined that the “speech at issue [wa]s non-commercial speech,” and accordingly applied “strict scrutiny.” *Id.* at 375.

Other courts of appeals apply the same framework. See, e.g., *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 108 (4th Cir. 2018) (Wilkinson, J.) (“some speech outside this ‘core notion’ may also be deemed commercial,” and “[c]ourts rely on three [*Bolger*] factors to identify such commercial speech” (citations omitted)); *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 950 (11th Cir. 2017) (similar); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 517 (7th Cir. 2014) (similar); *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (similar).

2. The Ninth Circuit discarded this well-established approach in favor of a new test of its own devising. The court acknowledged that laws requiring “submission of information to the government”—like HB 4005’s disclosure requirement—“typically do[] not ‘propose a commercial transaction.’” App. 27a (emphasis omitted). Nor does such a reporting requirement “neatly fit two of the factors identified in *Bolger*: A report to the government is not an ‘advertisement,’ and regulated entities and individuals typically produce these reports out of legal obligation, not economic motivation.” *Ibid.* And while the reports mandated by HB 4005 *do* refer to specific products—because the law requires it—that fact alone “does not by itself render the [reports] commercial speech.” *Bolger*, 463 U.S. at 66. Thus, the Ninth Circuit conceded, “applying these tests strictly” would require treating the speech compelled by HB 4005 as non-commercial. App. 27a.

Yet rather than apply the established commercial-speech framework—as other Circuits have done—the Ninth Circuit deemed it “inapt for determining what level of scrutiny to apply to ... mandatory reports from [a] regulated entity to the government.” App. 27a. In the court’s view, such “government reporting requirements” must receive a lower level of scrutiny to serve “policy considerations” and to avoid “counterintuitive results.” App. 27a,

37a (citation omitted). So the Ninth Circuit simply jettisoned “the traditional definitions of commercial speech” altogether. App. 28a.

In place of the traditional test, the Ninth Circuit announced a new rule: “product-specific government reporting requirements” are now to be “[t]reat[ed] ... as commercial speech.” App. 39a. Under this approach, such requirements receive only intermediate scrutiny—not strict scrutiny—so long as the government demands information that is “product-specific.” *Ibid.* The court did not elaborate on the meaning of “product-specific,” other than that the speech must concern a particular product.

3. The Ninth Circuit’s novel test for product-specific government reporting requirements is fatally flawed. Most fundamentally, this Court has cautioned against “mark[ing] off new categories of speech for diminished constitutional protection.” *NIFLA*, 585 U.S. at 767 (citation omitted). Absent “persuasive evidence of a long (if heretofore unrecognized) tradition” of lower scrutiny, courts may not afford such speech “less protection.” *Ibid.* (cleaned up). Here, the Ninth Circuit did not claim any such “tradition.” Instead, it articulated reasons for adopting its new test, none of which withstand scrutiny.

First, the Ninth Circuit observed that the conventional tests “were designed to determine the appropriate level of scrutiny to apply to laws that regulate voluntary speech from a regulated commercial entity to a public audience.” App. 27a. In the court’s view, that makes those tests “inapt for determining what level of scrutiny to apply to speech in an entirely different context—mandatory reports from the regulated entity to the government, which the government may then make available to the public.” *Ibid.* Yet nothing in this Court’s case law indicates that the “proper classification” of speech “as commercial or noncommercial” turns on whether the speech is voluntarily directed at the public, or instead is involuntarily

reported to the government. *Bolger*, 463 U.S. at 66. Speech does not become more commercial in nature simply because it is “mandatory.” App. 27a. Indeed, if anything, the fact that a law like HB 4005 requires *involuntary* speech, by one who “would prefer to remain silent,” requires a *more-stringent* justification for the law. 303 *Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023).

Next, the Ninth Circuit described its new test as necessary to avoid “counterintuitive results.” App. 27a-28a. In the court’s view, “[i]t would be odd to subject speech in a consumer-facing advertisement to *less* scrutiny than speech in an annual report filed with a state regulatory body simply because it better fits the doctrinal tests for defining commercial speech.” App. 28a. But it is immaterial that the reports required by HB 4005 are first filed with the State, since the law also requires the reports to be “post[ed] to its website.” Or. Rev. Stat. § 646A.689(9)(b). Indeed, the law’s asserted basis is to reduce “informational asymmetries.” App. 47a. That justification *depends* on making the information public.

HB 4005’s internet-posting requirement also easily distinguishes it from other “statutes and regulations that require regulated entities and individuals to report information to a government agency,” which the Ninth Circuit described as “a common feature of modern government.” App. 15a. As an example, the Ninth Circuit cited *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995), an accountant’s First Amendment challenge to IRS Form 8300, which requires taxpayers to report information related to cash transactions. In forcing the accountant “to provide the government with information which his clients have given him voluntarily,” the court explained, the form did not require him to “disseminate publicly” any message, but merely facilitated the “essential operations of government.” *Id.* at 878 (cleaned up). But unlike tax information provided confidentially to the IRS—needed to calculate

what a taxpayer owes—HB 4005’s reports are aimed at the public and designed to counteract “informational asymmetries” in the broader “market.” App. 47a.

Similarly unhelpful to the Ninth Circuit’s argument is *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011). There, the D.C. Circuit rejected a First Amendment challenge to an SEC regulation that required investment managers to disclose their investments to secure confidential treatment for their quarterly reports. *Id.* at 1108-09. In so ruling, the court emphasized that the agency needed the information to decide whether to grant the manager’s request for confidentiality. *Id.* at 1108. As a result, “the Commission—not the public—is [an investment advisor’s] only audience.” *Ibid.* Notably, the court *declined* to rule on a challenge to “public disclosure” of the quarterly reports themselves. *Id.* at 1106-07.

Finally, the Ninth Circuit reasoned that HB 4005 merely requires disclosure of “product-specific” information with “no independent expressive meaning.” App. 39a. That argument, which is unconnected to the commercial-speech doctrine, fails on its own terms. Under HB 4005, a drug manufacturer does not merely disclose *existing* historical facts. Instead, the manufacturer must *create* “a narrative description and explanation of all major financial and nonfinancial factors that influenced” its pricing decisions. Or. Admin. R. 836-200-0530(2)(h).

That requirement inherently calls for the generation of new—and value-laden—speech. As Judge Bea explained, “pricing strategies can be influenced by many factors, including drug manufacturers’ views on issues of public concern such as how drugs should be priced and who should be held responsible for” increased prices. App. 92a. Oregon’s law thus forces drug manufacturers to “recast [their] pricing strategies in language prescribed by Oregon and ... to voice their views as to how drugs are and should be priced.” App. 87a.

Moreover, HB 4005 does not merely require drug manufacturers to speak about the products they are selling or their prices; it also forces manufacturers to disclose their *internal* reasons for their pricing decisions. As a result, the forced disclosures go beyond telling consumers about a product's features. And such disclosures are not conventional in commercial transactions:

One need only ask oneself if a buyer of a Ford pickup truck would expect the dealer to tell him—as the terms of the potential transaction between them—*all the major* financial and non-financial factors that influenced the pickup's price, including, for example, the Ford Dearborn management's internal estimates of how competitors may price comparable pickups, its internal evaluation of competitors' business strengths, or its internal forecasts of tax credits and tariffs. Probably not.

App. 81a (Bea, J., dissenting in part). HB 4005's requirement to divulge internal decision-making is nothing like the type of advertising that lies at the “core” of commercial speech. *Bolger*, 463 U.S. at 66.

**B. The Decision Below Creates a Circuit Conflict Regarding Application of Intermediate Scrutiny to Government-Compelled Disclosures**

Even if disclosure requirements like HB 4005 could be characterized as regulating commercial speech, subject only to intermediate scrutiny, the Ninth Circuit's application of that test is indefensible. Under intermediate scrutiny—known as the *Central Hudson* test—the government must prove that its “regulation directly advances” a significant governmental interest and is “not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Unlike other courts of

appeals, the Ninth Circuit treats “reducing” “information asymmetries” as sufficient, in itself, to justify government-compelled disclosures. App. 47a. That holding renders intermediate scrutiny meaningless.

1. In the Second Circuit, the fact that “consumers ... wish to know” more information about a product “is insufficient” to compel sellers “to speak against their will.” *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). In *Amestoy*, dairy producers challenged a Vermont law requiring them to disclose the use of a growth hormone (rBST) on their milk labels. *Id.* at 69. Vermont “d[id] not claim that health or safety concerns prompted the passage” of the law, and indeed had avoided taking any position on the public health consequences of rBST. *Id.* at 70, 73. Instead, the State asserted a “strong consumer interest and the public’s ‘right to know’”—in other words, “the demand of its citizenry for such information.” *Id.* at 73. For purposes of the challenge, the court “assum[ed] that the compelled disclosure [wa]s purely commercial speech”; and, without deciding whether strict or intermediate scrutiny was the proper standard, it applied the latter. *Id.* at 72.

The Second Circuit nevertheless struck down the Vermont law, holding that “mere consumer concern is not, in itself, a substantial interest.” *Id.* at 73 n.1. Though the court was “sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds,” it held that “their desire is insufficient” to permit Vermont “to compel the dairy manufacturers to speak against their will.” *Id.* at 74. “Were consumer interest alone sufficient,” the court explained, “there is no end to the information that states could require manufacturers to disclose about their production methods.” *Ibid.* Instead, “those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it.” *Ibid.*

The D.C. Circuit likewise held that combatting informational asymmetry is insufficient to justify compelled disclosures. In *American Meat Institute v. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), meat packers challenged a rule requiring them to disclose their meat’s country-of-origin to retailers, who then provided the information to consumers. *Id.* at 21. The en banc court recognized that the “idle curiosity” of consumers would *not* be sufficient to compel such disclosures. *Id.* at 23. But crucially, “country-of-origin label mandates” have a “long history”—with Congress “imposing similar mandates since 1890.” *Ibid.* Given that “historical pedigree,” and the practical function of such labeling requirements in “enabl[ing] consumers to choose American-made products” and avoid “food-borne illness outbreak[s],” the court deemed the government’s interest sufficiently “substantial.” *Ibid.*

In a concurring opinion, then-Judge Kavanaugh was even more pointed in rejecting informational asymmetry as a justification for compelled disclosures: “[I]t is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information.” *Id.* at 31. “After all,” he explained,

that would be true of any and all disclosure requirements. That circular formulation would drain the *Central Hudson* test of any meaning in the context of compelled commercial disclosures.

*Ibid.* Judge Kavanaugh further emphasized that “history and tradition provide no support for that kind of free-wheeling government power to mandate compelled commercial disclosures.” *Id.* at 32. He thus “agree[d] with the Second Circuit’s statement in *Amestoy* that ‘consumer curiosity alone is not a strong enough state interest’ to sustain a compelled commercial disclosure.” *Ibid.* (quoting 92 F.3d at 74).

2. In the decision below, the Ninth Circuit deemed the State’s desire to correct “information asymmetries” as a “substantial interest” for purposes of intermediate scrutiny—and thus endorsed the very “freewheeling” compelled-disclosure authority against which Judge Kavanaugh warned. App. 47a. Notably, the court did not require Oregon to demonstrate that its compelled disclosures would have any *practical effect*. To the contrary, the court expressly deemed it irrelevant that “the State [had] failed to cite any empirical evidence linking drug pricing transparency laws to lower drug prices,” since “the State has never claimed” that the law would have such an effect. App. 49a; see App. 149a (“Oregon cite[d] no studies or anecdotal evidence” about HB 4005’s anticipated effects, relying on “little more than speculation”). Instead, the court observed, Oregon’s “stated goal in enacting HB 4005 was to reduce information asymmetries in the pharmaceutical market and provide drug purchasers with leverage in negotiations with manufacturers.” App. 49a. And since forcing sellers to give purchasers information *by definition* reduces any such asymmetry, the court concluded, “[i]t is common sense that collecting and publishing information about drug pricing, costs, and pharmaceutical market conditions ‘directly advances’ this goal.” *Ibid.*

That conclusion is irreconcilable with the Second and D.C. Circuits’ view that consumers’ “wish to know” information *cannot* justify compelled speech. *Amestoy*, 92 F.3d at 74. Instead, consistent with *Central Hudson*, those courts require the government to “demonstrate[]” that the compelled disclosure would actually address “cognizable harms.” *Ibid.* And they also recognize that the government’s showing cannot rest on appeals to “common sense” or on “speculation or conjecture”; rather, the government must actually prove “that the measure it adopted would in fact alleviate the harms it recited to a material degree.” *NAM*, 800 F.3d at 525-26 (cleaned up).

To be sure, the Ninth Circuit did acknowledge that “consumer curiosity alone is generally insufficient as a substantial state interest,” and also stated that Oregon’s “asserted interests here are not limited to transparency for its own sake,” but rather “are intended to ensure the preservation of a fair bargaining process.” App. 47a (cleaned up). The court’s invocation of a supposed effect on the “bargaining process” is puzzling, given that Oregon “never claimed” that its law would affect “drug prices” (or have any other practical effect). App. 47a, 49a. But speculation about how disclosures *might* reshape bargaining dynamics cannot substitute for evidence that the compelled speech actually *does* address a concrete harm.

In any event, there is no meaningful difference between an asserted governmental interest in informational “fairness” and a desire to “reduc[e] informational asymmetries.” Both simply reflect that one party has information that the other wants. The Ninth Circuit did not explain what “a fair bargaining process” might entail *other than* both sides having the same information. Yet if equalizing knowledge were sufficient, then any forced-disclosure law would be constitutional—since by definition such laws require disclosure of information that the speaker knows but the intended audience does not. Thus, the Ninth Circuit’s invocation of a fair bargaining process is simply the same “circular formulation” that “drain[s] the *Central Hudson* test of any meaning in the context of compelled commercial disclosures.” *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J., concurring).

### **C. This Case Is an Ideal Vehicle to Address Important First Amendment Questions**

The decision below creates a significant loophole to First Amendment protections. The Ninth Circuit—by upholding “government reporting requirements” that compel “product-specific” speech under intermediate scrutiny because they reduce “information asymmetries”—created

a roadmap for compelling speech by disfavored businesses. Review is warranted now to counteract this ruling and the dangerous trend that it has already begun to facilitate.

HB 4005 is part of a growing wave of intrusive state “transparency” laws. See, *e.g.*, Cal. Corp. Code § 27500 *et seq.* (requiring venture capital investors to disclose identity-based characteristics of the startup founders they fund); Nev. Rev. Stat. § 439B.640(1)(a) (requiring drug manufacturer to submit “report describing the reasons for the increase in the wholesale acquisition cost of [its] drug”); Cal. Health & Saf. Code § 38533 (requiring certain companies to submit reports about “climate-related financial risk” and “measures adopted to reduce” that risk); *Volokh v. James*, 148 F.4th 71 (2d Cir. 2025) (addressing challenge to New York law requiring social media companies to report information about their content-moderation policies); *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (similar for Texas law). These laws seek to influence market outcomes by forcing regulated entities to speak—often in narrative form—about their prices, strategies, or internal decision-making.

If the Ninth Circuit is correct that these disclosure requirements are valid whenever they are “product-specific” and seek to correct “information asymmetries,” App. 38a, 49a, then the only limit to the government’s ability to compel speech will be its creativity. Companies in any part of the economy—healthcare, energy, technology, financial services, and more—could be required to justify their business decisions to the public. Disfavored entities would have to reveal their internal strategy documents or negotiation playbooks, or could be forced to generate explanatory narratives to defend their decision-making, whenever officials think additional “leverage” would be useful to buyers, regulators, or other counterparties. App. 49a.

Examples are not hard to imagine. For instance, a State could require banks to publish narrative justifications for their interest rates—including the internal risk assessments and projections behind them—on the theory that lenders and borrowers should have the same information. Or a State could require clothing manufacturers to disclose not just *where* each product is made, but *why* the company selected that location—on the theory that such descriptions help consumers compare brands. Under the approach adopted below, such laws would escape meaningful First Amendment scrutiny so long as the government labels them “reports” about “product-specific economic information.” App. 38a-42a. That would erode First Amendment protections, inviting lawmakers to recast compelled expression as routine regulatory paperwork.

The threat to the “uninhibited marketplace of ideas” is significant. *303 Creative*, 600 U.S. at 585 (citation omitted). American businesses, no less than other speakers, play an important role in public discussion of “intensely debated and politically fraught topic[s].” App. 109a (Bea, J., dissenting); see, e.g., *303 Creative*, 600 U.S. at 596 (businesses may speak on topics with “political and religious significance”). Speech on such “sensitive” matters “occupies the highest rung of the hierarchy of First Amendment values,” and thus “merits special protection.” *Janus v. Am. Fed’n of State, County, & Municipal Employees, Council 31*, 585 U.S. 878, 913-14 (2018) (quotation marks omitted). Indeed, the Ninth Circuit itself acknowledged that “drug pricing decisions may implicate controversial public policy issues,” App. 43a, though it dismissed drug manufacturers’ desire *not to* speak about that topic. The ruling below thus hands the government a ready-made formula for “manipulat[ing] the public debate through coercion rather than persuasion.” *Turner Broad.*, 512 U.S. at 641.

This case is an ideal vehicle for addressing these weighty First Amendment issues. The implications of the Ninth Circuit’s new test are unusually clear here because Oregon introduced *no* evidence below—not even “anecdotes”—regarding the anticipated effects of its law. App. 48a-49a. Indeed, the State specifically *disclaimed* any potential effect on “drug prices.” App. 49a & n.27. Instead, the Ninth Circuit relied solely on the “common sense” (and circular) proposition that “collecting and publishing information about drug pricing” would reduce “information asymmetries.” App. 49a. Oregon’s failure to build an evidentiary record to defend its law thus throws into stark relief the *legal* question whether such an interest suffices for First Amendment purposes.

## II. THE NINTH CIRCUIT NULLIFIED TAKINGS CLAUSE PROTECTION FOR “HIGHLY REGULATED INDUSTRIES”

HB 4005 requires destruction of drug manufacturers’ confidential information: Their trade secrets *must* be published on the internet—thereby eliminating the secrets’ value—whenever a state agency determines that “the public interest ... require[s] disclosure of the information.” Or. Rev. Stat. § 646A.689(10)(a)(B). The Ninth Circuit nonetheless ruled that manufacturers are categorically barred from asserting a takings claim against HB 4005 because they “choose to run the risk of public disclosure of their trade secrets to do business in the highly regulated pharmaceutical industry.” App. 67a.

This new “highly regulated industry” exception to the Takings Clause is both dangerous and unprecedented. It guts property protections for any businesses operating in a field the Ninth Circuit deems sufficiently “regulated,” on the theory that the businesses can just walk away from the industry. Such a rule contravenes this Court’s teaching that the right to engage in interstate commerce 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). It also diverges from other courts of appeals, which afford property protections even in the most highly regulated industries.

### A. The Decision Below Is Wrong

Below, the Ninth Circuit ruled that businesses lack reasonable investment-backed expectations—and hence are categorically unable to assert takings claims—if they “sell a highly regulated product in a government-regulated market.” App. 67a. That ruling improperly treats the right to do business as a discretionary “benefit,” conferred by the government’s grace and subject to revocation at its will. *Ibid.* Leaving the decision in place would allow the government to take private property without compensation in any industry deemed “highly regulated,” by treating the taking as a condition of doing business. That is not the law, nor should it be.

1. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), this Court affirmed that trade secrets, when “protected by state [or federal] law,” constitute property “deserving of the protection” of the Takings Clause. *Id.* at 1003. The Court explained that a trade secrets’ “economic value ... lies in the competitive advantage over others that [the possessor] enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge.” *Id.* at 1012. Thus, when disclosure is made “to others who are under no obligation to protect the confidentiality of the information,” the “property right is extinguished” entirely. *Id.* at 1002.

When governmental regulation restricts the use of private property, courts analyze the potential taking using the *Penn Central* factors: “the regulation’s economic effect on the [property-holder], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Palazzolo v. Rhode Island*, 538 U.S. 606, 617 (2001)

(citing *Penn Cent. Transp. Co.*, 438 U.S. at 124). Even assuming HB 4005’s public-interest exception were merely a “regulatory” taking,<sup>2</sup> it would still work a taking every time it is invoked. Oregon law affords legal protection to trade secrets, investing their owners with rights of “[i]ntangible personal property.” Or. Rev. Stat. § 307.020(1)(a)(I). Yet the public-interest exception *requires* Oregon to publicly disclose manufacturers’ trade secrets whenever “the public interest ... require[s] disclosure of the information.” *Id.* § 646A.689(10)(a)(B). Each invocation of that exception, therefore, destroys the secrecy that gives the information its “economic value.” *Ruckelshaus*, 467 U.S. at 1012.

In *Ruckelshaus*, this Court considered a challenge to a law that required pesticide manufacturers to publicly disclose data previously protected as trade secrets. *Id.* at 992, 996-97. In evaluating the manufacturer’s takings claim, the Court recited the familiar *Penn Central* factors, but ultimately focused only on one—the effect on the manufacturer’s investment-backed expectations—because “the force of this factor [was] so overwhelming.” *Id.* at 1005. “Once the data that constitute a trade secret are disclosed to others,” the Court explained, “the holder of the trade secret has lost his property interest in the data.” *Id.*

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<sup>2</sup> Because HB 4005 deprives manufacturers of “all economically beneficial use of [their] property,” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (cleaned up), the law works a categorical taking. After all, “total deprivation of beneficial use is, from the [owner’s] point of view, the equivalent of a physical appropriation.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992). And publicizing a trade secret, like invading real property, “eviscerates the owner’s right to exclude others from ... using her property—perhaps the most fundamental of all property interests.” *Lingle*, 544 U.S. at 539. Oregon’s law also requires such publication to enable the public to capture the value of the information, making disclosure “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Ibid.*

at 1011. In other words, because operation of the law “destroy[ed]” the property’s value, the law on its face effected a taking. *Id.* at 1012. HB 4005’s compelled disclosures operate the same way.

2. The Ninth Circuit rejected PhRMA’s takings claim based on the theory that drug manufacturers lack any “reasonable investment-backed expectations” in the secrecy of their trade secrets because they operate in “the highly regulated pharmaceutical industry.” App. 67a. “[T]he ability to sell a highly regulated product in a government-regulated market,” the court held, is a “benefit provided to manufacturers.” *Ibid.* And Oregon may condition that benefit on a manufacturer’s abandonment of its trade secrets:

Here, manufacturers have a ... choice. If they decide the value of protecting their trade secrets from potential disclosure to be more valuable than the right to sell in Oregon, they can decide to forego pharmaceutical sales in the state and limit their product sales to other states and foreign markets.

App. 68a.

To justify that remarkable ruling, the Ninth Circuit relied on *Ruckelshaus*, where Monsanto had to disclose certain confidential information to EPA as a condition of its federal pesticide registrations, subject to subsequent public disclosure by EPA. 467 U.S. at 991-97. Given that condition, this Court held that “Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA.” *Id.* at 1008. Below, the Ninth Circuit deemed “HB 4005’s public-interest exception [to be] materially indistinguishable from” the disclosure requirement in *Ruckelshaus*. App. 67a.

But the Ninth Circuit ignored a crucial limitation: Monsanto “ha[d] not challenged the ability of the Federal Government to regulate the marketing and use of pesticides.” 467 U.S. at 1007. Federal law had “long” treated “the ability to market pesticides in this country” as a “valuable Government benefit” that the United States could withhold. *Ibid.* Pesticide manufacturers that wanted federal permission to sell their products thus had to submit their trade secrets “in exchange for the economic advantages of a registration.” *Ibid.*

HB 4005 offers drug manufacturers no comparable “exchange.” The ability to sell pharmaceutical products in Oregon is not a “benefit” that Oregon confers on manufacturers. In fact, this Court has already affirmed that *Ruckelshaus* applies only to genuine governmental benefits, not the right to sell in a market generally. In *Horne*, the federal government forced raisin producers to reserve a portion of their crop for acquisition by the government. 576 U.S. at 355. The government argued that the raisin producers could not challenge the reserve requirement under the Takings Clause, since they “voluntarily choose to participate in the raisin market,” and could avoid the reserve requirement by “plant[ing] different crops” or selling grapes for “juice or wine.” *Id.* at 365.

This Court disagreed, definitively rejecting “the idea that [*Ruckelshaus*] may be extended by regarding basic and familiar uses of property as a ‘Government benefit’ on the same order as a permit to sell hazardous chemicals.” *Id.* at 366. The government may not sidestep the Takings Clause by “characteriz[ing]” a taking “as part of a similar voluntary exchange.” *Ibid.* While selling a product “in interstate commerce” is “certainly subject to reasonable government regulation,” it is “not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection.” *Ibid.* For the same reasons, Oregon cannot force

manufacturers to choose between abandoning their trade secrets and exiting the market altogether.

Indeed, this is an *a fortiori* case. HB 4005’s disclosure regime is not limited to businesses that *choose* to sell their products in Oregon. Rather, it applies to anyone who “manufactures a prescription drug that *is sold* in th[e] state.” Or. Rev. Stat. § 646A.689(1)(e) (emphasis added). As a result, drug manufacturers that sell their products to national wholesalers—none of which are located in Oregon—will nevertheless be subject to HB 4005 if those wholesalers distribute the product to Oregon consumers. To avoid forced disclosure of its trade secrets, a manufacturer would have to refrain from doing business with wholesalers *nationwide*. This Court has never allowed States to exact such a price from those seeking to safeguard their property rights.

#### **B. The Decision Below Splits with Other Circuits**

The Ninth Circuit, by treating a “highly regulated” market as a categorical bar to relief under the Takings Clause, created a split among the lower courts. Other Circuits have expressly rejected such a *per se* approach, instead treating the pervasiveness of regulation as merely one factor bearing on a property-holder’s reasonable expectations.

In *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002) (en banc), the First Circuit considered a Massachusetts law that required tobacco manufacturers to submit ingredient lists for their cigarettes and authorized public disclosure of those lists whenever officials concluded that doing so “could reduce risks to public health.” *Id.* at 26. The First Circuit held that this statutory scheme violated the Takings Clause on its face, because the compelled public disclosure would cause the “trade secrets [to] lose all value.” *Id.* at 41; see *id.* at 46-47.

In so ruling, the en banc First Circuit expressly rejected the argument that the Ninth Circuit adopted here. The First Circuit acknowledged that tobacco is “subject to heavy regulation.” *Id.* at 26. Invoking *Ruckelshaus*, therefore, Massachusetts argued that it had given tobacco manufacturers a “valuable government benefit”—namely, “the right to sell tobacco products in Massachusetts.” *Id.* at 47. But the court disagreed that “allowing a manufacturer to simply sell its legal product [wa]s” equivalent to the pesticide registration at issue in *Ruckelshaus*. *Ibid.* The court instead concluded that “Massachusetts cannot condition the right to sell tobacco on the forfeiture of any constitutional protections the [manufacturers] have to their trade secrets.” *Ibid.*

The Federal Circuit, too, has held that “[a] property owner does not automatically relinquish her Fifth Amendment rights by entering a highly regulated industry.” *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1270 (Fed. Cir. 2017). Instead, the court treats whether a plaintiff operates in a “highly regulated industry” as one of three “considerations relevant to the determination of a party’s reasonable expectations.” *Ibid.* (quotation marks omitted). Along with the nature of the industry, the court also considers “whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property,” and “whether the plaintiff could have ‘reasonably anticipated’ the possibility of such regulation in light of the ‘regulatory environment’ at the time of purchase.” *Apollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc)).

Cases applying the Federal Circuit’s multi-factor analysis show that the Ninth Circuit’s per se rule is an outlier. In *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), for instance, the court addressed

new restrictions on property-owners that participated in federal programs for low-income housing—paradigmatically a highly regulated industry. *Id.* at 1323. The court acknowledged that businesses “in a heavily-regulated industry should reasonably expect certain types of regulatory changes that may affect the value of its investments.” *Id.* at 1350. Nevertheless, the court continued, “that does not mean that *all* regulatory changes are reasonably foreseeable or that regulated businesses can have *no* reasonable investment-backed expectations whatsoever.” *Ibid.* The court accordingly held that the new restrictions amounted to a compensable taking. *Id.* at 1350–53; see *Chancellor Manor v. United States*, 331 F.3d 891, 904 (Fed. Cir. 2003) (rejecting government’s argument that property-owner “could not have had reasonable expectations” when operating in “highly regulated field”).

### C. This Case Is an Ideal Vehicle to Address a Significant Question Under the Takings Clause

Recognizing “that the protection of private property is indispensable to the promotion of individual freedom,” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021), this Court has often granted review to prevent the lower courts from “relegat[ing] the Takings Clause ‘to the status of a poor relation’ among the provisions of the Bill of Rights,” *Knick v. Township of Scott*, 588 U.S. 180, 189 (2019) (citation omitted).

The Ninth Circuit’s approach effectively eliminates *all* takings protection for businesses in highly regulated markets. By treating “the ability to sell a highly regulated product” as a discretionary “benefit,” which the government may condition however it wishes, App. 67a, the decision below permits States to demand onerous conditions—even abandonment of property rights—without any compensation under the Takings Clause.

The implications of such a rule are staggering. Trade secrets are an “integral part of America’s economic well-

being,” and their protection “ensures continued growth and innovation.” H.R. Rep. No. 114-529, at 4, 6 (2016) (report on the Defend Trade Secrets Act of 2016). Yet under the decision below, legislatures that are already experimenting with aggressive “transparency” mandates will have every incentive to follow Oregon’s lead, insisting that companies who dislike the bargain “can decide to forego” doing business there. App. 68a.

Moreover, the Ninth Circuit’s logic is not restricted to “intangible” property like trade secrets. App. 60a-61a. It applies equally to all forms of property: goods, machinery—even land. Nor is the court’s reasoning limited to the pharmaceutical industry; it applies to any market that a court decides is sufficiently “regulated.” Only this Court can restore the settled understanding that the Takings Clause does *not* allow a State to treat the destruction of its property as the standard cost of doing business.

This case is an ideal vehicle to decide the Takings Clause question. PhRMA brought a facial challenge, and the case was resolved on cross-motions for summary judgment without material factual disputes. The Ninth Circuit addressed the takings issue in a published opinion and denied rehearing. This case accordingly presents a pure question of constitutional law.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2026