No. 25-1018

IN THE
Supreme Court of the United States

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,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. When a state law requires a pharmaceutical company to file reports with the government disclosing information about drug pricing, does that law violate the company's right to free speech?

2. When a state law permits disclosure of trade secrets reported to a state regulatory body if that disclosure is in the public interest, is that law *facially* invalid under this Court's precedent expressly permitting the disclosure of trade secrets in some circumstances?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

INTRODUCTION

To introduce more transparency into a market where rising prices have burdened the state treasury and citizens' pocketbooks, the Oregon Legislature passed a law requiring prescription drug manufacturers to file reports with a state regulatory agency if they increase the price of a drug beyond a specified threshold. The court of appeals correctly held: (1) that, under *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), those reports do not amount to compelled speech in violation of the First Amendment; and (2) that, under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the possible future public disclosure of information contained in those reports does not make the law facially invalid as a regulatory taking under the Fifth Amendment. That decision applied settled law regarding both commercial speech and regulatory takings, and it does not create or implicate any circuit split. PhRMA's complaints reduce to disagreements over how those circumstance-specific doctrines apply to the particular facts of this case. This court should deny *certiorari*.

STATEMENT OF THE CASE

This case is a challenge to reporting requirements enacted in Oregon's Prescription Drug Price Transparency Act, known more generally as House Bill No. 4005 ("HB 4005"). (Pet. App. 5a). At issue here are two provisions contained within that law.

First, HB 4005 requires that, as a condition of being authorized to sell their products in Oregon, drug manufacturers who increase prices beyond a specified threshold must report to the Oregon Department of Consumer and Business Services ("DCBS") information related to certain prescription drugs—including, as relevant here, "[t]he factors that contributed to the price increase, 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." (Pet. App. 6a–9a (identifying that provision as the "Reporting Requirement")).

Second, HB 4005 requires DCBS to publicly post on its website all information disclosed by drug manufacturers under various reporting obligations, unless that information is claimed to be a trade secret. (Pet. App. 9a–10a). But that trade-secret exemption does not apply to any trade secret for which disclosure would be in the public interest. (Pet. App. 9a–10a (identifying that provision as "Public-Interest Exception")).

A. Proceedings in the District Court

In its complaint, PhRMA challenged both the Reporting Requirement and the Public-Interest Exception as unconstitutional, claiming that the Reporting Requirement amounts to compelled speech in violation of the First Amendment and that the Public-Interest Exception amounts to an uncompensated taking in violation of the Fifth Amendment. (Pet. App. 5a, 10a).

The district court allowed relief on both claims. (Pet. App. 11a–14a). On the compelled-speech claim, the district court concluded that the Reporting Requirement's disclosures are "'best categorized as commercial speech'" under *Bolger*, 463 U.S. 60, but failed to survive the intermediate-scrutiny test applicable to commercial speech under *Central Hudson*, 447 U.S. 557. (Pet. App. 12a–13a (quoting district court opinion)). On the takings claim, the district court concluded that the Public-Interest Exception was at most a regulatory taking rather than a *per se* taking, and it determined that the law failed to survive the test applicable to such takings under *Penn Central*, 438 U.S. 104. (Pet. App. 13a–14a).

B. The Court of Appeals Decision

In the decision on review, the court of appeals reversed the district court's grant of summary judgment in favor of PhRMA on both claims. (Pet. App. 5a). On the compelled-speech claim, a majority of the court of appeals agreed with the district court that the Reporting Requirement compelled only commercial speech under *Bolger*, (Pet. App. 45a), but it disagreed with the district court that the law could not survive intermediate scrutiny under *Central Hudson*, (Pet. App. 51a). On the takings claim, the court of appeals unanimously agreed with the district court that a challenge to the Public-Interest Exception should be analyzed as a regulatory taking, (Pet. App. 61a), but it unanimously disagreed with the district court that *every* application of

that law would be impermissible under the *Penn Central* test, (Pet. App. 62a, 74a).

1. The First Amendment Claim

Before disposing of the First Amendment claim, the court of appeals discussed the difficulty of assessing compelled-speech challenges to "government reporting requirements," which it observed are "a common feature of modern government." (Pet. App. 15a–17a (citing examples including requirements to report financial information to the Internal Revenue Service, to report corporate governance information to the Securities and Exchange Commission, to report information about chemical use to the Environmental Protection Agency, and to report adverse medical events to the Food and Drug Administration)).

The court of appeals identified two possible approaches to determining the applicable level of scrutiny for government reporting requirements. (Pet. App. 17a). Under PhRMA's preferred approach, requirements to report information to the government would be treated no differently than laws that mandate disclosures directly to private parties or to the general public—that is, as categorically content-based speech regulation, which is subject to strict scrutiny except when the speech is commercial. (Pet. App. 17a–18a). Alternatively, under the approach advanced by Oregon DCBS, government reporting requirements would be subject to strict scrutiny (as compelled content-based speech) only when they mandate "political or ideological" statements. (Pet. App. 18a–19a).

After discussing reasons supporting the second of those approaches, the court of appeals ultimately declined to choose between them because "both approaches lead to the same conclusion" in this case. (Pet. App. 34a). That was so because the court of appeals agreed with the district court that the Reporting Requirement's disclosures amount to commercial speech, relieving the need for it to survive strict scrutiny under either of the two approaches. (Pet. App. 34a).

In concluding that the disclosures were commercial speech, the court of appeals applied this Court's holding that the "'core notion of commercial speech is speech which does no more than propose a commercial transaction.'" (Pet. App. 35a (quoting *Bolger*, 463 U.S. at 66; brackets and some internal quotation marks omitted)). The court of appeals reasoned that, although the compelled disclosures in these cases did not formally propose a commercial transaction, the core commercial-speech definition nevertheless applied because the disclosures "provided parties to actual or potential commercial transactions with information about those transactions." (Pet. App. 37a (internal quotation marks omitted)).

Having concluded that the disclosures were commercial speech under *Bolger*, the court of appeals then explained that the Reporting Requirement was subject to no more than intermediate scrutiny under any proposed analysis and that it survived such review. (Pet. App. 45a–46a). Disagreeing with the district court on

this point, the court of appeals concluded: that HB 4005's stated purpose of reducing information asymmetries is a substantial governmental interest, (Pet. App. 46a–48a); that the Reporting Requirement directly advances that interest in light of "evidence showing a correlation between drug pricing transparency laws and reductions in drug price increases," (Pet. App. 48a–50a & n.27); and that the Reporting Requirement is not more extensive than necessary to further that interest, (Pet. App. 50a–51a).

Dissenting, Judge Bea viewed the majority's analysis as a misapplication of *Bolger* and inconsistent with Ninth Circuit precedent; he would have concluded that the disclosures were non-commercial speech and therefore subject to strict scrutiny that it cannot survive. (Pet. App. 81a–109a).

2. The Fifth Amendment Claim

In contrast with the First Amendment claim, the court of appeals rejected PhRMA's Fifth Amendment challenge unanimously, with both the majority and the dissent agreeing that PhRMA could not succeed on the facial challenge it had chosen. (Pet. App. 74a, 76a n.3)

In reaching that result, the court of appeals first concluded that the "pre-enforcement posture" of PhRMA's challenge did not present a ripeness obstacle because the asserted claim is facial—presenting a question whether every invocation of the Public-Interest Exception constitutes a taking and therefore allowing a court to dispense with the specific enforcement

facts that are typically needed to apply *Penn Central*'s fact-specific standard. (Pet. App. 54a–59a).

After thus resolving justiciability, the court of appeals next agreed with the district court that PhRMA's challenge to the potential disclosure of trade secrets under the Public-Interest Exception must be analyzed as a regulatory taking because that was the analysis applied in "the only Supreme Court case addressing an alleged taking of trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)." (Pet. App. 60a–61a).

The court of appeals then assessed the Public-Interest Exception under the "fact-intensive" standard for regulatory takings articulated by this Court in *Penn Central*, and it concluded that PhRMA could not prevail on its facial challenge because it had not shown that the law would be valid under no conceivable set of circumstances. (Pet. App. 62a–74a). In particular, the court of appeals observed that an application of the Public-Interest Exception would be "materially indistinguishable" from the trade-secret disclosures that *Monsanto* held were permissible under the Fifth Amendment. (Pet. App. 67a). The dissent concurred. (Pet. App. 76a n.3).

REASONS FOR DENYING THE PETITION

This case does not present any question that warrants this Court's review. The court of appeals' definition of commercial speech reflects a faithful application of *Bolger* and does not conflict with any decisions of this Court or other courts of appeals. It correctly applied

intermediate scrutiny under *Central Hudson* by requiring a demonstrated correlation between the compelled disclosures and the law's stated goals of improving the unique and highly regulated pharmaceutical market. And it rejected the takings challenge under *Penn Central* based on a routine application of settled legal principles to a facial challenge. This Court should deny *certiorari*.

A. The court of appeals resolved this case by applying a commercial-speech definition entirely consistent with the decisions of this Court and other courts of appeals.

Contrary to PhRMA's contentions, (*see* Pet. 11–16), the court of appeals did not announce a novel test for "government-compelled disclosures" in this case. Instead, its ultimate holding rests on a faithful application of this Court's core commercial-speech definition under *Bolger*.

To be sure, the court of appeals devoted much of its opinion to evaluating the merits of "two different approaches for determining the applicable level of scrutiny" for government reporting requirements like those challenged in this case. (Pet. App. 18a–34a). But in its ultimate holding, the court of appeals declined to "resolve" which of those two approaches was required because both led "to the same conclusion" when applied to commercial speech, and because the Reporting Requirement's disclosures here qualified as commercial speech under existing precedent. (Pet. App. 34a; *see also* Pet. App. 18a–19a (recognizing that under either

approach, lower scrutiny would apply to commercial speech)).

In reaching that conclusion, the court of appeals focused its inquiry on whether the disclosures propose a commercial transaction. (Pet. App. 35a–37a). That standard mirrors this Court's core definition of commercial speech. *See, e.g.*, *Bolger*, 463 at 66 (explaining that "the core notion of commercial speech" is "speech which does no more than propose a commercial transaction" (internal quotation marks omitted)). From there, the court of appeals reasoned that speech proposing a commercial transaction includes speech that provides information about such a transaction to actual or potential participants in that transaction. (Pet. App. 37a).

And then the court of appeals applied that standard to the specific facts of the highly regulated pharmaceutical market, explaining that the challenged disclosures "communicate the terms of potential commercial transactions" by "communicat[ing] product-specific economic information about prescription drugs that are available for purchase on the market," of a sort "that manufacturers already disclose to the federal government and/or the public" and that is otherwise "tethered to commercial transactions." (Pet. App. 38a; *see also id.* 39a ("Indeed, the explicit purpose of HB 4005 is to provide market participants with information to facilitate future commercial transactions between drug manufacturers and market participants.")).

Neither the rule of law the court of appeals used nor its application to the facts of this case conflicts with any decision from another court of appeals. No circuit applies a rote, mechanical, or formulaically categorical definition of commercial speech—and certainly not one limited strictly to advertisements as PhRMA appears to contend. *See, e.g.*, *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013) (explaining that "context matters" when identifying commercial speech); *Nat'l Inst. of Family & Life Advocates v. James*, 160 F.4th 360, 374 (2d Cir. 2025) (similar, citing *Greater Baltimore* and a decision from the Ninth Circuit); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) ("Although commercial-speech cases generally rely on the distinction between speech that proposes a commercial transaction and other varieties of speech, it's a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this 'core' definition" because "there is a 'common-sense distinction' between commercial speech and other varieties of speech[.]" (internal citation omitted)).

Given the analysis supporting the ultimate holding that the court of appeals reached, the most that PhRMA could argue about the opinion is that it misapplied this Court's core commercial-speech definition to the unique facts of this case, not that it changed that definition or created a novel rule categorically applicable to government-compelled disclosures. *Cf. Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S.

755, 767–68 (2018) (disapproving of decisions in which "[s]ome Courts of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules").

But allowing review on the merits of that fact-bound argument is not a sound basis for granting *certiorari*. And even if the court of appeals in this case refined the definition of commercial speech in some meaningful way—which it did not for reasons just explained—that would not support *certiorari* either. This Court has long and correctly understood that identifying commercial speech on particular facts will often present "close[] question[s]," much as it did in *Bolger*, where this Court developed factors to inform that definition. 463 U.S. at 66. That is, the definition of commercial speech is intractably circumstance specific and not amenable to categorical rules. *See, e.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech * * *."); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (recognizing that "ambiguities may exist at the margins of the category of commercial speech").

Indeed, PhRMA cites no case from this Court or any court of appeals that has ever declined, specifically or categorically, to apply the commercial-speech doctrine

to government-required disclosures regarding the sale of commercial products. PhRMA suggests a conflict here with decisions cited from other circuits, but none involve government-required disclosures, let alone those connected to the sale of commercial products or to pricing, both of which are inherently commercial activities. (*See* Pet. 14–15).

For example, in *James*, the Second Circuit declined to apply the commercial-speech doctrine to "religiously and morally motivated statements about [abortion-pill reversal] on [the plaintiffs'] website, social media, and in other materials," intended to "provide the public with information" on that subject. 160 F.4th 360 at 366. Unlike here, the speech at issue was neither a disclosure to regulators nor connected to pricing or other inherently commercial activity.

Similarly, in *Greater Baltimore. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, the Fourth Circuit declined to apply the commercial-speech doctrine to a government-mandated sign intended to "notify[] clients" in pregnancy center waiting rooms when abortion or birth-control services are not available. 879 F.3d 101, 106, 108–09 (4th Cir. 2018). Again, that speech was not a disclosure to regulators about pricing or other commercial activity. Indeed, the analysis turned largely on the non-profit (or non-commercial) nature of the plaintiff, and the Fourth Circuit expressly entertained "the possibility that another facility in different circumstances could engage in

commercial speech" by posting the mandated sign. *Id.* at 109.

Likewise, in *Edward Lewis Tobinick, MD v. Novella*, the Eleventh Circuit declined to apply the commercial-speech doctrine to two articles posted on a "Science–Based Medicine" blog with a ".org" domain name, intended to serve "educational purposes" for the "public." 848 F.3d 935, 940, 950 (11th Cir. 2017). And the other cited decisions held nothing more than that certain advertisements were commercial speech, without opining on whether other statements might or might not also qualify as commercial. *Jordan*, 743 F.3d at 512, 517–22 (holding that an "ad in the commemorative issue [of Sports Illustrated Presents] qualifies as commercial speech"); *Semco, Inc. v. Amcast*, Inc., 52 F.3d 108, 110, 112–14 (6th Cir. 1995) (holding that a trade-publication "article peppered with advertising" was commercial speech). None of those cases involved disclosures to regulators about pricing or other commercial activity.

Finally, even if refining the commercial-speech definition were a question worthy of *certiorari*, it should wait for a case close enough that performing that task will affect the outcome. But this case presents a poor vehicle for such refinements because the outcome is likely the same regardless how commercial speech is defined—even the district court classified the challenged disclosures as commercial speech when ruling in favor of PhRMA. (*See* Pet. App. 12a).

At a minimum, if more guidance from this Court is necessary, that guidance will be better provided in a case presenting concrete facts to which the commercial-speech standard can be carefully applied—not in a facial challenge like this one, which requires the Court to apply that standard across all possible applications of the challenged law, to determine whether its impermissible effects are more substantial than its permissible ones. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 745–47 (2024) (Barrett, J., concurring) (discussing "the dangers of bringing a facial challenge" under the First Amendment, which presents "a daunting, if not impossible, task" and "forces a court to bite off more than it can chew" because it requires the Court to analyze a challenged law's impact on speech in a "broad swath of varied" facts). Particularly when answering a question as fact-bound as defining the margins of the commercial-speech category, concrete facts are essential and are wholly absent here.

B. The court of appeals allowed the compelled disclosures to survive intermediate scrutiny only upon a demonstrated correlation between those disclosures and the law's stated goals.

Because the Reporting Requirement compels only commercial speech, the court of appeals upheld that law by applying *Central Hudson*'s intermediate-scrutiny test. That analysis does not conflict with any decisions of this Court or other court of appeals.

In PhRMA's view the court of appeals applied intermediate scrutiny in an "indefensible" manner that creates a circuit split because it "treats reducing information asymmetries as sufficient, in itself, to justify government-compelled disclosures." (Pet. 18–19 (internal quotation marks omitted)). Yet even PhRMA recognizes that the court of appeals "did acknowledge that 'consumer curiosity alone is generally insufficient as a substantial state interest,' and that it 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.'" (Pet. 22 (quoting Pet. App. 47a)). PhRMA simply views that limitation as "puzzling" because "speculation about how disclosures might reshape bargaining dynamics cannot substitute for evidence that the compelled speech actually does address a concrete harm." (Pet. 22).

At bottom, then, PhRMA's concern about the intermediate-scrutiny analysis in this case reduces to a complaint that the court of appeals speculated about the effects of information asymmetries in the absence of evidence about them. Yet the court of appeals explicitly cited empirical "evidence showing a correlation between drug pricing transparency laws and reductions in drug price increases." (Pet. App. 49a n.27). Such evidence will not be available in every instance of a law enacted solely to satisfy consumer curiosity, and the opinion here does not require courts to uphold such laws under intermediate scrutiny in the absence of such evidence.

For that reason, the application of intermediate scrutiny here is not inconsistent with the decisions of any other circuit. Certainly, such empirical evidence was not available in *Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), which PhRMA cites as reflecting a circuit split. (*See* Pet. 19–20). In *Amestoy*, the Second Circuit invalidated a law that required dairy manufacturers to identify products derived from dairy cows treated with a synthetic growth hormone (rBST) used to increase milk production. 92 F.3d at 69. But the decision concluded that the challenged law served no substantial governmental interest only because it did not even purport to identify any health or safety concerns connected to the required disclosures—to the contrary, the only available evidence was that, "[a]fter exhaustive studies, the FDA has concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated with food products derived from cows treated with rBST." *Id*. at 73.

And the availability of empirical evidence supporting the efficacy of the disclosures here makes the decision here fully consistent with *American Meat Institute v. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*). (*See* Pet. 20 (discussing that case)). In *American Meat Institute*, the D.C. Circuit upheld a law requiring country-of-origin labeling for meat products, concluding that it served a substantial governmental interest because of "the context and long history of country-of-origin disclosures to enable consumers to choose American-made products[.]" 760 F.3d at 23.

That is, the law at issue advanced the substantial interest of "supporting American farmers and ranchers against their foreign competitors." *Id.* at 33 (Kavanaugh, J., concurring). Although that effect was not demonstrated by empirical evidence, it was "widely understood" that such labeling "causes many American consumers (for a variety of reasons) to buy a higher percentage of American-made products, which in turn helps American manufacturers, farmers, and ranchers as compared to foreign manufacturers, farmers, and ranchers." *Id.* at 32. Here, the availability of empirical evidence makes the substantial governmental interest even stronger than it was in *American Meat Institute*—and this case therefore presents even less concern of "free-wheeling government power" to compel disclosure based on "consumer curiosity alone." *Id.* (internal quotation marks omitted).

Given the narrowness of the decision by the court of appeals, PhRMA's concerns about a "growing wave" of transparency laws are unwarranted. (Pet. 23). Transparency and public disclosure laws have long existed in various forms. Consider, for example, the exhaustive disclosure requirements imposed by the Securities Exchange Commission on public corporations. *See generally, e.g.*, 17 C.F.R. § 229.401–08 (requiring publicly traded corporations to submit information regarding corporate management and governance). And whatever concerns PhRMA or its *amicus* might have about *other* potential disclosure requirements, those concerns can be better addressed in cases actually challenging them, rather than under the narrow facts

presented in this case, which involves disclosure of economic information related to the pricing of a specific physical product in a highly regulated and unique (but longstanding) industry. That kind of regulation is not very different from those long accepted in modern economic life, and it bears no meaningful relation to *amicus*'s feared or hypothetical regulations involving novel and intangible technological products such as social media and artificial intelligence, or relatively unregulated industries such as apparel manufacturing.

C. The court of appeals rejected the takings challenge in a routine application of settled legal principles to a facial challenge.

Finally, the challenged decision was a routine and unanimous application of *Penn Central*. The court of appeals here did not—contrary to PhRMA's argument, (Pet. 25)—nullify takings-clause protections for anyone, whether highly regulated or not. Instead, it rejected only a *facial* claim, explicitly leaving for another day whether an as-applied claim might succeed in a future case on more specific facts. In assessing that facial challenge under a stringent invalid-under-all-applications standard, the court of appeals hewed closely to this Court's precedents on facial challenges, which have expressly "made facial challenges hard to win" because they "often rest on speculation about the law's coverage and its future enforcement" while "threaten[ing] to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways." *Moody*, 603 U.S. at

723 (internal quotation marks omitted); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494–95 (1987) (explaining that a facial takings challenge is an "uphill battle" because it requires establishing whether the "mere enactment" of a law interferes with property rights).

PhRMA's claim here presents no reason to depart from the usual standard for assessing facial claims, and PhRMA has not come close to establishing that the Public-Interest Exception will be invalid in *every* application.

Indeed, this Court's own precedent—in its only case assessing a claimed regulatory taking of a trade secret—establishes that the law would be valid in at least some circumstances. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, (1984). As the court of appeals explained, the challenged law here "is materially indistinguishable" from a law upheld in *Monsanto*, where that law authorized the disclosure of trade secrets voluntarily disclosed to the state with full notice that those secrets might be released to the public under certain circumstances. (Pet. App. 66a–67a). As in *Monsanto*, the risk of public disclosure is the price of "do[ing] business in the highly regulated pharmaceutical industry." (Pet. App. 67a (internal quotation marks omitted)).

And PhRMA is mistaken to suggest that the pharmaceutical industry is inapt for comparison with the pesticide industry at issue in *Monsanto*, which held that the plaintiff there could permissibly be required

to accept such risks in order to do business in a similarly regulated industry. (*See* Pet. 29 (arguing against comparing drug manufacturers with pesticide manufacturers whose approval to sell products has long been viewed as something the government could withhold)). PhRMA appears to view its business as more akin to the one at issue in *Horne v. Department of Agriculture*, where raisin producers prevailed in their challenge to a law requiring raisin growers to "physically set aside" a percentage of their crop for the government to dispose in ways necessary to "maintaining an orderly market." 576 U.S. 350, 354, 367 (2015).

But the pharmaceutical industry is more akin to the pesticide industry than it is to the raisin production industry—both are highly regulated, and the right to sell an agricultural crop is a more basic traditional property right than a governmental benefit like permission to sell prescription drugs, which are not naturally occurring fruits but instead are essentially chemicals just like pesticides. *See Horne*, 576 U.S. at 366 (explaining that "[s]elling produce in interstate commerce" is a "basic and familiar use[] of property" and not a "special government benefit" on "the same order as a permit to sell hazardous chemicals"). PhRMA's reliance on *Horne* is misplaced for other reasons as well—that case involved a *per se* physical taking, whereas this case involves disclosure of a trade secret that is clearly a regulatory taking under *Monsanto*.

Regardless, nothing in the challenged decision prevents PhRMA or some other highly-regulated industry

participant from prevailing on an as-applied challenge to the disclosure of trade secrets on future facts—just as the plaintiff did on some of its claims in *Monsanto*, which remains good law. If the court of appeals rules otherwise on such particularized facts in an as-applied takings challenge, perhaps this Court will be required to step in then.

Awaiting an as-applied challenge also sidesteps a serious jurisdictional question discussed by the courts below but ignored by the petition. A pre-enforcement challenge—involving a state law that permits, but does not require, disclosure and that the state agency has not threatened to enforce—raises a question whether the dispute is sufficiently ripe to support Article III jurisdiction. *See generally, e.g.*, *Nat'l Park Hosp. Ass'n v. Dept. of Interior*, 538 U.S. 803, 807–08 (2003) (explaining that "[r]ipeness is a justiciability doctrine" that is drawn from Article III limitations and designed to protect administrative "agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (internal quotation marks omitted)).

The court of appeals concluded, after significant analysis, that the dispute here was ripe if limited to a facial challenge. (Pet. App. 57a–59a). That may be right. But if this Court grants review, it will have to decide the jurisdictional question itself. Petitioners do not contend that the jurisdictional question is itself worth of *certiorari*, but it is unavoidable. At best, it risks a distraction from briefing and deciding the

merits; at worst, it may present an obstacle to reaching those merits at all. If this Court sees a benefit in addressing the merits of the takings issue presented here, it would be better served waiting for an as-applied challenge that is not complicated by such jurisdictional questions.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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