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.

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

REPLY BRIEF FOR THE PETITIONER

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The Ninth Circuit, alone among the courts of appeals, has adopted two per se constitutional rules: One allows the government to compel businesses to generate and publish "product-specific" narratives under diminished First Amendment scrutiny; the other allows the government to take property from "highly regulated" businesses without compensation. Oregon does not seriously dispute the novelty of the Ninth Circuit's approach to these issues, nor does it defend either rule on the merits. Instead, it tries to rewrite the decision below, recasting these categorical rules as fact-bound applications of settled law. But the actual ruling is sweeping in its implications.

Indeed, the decision is *already* being invoked outside the pharmaceutical context to justify the compelled disclosure of sensitive proprietary information in emerging industries. That should come as no surprise. Rules that turn on whether information is "product-specific," and whether an industry is "regulated," supply no meaningful limits. Instead, they supply a roadmap: The government need only describe compelled-speech requirements as

necessary to promote "transparency," and claim that the confiscation of property is a condition of market participation. Yet the Constitution does not treat speech and property rights as so malleable. The petition should be granted.

I. THE NINTH CIRCUIT'S NOVEL APPROACH TO COMPELLED DISCLOSURES WARRANTS REVIEW

A. The Standard for Commercial Speech

Oregon does not dispute that the Ninth Circuit established a categorical rule under which compelled disclosures of "product-specific" information automatically qualify as commercial speech, subject only to intermediate scrutiny. Instead of defending that rule, Oregon recharacterizes it (Opp. 7-8) as a "faithful application" of *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983). According to Oregon, the Ninth Circuit merely held "that speech proposing a commercial transaction *includes* speech that provides information about such a transaction to actual or potential participants in that transaction." Opp. 9 (emphasis added). That attempted reframing fails twice over.

First, it contradicts the Ninth Circuit's explicit acknowledgement that the speech required by HB 4005 "*does not* propose a commercial transaction." Pet. App. 27a (emphasis altered). Indeed, the court conceded that applying *Bolger* "strictly" would require treating the compelled speech as non-commercial—which is precisely why it deemed that test "inapt" and fashioned a different one. *Ibid.*

Second, Oregon's attempted recharacterization of the ruling below would not even apply to HB 4005 itself, which *does not* require disclosure of information "about" a commercial transaction. Rather, it requires manufacturers to disclose their *internal* pricing strategies, profit margins, R&D costs, and a narrative explanation of their decision-making. See Or. Rev. Stat. § 646A.689(3); Or. Admin. R.

836-200-0530(2)(h). None of that information describes the drug-product being sold or the terms of a sale. And HB 4005's audience is *not* limited to "actual or potential participants" in any transaction, Opp. 9; the law mandates disclosure to a state agency, which must post the information on its public website.

Oregon's fallback argument is that "the outcome [here] is likely the same regardless how commercial speech is defined." Opp. 13. The Ninth Circuit obviously disagreed, which is why it replaced the *Bolger* framework with a novel test tailored to "government reporting requirements." Pet. App. 27a-28a Indeed, the court expressly stated that applying existing doctrine "strictly" would yield a *different* result: namely, that HB 4005 compels non-commercial speech, necessitating strict scrutiny—and almost certain invalidity. *Ibid*; see Pet. App. 82a (Bea, J., dissenting) (*Bolger* "should have ended our inquiry"). The outcome here thus turns on the correct legal standard.

Oregon attempts to distinguish other Circuits' decisions on the ground that they did not involve "disclosures regarding the sale of commercial products." Opp. 10-13. But the split is about *methodology*. Oregon does not dispute that other Circuits consistently (1) treat the "core notion of commercial speech" as speech that "does no more than propose a commercial transaction," and (2) apply the *Bolger* factors when evaluating speech falling outside that core. See Pet. 13-14 (citing cases from Fourth, Sixth, Seventh and Eleventh Circuits). Here, the Ninth Circuit did neither, instead applying a unique test for "product-specific" compelled disclosures. Pet. App. 39a. The fact that no other Circuit has fabricated a similar test is a reason to *grant* review, not deny it.

B. Application of Intermediate Scrutiny

1. Oregon does not defend the Ninth Circuit's rationale for upholding HB 4005 under intermediate scrutiny—

namely, that "reduc[ing] information asymmetries" is a sufficiently "substantial interest" to justify compelled disclosures, and that the law directly advances that interest as a matter of "common sense." Pet. App. 47a, 49a. Nor does Oregon dispute that such reasoning is circular. As then-Judge Kavanaugh observed, treating informational asymmetry as a sufficient justification would validate "*any and all* disclosure requirements." *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (emphasis added).

Oregon instead pivots to a *different* rationale: Intermediate scrutiny was satisfied here, it argues, by "empirical 'evidence showing a correlation between drug pricing transparency laws and reductions in drug price increases.'" Opp. 15 (quoting Pet. App. 49a n.27). But Oregon introduced no such evidence, which is why the Ninth Circuit declared it irrelevant that Oregon "failed" to prove HB 4005 affects drug pricing on the ground that "the State *has never claimed* that HB 4005's reporting requirement itself will directly lower drug prices." Pet. App. 49a (emphasis added). Indeed, the footnote Oregon cites reinforces this point: "HB 4005's stated legislative goal *is not* to lower drug prices." Pet. App. 49a n.27 (emphasis added). Oregon cannot satisfy First Amendment scrutiny based on a rationale that it specifically denied.

In any event, the supposed "evidence" to which Oregon alludes is unpersuasive. The cited footnote references a study cited by an amicus (not Oregon) claiming a temporal "correlation" between a Vermont transparency law and the number of drugs reaching a per-year price-increase threshold. *Ibid.* That study does not even purport to show causation. And HB 4005 was enacted in 2018; the study was published in 2022. If such post-hoc, non-causal data were enough to satisfy *Central Hudson*, the test would be toothless.

2. Oregon again invokes this "empirical evidence" to deny the circuit split regarding application of intermediate scrutiny to compelled disclosures. Opp. 16. But as noted, the Ninth Circuit expressly *disclaimed* any need for evidence, instead upholding HB 4005 based on supposed "common sense" that forced disclosure "directly advances" the goal of reducing information asymmetries. Pet. App. 49a.

That approach conflicts with other Circuits. Under the Ninth Circuit's approach, the dairy manufacturer in *International Dairy Foods Association* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996), would have lost: The required disclosures about rBST were "product-specific," and the State asserted an interest in correcting informational asymmetries; under the Ninth Circuit's test, the disclosures "directly advance[d]" a sufficiently weighty goal. Pet. App. 47a, 49a. Indeed, *Amestoy* correctly observed that if a compelled-disclosure law could be upheld absent "evidence" about the law's "impact," then "there is no end to the information that states could require manufacturers to disclose." 92 F.3d at 73-74.

The D.C. Circuit similarly demands far more than supposed common sense. In *National Association of Manufacturers* v. *SEC*, 800 F.3d 518, 526-27 (D.C. Cir. 2015), it required evidence that the compelled disclosure would "in fact alleviate the harms [the government] recited to a material degree." And in *American Meat Institute*, the court relied on the "long history" of laws requiring country-of-origin labeling. *Id.* at 23. Neither case followed the Ninth Circuit's informational-asymmetry approach, which is "circular" and thus even *less* rigorous than rational-basis review. *Id.* at 31 (Kavanaugh, J., concurring).

C. The Decision Below Merits Review

Oregon attempts to downplay the significance of the decision below. But the ruling has *already* produced far-reaching implications.

1. Oregon disputes neither feature that makes the Ninth Circuit's rule so problematic. First, if reducing informational asymmetries were sufficient, then all forced-disclosure laws would satisfy constitutional scrutiny—since, by definition, they all compel someone *with* information to give it to someone *without* it. Second, the disclosures here inherently call for the generation of new, value-laden speech. HB 4005 does not merely force manufacturers to report historical information; it compels them to compose "narrative description[s] and explanation[s] of all major financial and nonfinancial factors that influenced the[ir] decision" to raise prices. Or. Admin. R. 836-200-0530(2)(h). The law thus compels disclosing new descriptions of internal decision-making, not the price tag.

Oregon argues (at 17) that HB 4005 is no different than well-accepted reporting requirements like SEC disclosures. But information about a publicly traded company's "corporate management and governance" speaks directly to the product being offered to public investors: an ownership interest in the company itself. See 17 C.F.R. § 229.401-08. A prospective shareholder needs to know about the company's leadership structure, which is information about the transaction being proposed.

HB 4005, by contrast, compels disclosure of the manufacturer's *internal* reasons for its business decisions. The strategy behind a drug's list price is not information that typically accompanies a commercial transaction. And if a manufacturer's pricing strategy is fair game, then so is any other aspect of its strategic decision-making. Pet. 23 (citing examples of the "growing wave of intrusive state 'transparency' laws").

2. Oregon argues (at 18) that the decision below applies only to "disclosure of economic information related to the pricing of a specific physical product in a highly regulated and unique (but longstanding) industry." Nothing in the ruling supports that limitation. Instead, the Ninth Circuit's test asks only whether the compelled information is "product-specific." Pet. App. 39a.

Indeed, courts in the Ninth Circuit are *already* applying the decision well beyond the pharmaceutical industry. See xAI Amicus Br. 14-16. In *X.AI Corp.* v. *Bonta*, No. 2:25-cv-12295, 2026 WL 626926, *6-*7 (C.D. Cal. Mar. 4, 2026), a court relied on the decision below to uphold a California law compelling artificial intelligence companies to publicly disclose highly sensitive information about their proprietary training datasets. Such information qualifies as "commercial speech" under the decision in this case, the court explained, because xAI produces a "product," and its training data could theoretically inform a consumer's decisions. *Id.* at *7. Needless to say, AI is not a "physical product," nor is the industry "highly regulated" or "longstanding."

3. Oregon argues (at 14) this Court should await an as-applied challenge. But the questions presented are purely *legal* ones: What standard of scrutiny applies to government-compelled disclosure laws, and what kind of showing suffices to sustain such a law? The answers do not vary with the facts of individual enforcement decisions. Nor does Oregon identify any factual issue that would affect the relevant analysis.

Concrete facts are beside the point, moreover, because the Ninth Circuit held that *no* evidence of practical effect was necessary to sustain HB 4005 under intermediate scrutiny. Pet. App. 49a. The applicable standard is thus outcome-determinative on the existing record: Under the Ninth Circuit's approach, HB 4005 is constitutional without any proof of effectiveness; under this

Court's framework (as applied by the Second and D.C. Circuits), it is not.

II. THE NINTH CIRCUIT'S "HIGHLY REGULATED INDUSTRY" EXCEPTION TO TAKINGS PROTECTION WARRANTS REVIEW

A. The Decision Below Splits with Other Circuits

Oregon does not dispute that the Ninth Circuit's "highly regulated industry" exception conflicts directly with the approach of the First and Federal Circuits. Pet. 30-32. The First Circuit has held that a State cannot force tobacco companies to surrender trade secrets as the price of selling a lawful product, even though tobacco is "subject to heavy regulation." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 26, 47 (1st Cir. 2002) (en banc). And the Federal Circuit agrees 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).

The conflict with the Federal Circuit is especially intolerable. It pits the Ninth Circuit—the Nation's most populous Circuit, encompassing States with some of the most active regulatory regimes—against the Circuit with unique responsibility for takings claims. See 28 U.S.C. §§ 1295(a)(3), 1491(a)(1).

B. The Decision Below Is Wrong

Oregon embraces the Ninth Circuit's view that losing their trade secrets is simply "the price" that manufacturers must pay to do business in a regulated market. Opp. 19. Oregon thus analogizes this case to *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), because both involve disclosure of trade secrets submitted to regulators. But Oregon itself identifies (Opp. 19) the critical difference: *Ruckelshaus* involved trade secrets "voluntarily disclosed" to the government, with full notice that the information could later be released. This Court thus

emphasized the voluntary nature of the bargain: Monsanto had "not challenged the ability of the Federal Government to regulate the marketing and use of pesticides," and Federal law had "long" treated "the ability to market pesticides in this country" as a "valuable Government benefit" that could be withheld unless the manufacturer accepted statutory conditions. 467 U.S. at 1007.

Nothing comparable is true here. Oregon offers PhRMA's members no special license, subsidy, registration, or other "governmental benefit" in exchange for their trade secrets. *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 366 (2015). Oregon responds that drugs and pesticides both contain "chemicals," whereas raisins do not. Opp. 20. But *Horne*'s reasoning applies more broadly, to any scenario where the right to sell a product "in interstate commerce" is not granted at the government's sufferance. 576 U.S. at 366.

Indeed, HB 4005 is *not* limited to manufacturers that choose to sell directly in Oregon. The statute applies to any company that "manufactures a prescription drug that *is sold* in th[e] state." Or. Rev. Stat. § 646A.689(1)(e) (emphasis added). A manufacturer that sells to national wholesalers outside Oregon thus may be swept in simply because a product is later resold into the State. The supposed "choice" offered by Oregon is accordingly stark: To avoid the forced disclosure of its trade secrets, a manufacturer would have to refrain from dealing with wholesalers *nationwide*. This Court has never permitted a State to exact that kind of extraterritorial "ransom[]." *Horne*, 576 U.S. at 366.

Finally, nothing about the ruling below turns on whether the government's hostage-taking amounts to a "*per se* physical taking" or a "regulatory taking." Opp. 20. A taking either is or is not part of a voluntary exchange. Regardless, HB 4005 effects a categorical taking because whenever the public-interest exception is invoked, it

results in disclosure of a trade secret that destroys its entire value. See Pet. 27 n.2.

C. This Case Is an Ideal Vehicle to Address a Significant Question

Oregon does not seriously deny that the consequences of the Ninth Circuit's rule are sweeping. Pet. 32-33. If the government may deem market participation a "benefit," and may condition that benefit on surrendering property, then the Takings Clause offers no protection in any industry that a court later characterizes as sufficiently "regulated." Pet. App. 67. Nor is the logic limited to trade secrets. The same theory would allow the government to demand the uncompensated surrender of equipment, inventory, or even land as the price of doing business in the healthcare, energy, finance, technology, or other sectors. Yet constitutional property rights do not turn on how many regulatory provisions apply to a particular industry.

Oregon's vehicle objections are unpersuasive. Oregon first insists (at 18-19) that this case is unsuited to review because PhRMA brought a facial challenge. But Oregon does not dispute the two features that make this case an unusually clean vehicle. First, *every* application of the public-interest exception results in the same constitutional injury: Once the agency determines that publication of a claimed trade secret is in the "public interest," disclosure is *mandatory*, and the trade secret's value is completely destroyed. Pet. App. 56a, 70a-71a. Second, the Ninth Circuit's *reason* for rejecting PhRMA's takings claim did not depend on the particulars of any specific trade secret. It turned instead on a categorical legal rule—namely, that manufacturers lack *any* reasonable investment-backed expectations because they choose to do business in a "highly regulated" industry. Pet. App. 67a.

For the same reason, Oregon is wrong (at 20-21) that PhRMA or its members must wait to file "an as-applied challenge" based on disclosure of a specific trade secret. If the Ninth Circuit's premise is correct—if "the ability to sell a highly regulated product in a government-regulated market" is a governmental "benefit" that may be conditioned on the exposure of trade secrets, Pet. App. 67a—then no facts about a particular disclosure will matter. Per the decision below, the State's answer will always be the same: The manufacturer accepted the risk of public disclosure by participating in the market.

Nor is there any "jurisdictional question" that might impede review. Opp. 21. The Ninth Circuit correctly held that PhRMA may bring this pre-enforcement challenge because "[w]here, as here, 'the State has not disavowed any intention of invoking the challenged provision,'" manufacturers face a "credible threat" that their trade secrets will be publicly disclosed. Pet. App. 55a (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 302 (1979)). Indeed, the threat is more than credible. "PhRMA's theory rests on a single determination by [the agency] that disclosure of a claimed trade secret is in the 'public interest.'" Pet. App. 56a. "Once that determination is made, disclosure under HB 4005 is mandatory." *Ibid.* And upon disclosure, the bell cannot be unrung.

Oregon also offers no reason to think the Ninth Circuit's jurisdictional ruling is wrong. To the contrary, it admits (at 21) the ruling "may be right," while speculating that the issue *could* become a distraction. But the court of appeals found jurisdiction; Oregon does not meaningfully contest that finding; and the merits question was squarely decided in a published opinion. This case presents a clean opportunity to resolve whether a State may sidestep the Takings Clause by recharacterizing the right to sell a

lawful product in a regulated market as a discretionary benefit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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