Nos. 25-749, 25-751

In the Supreme Court of the United States

JANSSEN PHARMACEUTICALS, INC.,
Petitioner,
v.
ROBERT F. KENNEDY, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

BRISTOL MYERS SQUIBB COMPANY,
Petitioner,
v.
ROBERT F. KENNEDY, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* PACIFIC RESEARCH INSTITUTE IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[*]

Pacific Research Institute is a nonprofit, nonpartisan 501(c)(3) organization that promotes free-market policy solutions to everyday problems facing Americans. The decision below frustrates that mission. The Third Circuit rejected the petitioners' challenge to a federal drug-pricing program that empowers the government to coerce drug companies into selling their drugs for less than fair market value. The program is unconstitutional. And because the program reduces the rewards companies can reap from developing effective drugs, it discourages companies from investing in such development, delaying the release of life-saving and life-altering treatments. In hopes of preventing this predictable outcome from coming to pass, PRI files this brief urging the Court to grant *certiorari* and to hold this confiscatory program unconstitutional.

SUMMARY OF ARGUMENT

This case presents a constitutional challenge to a drug-pricing program enacted through the Inflation Reduction Act. Pub. L. No. 117–169, 136 Stat. 1818 (2022). Under that program, the Centers for Medicare and Medicaid Services—"CMS," for short—may demand that drug companies sell their

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[*] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6. Counsel for the parties were timely notified of the *amicus curiae*'s intent to file this brief more than 10 days before the due date. *See* Rule 37.2.

goods to the government at a reduced price. Companies have a nominal option to refuse. But in truth, these companies have no option at all. For if they refuse the so-called "offer," they must either pay a massive excise tax or withdraw *all* of their products from Medicare and Medicaid. Neither choice is viable. The excise tax is so confiscatory that no company would pay it. Pet.App.50a (Hardiman, J., dissenting). (All Pet.App. cites refer to the appendix filed in No. 25-749.) And the enormous size of the Medicare and Medicaid markets makes withdrawal equally impractical. Thus, companies have no choice but to knuckle under by accepting the government's terms. And those terms leave them far worse than they were before the passage of the pricing program.

The program in question violates both the Takings Clause and the unconstitutional-conditions doctrine: CMS acts unconstitutionally when it leverages its monopsony power over the Medicare and Medicaid markets to extract the forced transfer of the drug companies' products at below-market rates. *See* Richard A. Epstein, *Confiscation by Consent: The warped economics of price regulation for pharmaceuticals under the Inflation Reduction Act*, 30 Tex. Rev. L. & Pol. (forthcoming), draft available at https://perma.cc/DVQ8-4ZZL.

The Third Circuit rejected this argument. It reasoned that "there is no physical taking when a party gives up private property as part of voluntary exchange with the government." Pet.App.17a (citing *Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1232 (D.C. Cir. 2023)). And outside the land-permitting context, it said, such voluntary transactions do not violate the unconstitutional-conditions doctrine, either. Pet.App.30a–31a.

The Third Circuit misunderstood the role that voluntary consent plays in both the takings and unconstitutional-conditions contexts. In many private- and public-law contexts, courts give no effect to voluntary consent secured through the improper leveraging of market power. Most notably, it is not a defense to a charge of cartelization that the buyers consented to cartel pricing. Indeed, if consent were a defense to antitrust violations, the entire system of *per se* offenses under the antitrust laws would disappear. The same principles compel the conclusion that drug companies' consent is constitutionally irrelevant when secured by the government's exercise of monopoly or monopsony power. Indeed, given the many areas in which the government exercises such power, the Third Circuit's reasoning creates an avenue the government can easily use to evade constitutional limits.

The Court should grant *certiorari* and reverse the Third Circuit's judgment.

ARGUMENT

The Inflation Reduction Act empowers the government to extort the transfer of patented pharmaceuticals. That action triggers the Fifth Amendment's Takings Clause, which guarantees that no "private property be taken for public use, without just compensation." That the drugs are personal property, not real property, does not affect the analysis. "Nothing" in our constitutional history "suggests that personal property was any less protected against physical appropriation than real property." *Horne v. Dept. of Agriculture*, 576 U.S. 350, 359 (2015). To the contrary, "[a]s this Court" long ago "summed up in *James v. Campbell,* a case concerning the alleged appropriation of a patent by the Government: 'A patent confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.'" *Id.* at 359–60 (quoting 104 U.S. 356, 358 (1882)) (formatting altered, internal citation omitted).

The government eviscerates the Fifth Amendment's protection of private property when it takes patents or patented products at prices below their fair market value. Any forced price reduction violates the unconstitutional-conditions doctrine, too.

In arguing otherwise, the government has insisted that all sales the drug-pricing program compels are consensual; drug companies have a legal right to walk away. But that argument assumes that the law adopts an extreme and untenable libertarian version of consent. Under this version of consent, transactions with the government are consensual whenever the property owner has a legal right to refuse, no matter how irrational or impractical refusal might be.

That extreme version of consent does not comport with our Constitution. Nor does it accord with legal principles more broadly. Consider the antitrust laws. When monopoly power is at stake, as with cartels, consent is utterly irrelevant:

monopolists' transactions are illegal *without regard* to whether they are consensual, and customers may sue for enforcement *without regard* to whether they consented to the transactions at issue. Were the law otherwise, it would be well-nigh impossible for consumers injured by *per se* antitrust violations to sue for redress. This insight matters here because the government often acts as a monopolist. The Fifth Amendment and the unconstitutional-conditions doctrine exist to protect citizens from the government's exploitation of its monopoly position. Treating the government's extreme libertarian version of consent as a defense in the constitutional context would have the same effect it would in the antitrust context: those harmed by the abuse of monopoly power would lack any right to obtain redress for their injuries. While *Parker v. Brown* created a judge-made exception to the antitrust laws for anticompetitive conduct that governments undertake in their sovereign capacities, 317 U.S. 341 (1943), that statutory doctrine does not (and could not) immunize such conduct from scrutiny under the Takings Clause or the unconstitutional-conditions doctrine.

Because the Third Circuit undermined these constitutional restrictions on government power, this Court should grant *certiorari* and reverse.

I. The Inflation Reduction Act enables the government to use its monopsonist position to force drug sales at below-market prices.

In 2022, Congress passed the Inflation Reduction Act. The Act creates the "Drug Negotiation

Program"—"the Program," for short—at the heart of this case. This section explains how the Program works. Because the Program's operation is easiest to understand in light of some background on Medicare and Medicaid—two massive federal healthcare programs through which tens of millions of Americans get prescription drugs—this section starts there.

"Medicare is a federal medical insurance program for people ages sixty-five and older and for younger people with certain disabilities." Pet.App.10a (quotation omitted). "Medicare is divided into Parts, one of which is Part D," a prescription-drug program through which the federal government "subsidizes the cost of prescription drugs and prescription drug insurance premiums for Medicare enrollees." Pet.App.11a (quotation omitted).

Medicaid, for its part, "offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care." *NFIB v. Sebelius*, 567 U.S. 519, 541 (2012). "Today, all 50 States participate in Medicaid." *Medina v. Planned Parenthood S. Atlantic*, 606 U.S. 357, 363 (2025). "To gain payment under Medicaid for covered drugs, a manufacturer must enter a standardized agreement with HHS; in the agreement, the manufacturer undertakes to provide rebates to States on their Medicaid drug purchases." *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 114 (2011).

"Through Medicare and Medicaid, the federal government pays for *almost half* the annual nationwide spending on prescription drugs." Pet.App.11a (emphasis added, quotation omitted).

A. The Inflation Reduction Act empowers CMS to leverage its control over the Medicaid and Medicare markets.

1. Before Congress created the Program, federal law "barred [CMS] from using its market share to negotiate lower prices for the drugs it covered." Pet.App.10a. Under then-existing law, drug companies and pharmacies bargained over price. Each did so with the ability to walk away if they could not come to mutually agreeable terms with the government.

The Inflation Reduction Act upended this market-based, voluntary approach. The Program empowers CMS to negotiate prices directly with drug companies for brand-name drugs. 42 U.S.C. §1320f; 26 U.S.C. §5000D. First, CMS identifies the fifty qualifying single-source drugs with the highest total qualifying expenditures. 42 U.S.C. §1320f-1(d). CMS then ranks these drugs by expenditure, highest to lowest. 42 U.S.C. §1320f-1(b)(1). Finally, CMS selects annually a fixed number of drugs whose prices it negotiates under its new powers. 42 U.S.C. §1320f-1(a). The number increases from ten drugs in the 2026 price period, to fifteen in the 2027 and 2028 periods, and twenty drugs for all subsequent periods. *Id.*; *see also* Pet.App.47a (Hardiman, J., dissenting).

Once CMS selects drugs, the Inflation Reduction Act allows CMS to set prices, employing a dressed-up system of strict controls. Companies submit data to CMS. 42 U.S.C. §1320f-2(a)(4). CMS then makes "a written initial offer that contains [its] proposal for the *maximum fair price* of the drug." 42 U.S.C. §1320f-3(b)(2)(B) (emphasis added). "Not later than 30 days after" receiving the initial offer, the manufacturer must either accept such offer or propose a counteroffer. 42 U.S.C. §1320f-3(b)(2)(C). This option to propose a counteroffer supplies no protection, as the government could always open with an exceptionally low offer that it later agrees to raise to the price it wants. If the parties have not agreed on a price through this process by a statutorily defined date, the manufacturer becomes subject to excise-tax penalties discussed below. 26 U.S.C. §5000D; 42 U.S.C. §1320f-3(b)(2)(E); CMS, *Medicare Drug Price Negotiation Program: Revised Guidance, Implementation of Sections 1191–1198 of the Social Security Act for Initial Price Applicability Year 2026* at 169 (June 30, 2023) ("*CMS Guidance*"). All prior bargaining is done in the shadow of CMS's robust regulatory authority.

How does the CMS calculate its "maximum fair price?" The answer is murky. The statute says that the "maximum fair price negotiated … for a selected drug … shall not exceed the lower of" the amount calculated under one of two subsections. 42 U.S.C. §1320f-3(c)(1)(A). One of those subsections sets prices based on "the average non-Federal average manufacturer price for such drug for 2021, … increased by the percentage increase in the consumer price index for all urban consumers …." 42 U.S.C. §1320f-3(c)(1)(C)(i). This price is then lowered by certain applicable percentages, ranging from 75 to 40 percent. 42 U.S.C. §1320f-3(c)(3). Finally, CMS may, at its discretion, further lower the price by relying on numerous factors, including whether the drug has "therapeutic alternatives" or received "prior Federal financial support." *CMS Guidance* at 132, 150.

2. By design the "maximum fair price" will not equal a drug's fair market value. The reason turns on drug-pricing economics.

Producing new drugs requires high initial fixed costs—companies spend immense amounts on R&D and regulatory approval. *See* Joseph A. DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. Health Econ. 151, 154–56 (2003); *see also* John F. Duffy, *The Marginal Cost Controversy in Intellectual Property*, 71 U. Chi. L. Rev. 37 (2004). Thereafter, companies bear only a low marginal cost for producing each additional dose. But because of the high fixed costs, most drugs cannot be profitable unless drug companies can obtain higher prices from subsequent users willing and able to pay more than marginal cost. To recover the high initial fixed cost drug companies reach different deals with different customers. Accordingly, this standard pricing scheme for drugs necessarily fails if front-end costs cannot be spread over a large base that includes government purchases under Part D. Thus, drug companies cannot receive fair market value if forced to sell at an "average non-Federal average manufacturer price." *See* 42 U.S.C. §1320f-3(c)(1)(C)(i). Because this price is further reduced by 40 percent, 42 U.S.C. §1320f-3(c)(3), the "maximum fair price" is guaranteed to be much lower than a drug's fair market value.

This economic model is not unique to drugs. Indeed, almost two hundred years ago, this Court observed a similar pricing model in the context of contracts giving third parties exclusive franchises to build bridges over rivers. The contracts allowed these parties to charge supercompetitive prices for several years until they recovered their fixed costs. Thereafter, tolls were sharply decreased to cover only marginal costs *See Charles River Bridge Co. v. Warren Bridge Co.,* 36 U.S. 420, 536–37 (1837). Today, as in the nineteenth century, businesses will not invest in products or services if they cannot recover upfront, fixed costs and make a normal profit.

3. In practice, companies have no choice but to accept the CMS-imposed price. True enough, the manufacturer has a *legal* right to "walk away and choose not to do business with the government." Pet.App.49a (Hardiman, J., dissenting). "But a manufacturer that does so must pay a daily excise tax that begins at 185.71 percent and rises to 1,900 percent of the selected drug's total daily revenues from all domestic sales." *Id*. "The Congressional Budget Office observed that '[t]he combination of that excise tax and corporate income taxes could exceed a manufacturer's profits from that product.'" Pet.App.49a–50a (quotation omitted).

A drug company's only alternative to paying this confiscatory tax—a tax "Congress knew that no manufacturer would ever be able to pay," Pet.App.50a—is to "decline to participate in the

Program by terminating Medicare and Medicaid coverage of *all of its products*." *Id.* (citing 26 U.S.C. §5000D(c)). That option is no more viable than paying the confiscatory tax. By law, CMS is the *sole* buyer in this market—a market that comprises over a third of all Americans. And many of those Americans are poor or otherwise unable to secure other forms of health coverage, meaning there is no other avenue for selling these drugs to many consumers. The result? CMS exercises monopsony power: unless drug companies participate in Medicaid and Medicare, they lose access to a massive percentage of the market for drugs, dramatically impairing their ability to turn a profit.

All told, drug companies subject to the program face a trilemma. They must either (1) sell the drugs at the dictated prices, (2) pay a confiscatory tax, or (3) leave Medicare and Medicaid altogether. All choices leave the companies worse off than they were before these negotiations began. But drug companies *must* accede to the demands and choose option one, as they cannot afford to pay the tax or leave the market over which CMS exercises monopsonistic control.

The facts of this case illustrate the Program's coercive nature. CMS has dictated the prices of two drugs, Eliquis (produced by Bristol Myers Squibb) and Xarelto (a Janssen product). Under the program, CMS forced price cuts of 56 and 62 percent for these drugs, respectively. *See* Jenna Philpott, *US government unveils finalized drug prices under Inflation Reduction Act*, Pharmaceutical Technology (Aug. 15, 2024), https://perma.cc/2WK9-R4DF. Both are blood thinners with $18.2

and \$7.4 billion in sales in 2022. Brian Buntz, *The 50 best-selling pharmaceuticals of 2022*, Drug Discovery and Development (Apr. 18, 2023), https://perma.cc/G3CN-6GPF.

II. The Third Circuit's decision below misconstrues the role of consent coerced by government power.

The Program is unconstitutional. The Third Circuit's contrary holding rests on a misunderstanding of the relevance of voluntary consent in the monopoly and monopsony contexts.

A. The Program violates the Takings Clause and the unconstitutional-conditions doctrine.

The parties' *certiorari* petitions and Judge Hardiman's dissent below illustrate why the Program violates the Constitution.

1. Consider first the Fifth Amendment, which forbids the government to take private property for public use "without just compensation."

The government needs the power to take private property for public ends; otherwise, holdouts (like the owner of property needed to connect the east and west ends of the intercontinental railroad) could extort the government (and, ultimately, the taxpayers) in connection with legitimate public projects. For that reason, the Fifth Amendment does not prohibit takings. Instead, its just-compensation requirement protects property owners from governmental abuse by ensuring property owners are left no worse off when the government takes their property. This requirement keeps the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The facts of *Armstrong* drive home this insight. There, subcontractors asserted "materialmen's liens under [Maine] law for materials furnished to a prime contractor building boats for the United States." *Id*. at 41. The U.S. Navy made the liens unenforceable by sailing the ships out of Maine waters. The Court held that this constituted a taking of the subcontractors' materialmen's liens. *Id.* at 48. Had the Court held otherwise, those subcontractors would have borne a huge fraction of the shipbuilding costs for a national asset.

That just-compensation requirement leaves the owners of seized property no worse off than they were before the taking, by giving them the "full and exact equivalent" of the property seized. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). Just compensation, in other words, equals the "fair market value" of the property in question. *Sheetz v. Cnty. of El Dorado, California*, 601 U.S. 267, 273 (2024).

The Program violates the Fifth Amendment because it takes property—the drug companies' patented products—without just compensation. That is a physical taking; the compelled sale means "forcing the" companies to "turn over physical doses of Eliquis and Xarelto to Medicare beneficiaries at certain prices." Pet.App.53a (Hardiman, J., dissenting).

As Judge Hardiman noted in dissent, the scheme resembles the forced transfer in, *Horne*, 576 U.S. 350. There, the government engaged in a taking by requiring raisin growers to surrender a fraction of their crops to the Department of Agriculture (for either destruction or sale in impoverished countries) as a condition for marketing the remainder of their raisins. *Id*. at 354–55. Similarly here. The government takes the companies' drugs by *requiring them* to transfer ownership of those drugs. And because the forced transfer is made at a rate far below the drugs' fair market value, the companies are denied just compensation. Therefore, the Program violates the Takings Clause. Indeed, the constitutional violation here is starker than in *Horne*. The taking in *Horne* conferred at least *some* benefit on raisin growers: the takings restricted supply and thus increased the value of the farmers' other raisins. Indeed, the fact that the government created the program in conjunction with farmers made it "highly unlikely that" the takings' "economic effect cut[] against the farmers as a class." Richard A. Epstein, *The Unfinished Business of Horne v. Dept. of Agriculture*, 10 NYU J.L. & Liberty 734, 747 (2016). Any "direct benefits" from the program would have "offset the economic burdens imposed." *Id*. The Program offers no such offsetting value to drug companies whose products are taken.

2. Relatedly, the Program violates the unconstitutional-conditions doctrine.

Broadly speaking, that doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgt. Dist.*, 570 U.S. 595, 604 (2013). Often, the doctrine protects the public from governmentally implemented monopoly power. *See* Richard A. Epstein, *Bargaining with the State*, Ch. 4 (1993). One mechanism that governments (and businesses) use to leverage monopoly is "bundling." This technique involves offering or "bundling" two goods together so that they are sold only as a pair, with one desired product and another that is desired less or not at all. When a monopolist precludes the possibility of separate purchases of these items, people must buy both components of the bundle together to get the more desirable one at a cost lower than their perceived combined value.

To illustrate with a simplistic hypothetical, suppose that the government is the sole seller of fruit, separately offering tomatoes for $25 and bananas for $50. The customer values tomatoes at $10 and bananas at $80. If sold separately, he will buy only bananas for a net gain of $30. But, if forced to buy the bundle at $80, his net gain drops to $10, because he values the package at $90 ($10 + $80). Thus, the inefficiency comes from the forced combination that the seller monopolist can impose.

Just this inefficiency emerges in the land-permitting context, when the government uses its monopoly power over permits to bundle a sought-after permit with an unrelated government demand. "By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth

Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605; *accord Nollan v. California Coastal Comm'n,* 483 U.S. 825, 831 (1987). "So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable." *Koontz*, 570 U.S. at 605. "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Id.*

The Court has recognized a similar dynamic in the Spending Clause context. This Court has interpreted that clause, U.S. Const. art. I, § 8, cl. 1, as empowering the government to spend funds in service of public programs. Using this power, the federal government often makes conditional offers to States and private actors, requiring that funding recipients accede to conditions the federal government lacks the power to command directly. Insofar as the recipients "voluntarily" agree to these terms, no constitutional problem arises. *NFIB*, 567 U.S. at 577 (op. of Roberts, C.J.) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). But when the government *coerces* agreement, it exceeds its constitutional authority by achieving indirectly that which it lacks authority to achieve directly. *Id.* at 579–580; *accord South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

The Court's decision in *NFIB* is illustrative. There, the Court held that Congress exceeded its Spending Clause power when it enacted the

Medicaid expansion under the Affordable Care Act. 567 U.S. at 581–82 (op. of Roberts, C.J.); *id.* at 671–91 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). The preexisting "Medicaid program" required participating "States to cover only certain discrete categories of needy individuals." *Id.* at 575 (op. of Roberts, C.J.). "The Medicaid provisions of the Affordable Care Act, in contrast, require[d] States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line." *Id.* at 576. States could, theoretically, opt out of the expansion. But those States that opted out would be stripped of *all* their Medicaid funding, an amount equaling "over 10 percent of a State's overall budget." *Id.* at 581–82 (quotation and citations omitted). That, the Court said, "is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at 582. This operated as a "gun to the head" that vitiated any otherwise-valid consent by participating States. *Id.* at 581.

The reasoning of *NFIB* and the land-permitting cases translates effortlessly to the Program. In all of these contexts, the government wields its monopoly position to extract nominal agreements to acts that would otherwise violate the Constitution. In the land-permitting context, the government extracts transfers of land that could otherwise be taken only with just-compensation. And in *NFIB*, the government used its coercive offer to impose state-run Medicaid coverage that it would lack constitutional authority to mandate directly. Similarly, here: the government, by threatening exclusion from the critical Medicare and Medicaid markets over which it exercises monopsonistic control, unconstitutionally coerces these companies into surrendering their property rights without just compensation. Congress engages in impermissible coercion when it threatens to strip the States of funds equal to 10 percent of their budgets, and it does the same when it requires companies to hand over their products or else face exclusion from programs comprising "*almost half* the annual nationwide spending on prescription drugs." Pet.App.11a (quotation omitted, emphasis added).

B. The Third Circuit's appeal to voluntariness ignores the relevance of monopsony power.

The Third Circuit's reasoning reflects its failure to understand how market power can vitiate the relevance of consent.

1. The Third Circuit ignored foundational economic principle of how bundling undermines voluntary choice.

In its decision below, the Third Circuit began from the following premise: "there is no physical taking when a party gives up private property as part of a voluntary exchange with the government." Pet.App.17a. From there, the Court reasoned that there could be no takings problem under the Program, since drug companies *voluntarily* agree to participate. To quote the court, the companies "face a choice: forgo participation in certain Medicare and Medicaid programs or accept federal reimbursements for selected drugs on less lucrative terms." Pet.App.32a "Economic realities may provide a strong incentive for a manufacturer to choose the latter." *Id*. "But this choice is not a taking." *Id*.

The argument fails. In both private- and public-law settings, "consent" is irrelevant when it is secured by one party's leveraging monopoly power over another.

Start with the private law, and in particular with the contract-law doctrine of duress. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim with no *reasonable* alternative," any agreed-upon contract can be voided. *See* Restatement (Second) of Contracts §175(1) (emphasis added). Critically, the "reasonable alternative" standard "is a practical one under which account must be taken of the exigencies in which the victim finds himself." *Id*. cmt. b. Thus, the *theoretical* option to reject the offer will not suffice where circumstances make rejection infeasible. Critically, for present purposes, the lack of any practical option can arise from a party's *de facto* monopoly power.

S. P. Dunham & Co. v. Kudra, 44 N.J.Super. 565 (N.J. Super. Ct. App. Div. 1957), is a classic case in this line. The defendant, Kudra, cleaned furs that the plaintiff department store (Dunham) agreed to store for its customers during warm-weather months. During a cold snap, Kudra refused to return the furs unless Dunham paid a premium price, unjustified by any change in position. *Id*. at 569. Kudra thus leveraged its monopoly position; it was the only party that could return the coats, and Dunham's relationships with its customers would have been destroyed if it could not return their coats. Even though Dunham agreed to the extortionate demand, the Court held that the store could recover the premium Kudra extorted. *Id.* at 570–71. *See generally* John P. Dawson, *Economic Distress—An Essay in Perspective*, 45 Mich. L. Rev. 253 (1947).

Relatedly, the law finds no voluntary choice when a person agrees to a contract that leaves him better off under conditions of necessity where, as under monopoly, there is only one choice. Consider this Court's decision in *Post v. Jones*, 60 U.S. 150 (1856). The dispute arose when a ship called the *Richmond* was stranded at sea, laden with oil and whalebone. The *Richmond* sold large quantities of its cargo to a rescue ship in a transaction that left her better off than losing everything. Nonetheless, when she returned to port, her owners sued to obtain additional money for the goods sold. Justice Grier, writing for the Court, set aside that auction as a "contrivance" where "the master of the *Richmond* was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission." *Id.* at 159. The Court's opinion rejected the contention that "the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered, than suffer a total loss." *Id.* at 160. To avoid exploitation, the salvor had to accept only reasonable compensation for his services. *Id.* at 160–61.

The same concerns present themselves in public-law contexts. The unconstitutional-conditions doctrine discussed above provides one example. In many contexts, the government acts as a monopolist. It may be, for example, the only entity that can offer a land-use permit to a property owner wishing to engage in new construction. Governments can leverage this position to demand concessions on terms to which they are not otherwise entitled. For example, they can demand the transfer of unrelated land rights—property rights for which they would otherwise have to pay just compensation—in exchange for the permit's issuing. *See Nollan,* 483 U.S. at 831. The unconstitutional-conditions doctrine bars the government from doing so.

The same dynamic appears in numerous other contexts. For example, each State has the power to grant or deny business licenses. May States condition the award of these licenses on businesses' prospectively waiving (for example) their First Amendment right to speak on political matters? Of course not. True enough, property owners in the land-use context, and businesses in the free-speech context, would likely consent to these restrictions on their rights: provided the rights surrendered are worth less than the rights gained, the transaction will be mutually beneficial. But that mutual gain does not *cure* the underlying constitutional problem. Instead, precisely because the government can wield its monopoly power to secure these concessions, consent cannot cure the violations.

Similar insights are fundamental to antitrust law. Most every transaction between a monopolist and a buyer is voluntary, in the sense of being mutually beneficial and non-coerced: there are always consumers who are better off paying the monopoly price than declining to do business with a monopolist. *See* Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* 56 (2011). Critically, however, these willing buyers are still injured by the monopolist's conduct, which increases the prices they now must pay. For that reason, these consumers always have standing to sue for damages under the antitrust law *notwithstanding* their voluntary purchases from the monopolist.

In sum, the law has not traditionally treated as binding any consent secured through monopolistic leverage. There is no reason to apply a different construct in the takings context. Indeed, there is every reason to treat as irrelevant consent extracted via monopolistic leverage: wrongly allowing the government to raise "consent" as a defense to a takings claim would routinely enable the government to evade the Takings Clause altogether. To leave no doubt that such circumvention is improper, the Court should grant *certiorari* and reverse.

2. The Third Circuit's unconstitutional-conditions analysis is risible.

The Third Circuit rejected the companies' unconstitutional-conditions argument, apparently on the ground that the doctrine applies only in "land-use permitting" context. Pet.App.30a–31a. That is wrong as a legal matter; the doctrine applies to rights other than the Takings Clause, and in contexts unrelated to land use. *See, e.g.*, *O'Hare Truck*

Serv., Inc. v. City of Northlake, 518 U.S. 712, 718–19 (1996) (addressing unconstitutional-conditions cases relating to the First Amendment). While the Court has announced *one particular test* applicable to the land-permitting context, that provides no reason for refusing to apply the doctrine to other forced transfers.

Indeed, the Third Circuit's analysis is positively dangerous. If the government is not subject to the unconstitutional-conditions doctrine when it extracts agreements to surrender property outside the land-use context, it will secure broad authority to circumvent the Takings Clause, as addressed in the previous section.

Insofar as the Third Circuit's unconstitutional-conditions analysis rests on the drug companies' nominal consent, it is equally dangerous. Consent does not cure the imposition of unconstitutional conditions. To the contrary, the unconstitutional-conditions doctrine exists to *prevent* the government from leveraging its power to extract voluntary concessions of constitutional rights. If consent were a defense, the doctrine would cease to have any teeth: the government is able to extract concessions *only* when it makes offers to which it knows citizens will consent. Here again, the Court should grant *certiorari* to reject the Third Circuit's misunderstanding of the role played by consent.

CONCLUSION

This Court should grant the petitions and reverse the judgment below.

Respectfully submitted,

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