No. 25-751

IN THE

Supreme Court of the United States

BRISTOL MYERS SQUIBB COMPANY,

Petitioner,

v.

ROBERT F. KENNEDY, JR., SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The statement contained in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The "Medicare Drug Price Negotiation Program" involves many things, but not a negotiation. In real negotiations, "no deal" is always an option: If a buyer's best offer is too low, the seller can walk away. The Program, by contrast, chains drug manufacturers to the table. They *must* "agree" to provide "access" to government-picked products at government-dictated markdowns or face punishments that are far worse: ruinous tax penalties avoidable only by complete withdrawal of *all* their products from the government-controlled half of the U.S. prescription-drug market—the proverbial offer that cannot be refused.

Everything hinges on that point. Despite the government's nothing-to-see-here handwaving, Congress did not authorize CMS to engage in "real negotiation[s]." BIO.18. Instead, it built a choreographed system of pseudo-negotiations—combining sovereign power and monopsonistic tying of non-covered products to covered ones—to create a coercive regime leaving manufacturers no alternative to surrendering basic rights. The Program therefore compels manufacturers' feigned "agreement" to both this deceitful process and its confiscatory results.

This unprecedented property-taking, speech-compelling apparatus defies the constitutional prohibition on the government "indirectly coerc[ing]" what it cannot "directly command[]." *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012) (Roberts, C.J.). To defend the Program, the government therefore must gloss over how it actually works and the "degree of coercion" employed. BIO.26.

One example: Despite referencing the Program's "excise tax" 10 times and suggesting manufacturers can just pay it if they prefer, the government never mentions the staggering sum at issue: up to *1900%* of a drug's sticker price. 26 U.S.C. § 5000D; App.53a & n.1 (Hardiman, J., dissenting). The government nonetheless claims this jaw-dropping penalty does not affect whether the Program is "involuntary." BIO.17.

Another: To pretend the "negotiations" are "real," the government stresses that CMS has accepted a few "revised counteroffers." BIO.11, 18, 26. Yet the government knows full well that given the draconian penalties for not reaching an "agreement" by a fixed deadline, CMS has infinite leverage and complete control over the final "negotiated" price. Pet.6-9. That is why it calls "the determination of a maximum fair price" an "*agency* decision[]." BIO.8 (emphasis added).

Most remarkably, the government frames the Program as no "different from ordinary government contracting." BIO.25. Never mind that CMS press-gangs manufacturers into the Program or that, once drafted, a confiscatory "excise tax" awaits all who fail to "agree." BIO.16. In the government's telling, any objection is just dissatisfaction with Congress's "bargaining terms." BIO.18. Indeed, according to the government, BMS's desire not to be forced to hand over its property at cut-rate prices under threat of crippling penalties is akin to BMS "forc[ing]" the government to buy its drugs "at prices the government is unwilling to pay." BIO.33. Nonsense. *BMS* cannot "dictate" that the government—or anyone else—purchase its drugs. *Id. The government,* by contrast, is now using ruinous penalties to force BMS to hand them over for a pittance.

All this shows why the government cannot defend the Program without falling into the same doublespeak on which it is built. That alone is a powerful indication of the Program's infirmity and the need for this Court's review. In plain English, the Program is a regime that violates the Constitution twice over—by requisitioning drug manufacturers' property under duress, and by forcing them to confess falsehoods about what is happening. Pet.14-27. If it stands, it will imperil all constitutional rights, *any* of which could be extorted through similar regimes combining direct and indirect coercion. Pet.28-31. The Program's economic and scientific implications are equally (and concededly) enormous. Pet.31-33; BIO.33-34. And there is no point in awaiting a future vehicle, when this case cuts straight to the Program's unconstitutional core. Pet.33-35. The Court should grant review and reverse.

I. THE PROGRAM IS UNCONSTITUTIONAL.

As the government practically admits, everything turns on whether the Program is "voluntary." BIO.14, 16-17, 20-21, 25-30. Common sense and longstanding precedent reject that Orwellian description.

A. The Program violates the Takings Clause.

1. The government agrees that it physically takes property whenever it "compel[s]" the owner to "transfer" it to "'someone else.'" BIO.15. The Program does just that. BMS must grant Medicare beneficiaries "access" to Eliquis at CMS's cut-rate prices under threat of severe penalties. Pet.7-9. That extorted "access" is a physical taking. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021); *see Horne v. Dep't of Agric.*, 576 U.S. 350, 356, 361-62 (2015).

Insofar as the government disputes any of this, its talking points fail. Yes, CMS "'trucks'" are not "haul[ing] away" boxes of Eliquis (BIO.16), but the Constitution does not care how an expropriation "comes garbed." *Cedar Point*, 594 U.S. at 149. And yes, CMS can "accept[]" a "counteroffer[]" (BIO.18-19), but the final price is by definition well below market value and thus cannot provide just compensation. Pet.7-8, 16. As for the suggestion that the Program "prohibits selling" products, that could not be more backwards: it "compel[s] the transfer" of BMS's drugs through the threat of ruinous penalties. BIO.15-16; *see* Pet.15.

2. Since the Program's "'substance'" is indefensible, the government retreats to "'shadows.'" *SFFA v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023). Specifically, it invokes manufacturers' "options" besides submitting to the Program. BIO.8, 16-17. But every gun-to-the-head offer includes the "option" of taking the bullet. And here, by design, every "option" is so draconian that no manufacturer could "choose" it, making them paradigmatic examples of the government trying to "do indirectly what" the Constitution prohibits "doing directly." *NRA v. Vullo*, 602 U.S. 175, 190 (2024).

a. To start, the government highlights the manufacturer's "option" of refusing to "negotiate" or "agree." *See* BIO.8. But the consequence? An up-to-1900% "excise tax" on *all* selected-drug sales to *anyone,* whether covered by Medicare or not.*

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* Notwithstanding the government's obfuscation (BIO.8-9), even the panel majority below recognized that Congress imposed "these excise taxes" on "all sales of the drug," "including sales outside of the Medicare system." App.15a-16a.

The government never denies that this is just as legally irrelevant as the "option" of paying the raisin fine in *Horne*. Pet.15. That concession gives the game away, for it is just this "'sword of Damocles'" that coerces manufacturers into the Program's framework. Pet.1-2, 7-9.

b. It is likewise irrelevant that BMS could divest "ownership of the selected drug to another entity and continue to sell other drugs." BIO.8. Under this so-called "option," BMS could avoid being forced to give its property to *certain* third parties (Medicare beneficiaries) by preemptively transferring the property to a *different* third party (another manufacturer) instead. That does not cure the taking; it swaps the transferee.

c. Ultimately, the government, like the panel majority, places all its chips on manufacturers' "option" to "[s]uspend[]" (26 U.S.C. § 5000D(c)) the "excise tax" by "withdrawing" *their entire portfolios of medicines* "from Medicare and Medicaid." BIO.8, 16-17. But requiring BMS to surrender its products or abandon half the U.S. market is just "a choice between the rock and the whirlpool." *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926); *see* Pet.22-26. That follows from both *NFIB*'s exposition of the *structural* anti-coercion principle limiting Congress's spending powers, 567 U.S. at 575-85, and the unconstitutional-conditions doctrine protecting *individual* rights from the same strongarming, Pet.22-26. The core lesson of each doctrine is that "what cannot be done directly because of constitutional restriction cannot be done indirectly" by overwhelming collateral leverage. *Pacific Co. v. Johnson*, 285 U.S. 480, 501 (1932). The government overlooks that bedrock truth.

i. Regarding the spending power, the government begs this Court to ignore *NFIB*. There, as here, the coercive Medicaid expansion used preexisting funding streams to exact compliance with fundamental changes to the original deal. Pet.23. Rather than dispute this, the government brushes *NFIB* aside as a "*federalism*" case—and even quote-mines an inapposite decision to claim "'coercion is wholly irrelevant'" when "'federalism concerns'" are absent. BIO.27; *see Nevada v. Skinner*, 884 F.2d 445, 450 (9th Cir. 1989) (rejecting a State's challenge because Congress could legislate the condition "directly").

This Court's precedents, however, direct that when Congress uses conditional spending to impose conditions it could not legislate, the same coercion "principles" apply for "state and private recipients" alike. *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 374 n.5 (2025). That explains why OLC recently confirmed that the "anti-coercion principle" in "*NFIB*" sweeps beyond "the federal-state context." *Constitutionality of the Presidential Records Act*, 50 Op. O.L.C. __ (Apr. 1, 2026), slip op., at 36. The government therefore ultimately admits that private recipients, too, must be able to "voluntarily" "'consent.'" BIO.27-28. In short, *why* the government cannot do something *directly*—whether the Tenth Amendment, the Fifth, or anything else—is distinct from *whether* it can achieve its unconstitutional ends *indirectly* through coercion.

Here as in *NFIB*, the government cannot. All agree the government cannot directly seize BMS's property, yet the Program achieves the same result indirectly. Pet.21. That BMS's final "option" is a point-for-point copy of what *NFIB* called a "gun to the head," 567 U.S. at 581, only confirms this exaction is not "voluntary."

ii. Similarly, if the unconstitutional-conditions doctrine means anything, it bans leveraging "*all of a manufacturer's sales* to Medicare and Medicaid to coerce its submission to the seizure of *one* product." Pet.24. The government's answer is both unresponsive and frightening. Like the Third Circuit, it rejects *any* form of nexus-and-proportionality scrutiny here—because the Program involves *personal* property instead of "'land-use permitting.'" BIO.30. That cramped view is at war with first principles and settled precedent. Pet.25-26.

Indeed, even the government cannot stomach its absolutist position. Apparently conceding that *some* form of unconstitutional-conditions scrutiny applies, the government ultimately claims the Program's cross-collateralized coercion is allowed because it stays within the same "'scope.'" BIO.28-29. But by any rational yardstick, the Program's scope concerns only *selected drugs*—here, Eliquis—and has nothing to do with BMS's *unselected* drugs. *See* BIO.6 ("only certain drugs are eligible for selection in the … Program"). The Program concerns other drugs solely to hold them hostage to ensure *Eliquis*'s surrender on unconstitutional terms. In fact, this hostage-taking provision is not even a spending condition, but a carve-out to a tax sanction for noncompliance. 26 U.S.C. § 5000D(c).

The government's argument therefore only exemplifies how "the definition of a particular program can always be manipulated to subsume the challenged condition." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 215 (2013) (*AOSI*). Shorn of that ruse, the Program's attempted end-run around the Takings Clause falls squarely within the unconstitutional-conditions doctrine. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013).

B. The Program defies the First Amendment.

The Program also violates the First Amendment by making manufacturers "agree" that they and CMS have "negotiated" the "maximum fair prices" for their drugs. Needless to say, BMS does not "agree" with any of this mandated propaganda. Instead, it believes "the entire negotiating process is a 'charade'" and that a "fair price" is what a willing buyer would pay in a free market. BIO.20. BMS is compelled to betray those beliefs—and thereby condemn itself—only because the IRA's penalties leave it "no choice." App.211a.

The government's claim that this forced expression is "conduct" rather than "expressive speech" (BIO.22-23), cannot be taken seriously, lest First Amendment rights "be renamed away." *Chiles v. Salazar*, 2026 WL 872307, at *9 (U.S. Mar. 31, 2026). The Program is *not* "'typical price regulation'" that incidentally shapes speech by making certain offers illegal. BIO.22. Rather, it "dictate[s] the content of [BMS's] speech" by leveraging crippling sanctions to secure BMS's public "agreement" to a false narrative. *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). First Amendment protection may "not end at the spoken or written word," but it certainly *starts* there. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Nor does the contractual form of BMS's forced confession "deprive [it] of its expressive component." *Doe v. Reed*, 561 U.S. 186, 195 (2010).

Again, the proof is in the pudding. If manufacturers' "agreements" do *not* confess the "negotiations" to be genuine and the result an agreed-to "fair price," why did President Biden use them to claim manufacturers were freely coming "'to the negotiating table'"? Pet.20. Why did CMS bother trying to neuter those messages

(and First Amendment scrutiny) with a clumsy "disclaimer"? BIO.23-24. And why did Congress create this convoluted framework in the first place, except to hide that the "Negotiation Program" runs on government fiat and not actual negotiation? Pet.20.

The government has no answers. Here too, its defense reduces to the claim that the Program involves no "'compulsion,'" despite the draconian penalties for walking away or the extortionate nature of the only (theoretical) escape. BIO.20-21. That argument cannot pass the smell test. By compelling BMS to not only surrender its property but provide political cover for the imposition, the Program violates the First Amendment "by its very nature." *AOSI*, 570 U.S. at 218.

II. THIS CASE DEMANDS REVIEW.

Both legally and factually, the decision below is enormously significant. It not only negates *any limits* on Congress's ability to "leverage" its vast tax-and-spend powers to extort constitutional rights, but ensures less research, less innovation, and fewer critical cures for the patients of the future. Pet.28-33.

The government offers no serious rebuttal to these compelling reasons for review. BIO.31-34. Legally, its dismissal of the disturbing implications of the decision below rests entirely on its see-no-evil depiction of "the nature of this program." BIO.32. But that characterization is radically wrong and distorts the questions at stake. No one disputes Congress can limit Medicare's drug expenditures in any number of lawful ways. Pet.16. No one is saying "bargaining power" is inherently illegitimate, or that the government ever has to buy anything it does not want at any given price. BIO.32-33. This case is about none of that.

Rather, the problem is that Congress wanted to pay far less than drug manufacturers' prices for the most widely prescribed medicines, but feared not just losing access to them but also the political blowback of forcing manufacturers' hands. So it created an unprecedented system—backed with gun-to-the-head sanctions—that *compels* manufacturers to give away their most successful products at bargain-basement prices while confessing the new price as "fair" and "negotiated." By contrast, none of the other schemes the government flags involved, among other things, threatened exclusion from nearly half the Nation's prescription drug market, calamitous financial penalties, and a fundamental change to a preexisting funding relationship on which manufacturers have relied for decades. BIO.17-18, 32-33. Especially given that dramatic "transformation" of Medicare in this area, these previous regimes—accepted without protest—"simply do not fall into the same category as the one at stake here." *NFIB*, 567 U.S. at 584-85. Recognizing this one-of-a-kind framework as unconstitutional will therefore have "no sweeping implications outside" the Program itself. BIO.33.

Rather, the only one without "limiting principles" here is the Third Circuit (BIO.32), which did not deny that Congress pulled at least one gun (the "excise tax") or that this stick-up would be unconstitutional absent any other "option." Pet.11. The Program survived only because the majority below found another "option"—economic exile from half the U.S. market—and held that its existence made acquiescence "voluntary" *per se*, no matter how ruinous or mismatched to the otherwise-unlawful exaction. Pet.28. But a gun to the heart is no better than one to the head.

In the Third Circuit, however, there is now *no problem* with the government "economic[ally] dragooning" *anyone* into surrendering constitutional rights by disproportionately "leverag[ing]" unconnected "funding," unless the target is a State or (maybe) an applicant for a land-use permit. App.26a, 43a. If that is right, the Constitution's "robust protections" are meaningless, because the government can *always* play with the purse-strings to indirectly accomplish what it cannot do directly. BIO.32. The government's response to (only) one of BMS's hypotheticals proves the point: even if the government's intended result might fail strict scrutiny, the "voluntariness" theory below would erase *any* scrutiny for anything packaged as an unrefusable funding condition with an illusory opt-out. *Id.*

As for real-world fallout, the government does not dispute that this case is enormously important for "consumers of pharmaceutical drugs, the companies that provide them, and the public at large." App.90a (Hardiman, J., dissenting). To the contrary, it trumpets (BIO.33-34) the Program's significance, while offering no response to the crushing impacts on pharmaceutical research and development that BMS and numerous *amici* detailed. *E.g.*, Pet.31-33; B.I.O.Br.4-15; Chamber.Br.16-18. Not only are those impacts materializing already, the Program is designed to ensure they metastasize in perpetuity. Pet.33.

The government waves all this away as "harms to manufacturers." BIO.33. But manufacturers' profits on today's cutting-edge products are what fund the innovations of tomorrow. And while the government accuses BMS of trying "to reimpose higher costs," BMS cannot force anyone to buy its products at any price or the government to subsidize any purchases. BIO.34.

III. THIS CASE IS AN IDEAL VEHICLE.

Finally, this case is an ideal vehicle to review the unconstitutional core of the most significant healthcare law in years, built on a combination of constitutional defects never before seen, much less permitted. Pet.34-35. Confirming as much, the government never argues that the lengthy opinions below fail to ventilate the questions presented or that this case suffers from any vehicle problems.

Instead, it vaguely urges "percolation" in light of two pending cases. BIO.34. But those challenges feature "no overlapping claims." Pltfs. Br. iii, *Teva Pharms. USA Inc. v. Kennedy*, No. 25-5425 (D.C. Cir. filed Jan. 9, 2026); *see Nat'l Infusion Ctrs. Ass'n v. Kennedy*, 798 F. Supp. 3d 748 (W.D. Tex. 2025). The government's half-hearted claim that review would be "premature" is therefore as flimsy as they come. BIO.34. BMS does not object to the Court considering this petition with the other pending petitions challenging this unprecedented scheme. Pet.35; BIO.34. But there is no reason to deny review of the Program's core structure simply to see if the government loses on other issues.

CONCLUSION

This Court should grant the petition.

April 8, 2026

Respectfully submitted,

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