Nos. 25-749, 25-751

In the

Supreme Court of the United States

JANSSEN PHARMACEUTICALS, INC.,
Petitioner,
v.

ROBERT F. KENNEDY, JR.,
Secretary of Health and Human Services, et al.,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

January 22, 2026

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Authorizations of Use of Force

Other Authorities

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF advances that mission, in part, by appearing as amicus curiae before this Court to ensure that governments respect constitutional limits on their ability to control private companies. *E.g.*, *Learning Resources v. Trump*, Case Nos. 24-1287, 25-250 (U.S. 2025); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

A common layman's critique of the law is that it amounts to nothing more than tricky word games. Changing a word in a statute, without changing the substantive result, transmogrifies the illegal to the legal, the unconstitutional to the constitutional. Often, that stereotype is flatly wrong—and, indeed, its widespread acceptance perniciously undermines the legitimacy of the judiciary itself. *Cf.* Philip Bobbitt, *Constitutional Interpretation* 184 (Basil Blackwell 1991) (lamenting "the current commentary on constitutional decisionmaking" that "insist[s] on the illegitimacy of our practices").

---

* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. All parties were timely noticed of WLF's intent to file this brief.

But, as the saying goes, broken clocks are not just right twice a day—they are also the only clocks that are always precisely right twice a day.

Take this case: state coercion is not a free and fair "negotiation." The decision below, which plowed through no fewer than three enumerated rights to pretend otherwise—can only be reversed by this Court. The writ ought to be granted so it may do so.

Far from a casual application of Congress's commerce power, the Inflation Reduction Act's Drug Price Negotiation Program forces an uncompensated per se taking, compels speech to no sufficiently vital national interest, and conditions acquiescence through the threat of excessive fines.

Here's how it works:

(a) Congratulations, your company makes a wildly successful drug that lots of people want. But the price seems a little high. So we'd like to "negotiate" a price with you. 42 U.S.C. § 1320f-1.

If you'd rather not engage in that "negotiation," no problem, you have a free choice to either (1) pay a tax on domestic sales of the drug which might "quickly eclipse $1 billion *per day*," 25-751 Pet. 2 (emphasis in original), or (2) cease your company's entire participation in Medicare and Medicaid (not merely for that pesky high-priced drug—but for all drugs). 26 U.S.C. § 5000D; 25-749 Pet. 7.

(b) So, of course, you'll negotiate with us, right? We'll begin by offering a below-market price, and we will generously take into consideration your counter.

We may—or may not (maybe we'll stand pat)—then provide a final offer, 42 U.S.C. § 1320f-3(b)(2), which you can either take by a date certain, *id.*, or face the forementioned company-destroying tax. *Compare* 42 U.S.C. § 1320f-2(a)(1); 26 U.S.C. § 5000D; *with Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 150 (1978) (Rehnquist, J., dissenting) ("Of all the terms used in the Taking[s] Clause, 'just compensation' has the strictest meaning").

(c) Thanks for agreeing to our offer. Before anything can go into effect, you'll need to agree that our fixed price was the freely negotiated "'maximum fair price,'" 25-749 Pet. App. 190a, implying that this amount was reached cooperatively and voluntarily through a fair negotiation. *But see Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

(d) And don't think about reconsidering. If you deviate upward from the price we've set, the federal government will impose an excessive 1,000 percent per-unit levy on the difference between your sale price and our set price, 42 U.S.C. § 1320f-6(a), *and* a $1 million-a-day fine for every day you fail to keep to the code. *Id.* § 1320f-6(c); 25-751 Pet. 9; *but see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (applying the "overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing [targets] into giving them up").

No prudent fiduciary, seeking to return a profit to its shareholders, could do anything but bow before the Secretary's "offer." The Third Circuit found that this posed "no unconstitutional compulsion." 25-749 Pet. App. 41a.

But our Constitution is made of sterner stuff. "The Bill of Rights was designed to fence in the government and makes its intrusions on liberty difficult and its interference with freedom of expression well-nigh impossible." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 72–73 (1963) (Douglas, J., concurring) (capitalization altered). The Secretary cannot violate one enumerated freedom, let alone the First, Fifth, and Eighth Amendments, through magical thinking that pretends his threats are no more than breezy "negotiation."

Worse yet, the Third Circuit blessed the Secretary's position that his compelled-speech mandate was a harmless incidental by relying on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006), a wartime case about raising and supporting the Nation's armed forces. There, the Court properly found intrusions like the occasional notice by a law school's administration that a recruiter would be available in a specific room for a specific time survived constitutional review, 547 U.S. at 61–62, because "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies." *Id.* at 58 (internal punctuation and citation omitted).

But *Rumsfeld* deference has no purchase on the government's coercion of a private actor's speech for wholly domestic, peacetime purposes. The Third

Circuit's militarization of compelled speech caselaw is yet another reason to grant the writ.

ARGUMENT

I. THE "NEGOTIATION" PROGRAM VIOLATES THE CONSTITUTION THREE DIFFERENT WAYS.

"The federal government dominates the healthcare market. Through Medicare and Medicaid, it pays for almost half the annual nationwide spending on prescription drugs." *Sanofi Aventis U.S. LLC v. U.S. Dep't of HHS*, 58 F.4th 696, 699 (3d Cir. 2023).

The Constitution doesn't prevent the federal government from acquiring that astounding share of consumer demand. But "'with great power there must also come—great responsibility.'" *Kimble v. Marvel Entm't*, 576 U.S. 446, 465 (2015) (quoting S. Lee & S. Ditko at 13, Amazing Fantasy No. 15: "Spider-Man" (1962)). So that power can't be abused by resort to compelled speech, uncompensated takings, or excessive fines. U.S. Const. amends. I, V, VIII. Since that's exactly what the Program does, the Court should grant the writ and reverse.

A. The government can't take a company's products without just compensation.

All concede that "Congress could simply pass a law setting drug prices." 25-749 Pet. App. 86a (Hardiman, J., dissenting). But the government can't force that result by effecting an uncompensated taking. "The Constitution . . . is concerned with means

as well as ends." *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015).

Under the Act, if a company declines the government's offer to a pseudo-parley, it faces confiscatory taxation. 26 U.S.C. § 5000D. To avoid that outcome, it must forgo selling into nearly half of the U.S. market for pharmaceutical drugs by withdrawing from Medicare and Medicaid entirely. *Id*. § 5000D(c)(1)(A)(i); 25-749 Pet. 7.

Perhaps—*perhaps*—those sticks could be justified if the underlying negotiation was bona fide. But it's not. A company doesn't really get to freely back-and-forth with the United States. The law presents (at best) a three-move checkmate of offer-counter-final, because the statutory deadline will always compel acceptance of the government's terms to avoid the Act's "enterprise-crippling" sanctions regime. 25-749 Pet. App. 85a (Hardiman, J., dissenting); *cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (Roberts, C.J., controlling) ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head").

If the government physically took possession of a pharmaceutical company's inventory, then sold it directly to consumers at a below-market rate, that would be an uncompensated taking. It still would be uncompensated even if the government turned around and gave the fleeced company every dollar the state had earned on its bargain-basement sales. "Physical appropriations constitute the 'clearest sort of taking,'" and this Court must "assess them using a simple, per se rule: the government *must* pay"—

actual market value—"for what it takes." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148 (2021) (quoting *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001)) (emphasis supplied, capitalization and italics altered); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (Fifth Amendment requires "a full and perfect equivalent for the property taken").

The Act commandeers this same effect—Petitioners' drugs are taken from its inventory at the pointy end of a statute and sold at a fire-sale rate. Just because the Act evokes the appearance of civilized parley to its confiscation, that doesn't excuse the Secretary from complying with the Fifth Amendment. Such "short-cut procedure[s,] which must inevitably result in suppressing" a constitutional guarantee, are verboten. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958).

B. The government can't coerce a private actor to agree that it struck a "fair" bargain.

The government's power to make a private actor salute its work, even indirectly, is microscopic at best. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("Generally, too, the government may not compel a person to speak its preferred messages"); *Wooley*, 430 U.S. at 714 (First Amendment ensures the "right to refrain from speaking").

The Act forces losers of its three-move checkmate (or those who, seeing the inevitable, surrender early) to sign an Addendum with the Center for Medicare and Medicaid Services (CMS) that deems the new price the fair result of free negotiation. 25-749 Pet. App. 190a–92a. Even the

majority opinion below conceded that this mandate has First Amendment import. *Id.* at 36a ("After all, the legal effect of signing a contract does not deprive the signing of its expressive component").

Compelled speech is highly disfavored, even when the government's requested obedience is merely the rote recitation of a technically true statement in the less-protected context of a commercial transaction. *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023). Once the government traipses out of the commercial context into forcing the parroting of opinions about the government, the First Amendment's strictures on state compulsion ratchet even more. *Wooley*, 430 U.S. at 714. For example, Congress couldn't require all public companies above a certain size, regardless of enforcement history, to file an addendum to their Form 10-K attesting that the company "really believes in and supports the current enforcement of the securities laws." That's roughly equivalent to what the Addendum demands here.

This extracted concession of "fairness" is only made worse by the fact that Petitioners don't believe it is. As Judge Hardiman aptly put it, this concession is "*confessing* to having previously charged unfair prices"—and Petitioners don't think their pre-Act pricing was designed to shake down their customers. 25-749 Pet. App. 77a (emphasis supplied). Normally, lying to the government on a federal form is illegal, *see* 18 U.S.C. § 1001, not part and parcel of compliance with a federal statute.

It would be one thing if securing this confession was essential to carrying out the government's lawful

regulation of conduct. Some collateral damage to speech in those circumstances can be unavoidable, and therefore permissible. There is "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of [illegal] narcotics or soliciting prostitutes." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 388 (1973). But it's hardly necessary to a price-fixing scheme for the Secretary to extract a concession that the "negotiated" price is fair and equitable.

The Secretary's interest is to "effectuate the Program," 25-749 Pet. App. 38a, and no government may compel speech "when narrower restrictions on expression would serve its interest as well." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565 (1980). The contracts could simply provide that under the relevant provisions of the Act, the price of a drug will now be X. Because that less-restrictive means is available, the Secretary's mandatory confession requirement should have fallen below. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (voiding commercial speech restriction where the legislature had "the availability" of several "options, all of which could advance the Government's asserted interest in a manner less intrusive to [a company's] First Amendment rights"). Instead, the Third Circuit gave Petitioners' free-speech rights short shrift.

C. The government can't condition compliance with an unconstitutional regime on the threat of an excessive fine.

While "Congress has wide latitude to attach conditions to the receipt of federal assistance in order

to further its policy objectives," *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (Rehnquist, C.J., plurality), "the Constitution's protection is not limited to direct interference with fundamental rights." *Healy v. James*, 408 U.S. 169, 183 (1972) (capitalization altered). Neither Congress nor the Secretary may threaten to "exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006). Nor may they threaten an unconstitutional riposte to ensure compliance with a federal program.

Yet that's exactly what was upheld below. Acceptance of the Program is hardly voluntary, involves the waiver of speech and property rights, and is backstopped by a threat of confiscatory taxation and excessive fines. A targeted company can't avoid being sucked into the Secretary's sham negotiations without risking an "enterprise-crippling" financial burden, and it can't escape after signing without facing ruinous financial penalties—1,000 percent exactions and $1 million-a-day fines. *Tyler v. Hennepin Cnty., Minn.*, 598 U.S. 631, 649–50 (2023) (Gorsuch and Jackson, JJ., concurring) ("Economic penalties imposed to deter willful noncompliance with the law are fines by any other name").

Yet the Secretary thinks he can get away with it, because Eighth Amendment challenges can't be brought "'until the actual, or impending, *imposition* of the challenged fine.'" *Thomas v. Cnty. of Humboldt, Cal.*, 124 F.4th 1179, 1189 (9th Cir. 2024) (quoting *Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995)) (emphasis in original). No corporate control group would ever bet the business on triggering the Act's

exorbitant fines just to ensure standing for an Eighth Amendment claim.

The Court should grant the writ to strip this move out of the government's playbook, and clarify that "the unconstitutional conditions doctrine," which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," applies when the government conditions access to a federal program, like Medicare and Medicaid, by threatening unconstitutional penalties against the noncompliant. *Koontz*, 570 U.S. at 604.

II. THE COURT SHOULD GRANT REVIEW TO RELEGATE *RUMSFELD V. FAIR* TO ITS NATIONAL SECURITY CONTEXT.

The Court should also take this case because the Third Circuit dangerously expanded the scope of *Rumsfeld v. FAIR*. *Rumsfeld* was the lower court's principal case for its holding that the Program's confession mandate "is directed at conduct" not speech. 25-749 Pet. App. 35a; *id*. 34a–35a, 38a (citing *Rumsfeld*).

But *Rumsfeld* was no garden-variety First Amendment dispute. *Rumsfeld* is a case about the capacity of Congress to raise and support the Nation's armed forces—heard by this Court during the early days of the war on terror. *See* Pub. L. 107-40 (Sept. 18, 2001) (authorizing warfare "against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons"); Pub. L.

107-243 (Oct. 16, 2002) (authorizing warfare to "defend the national security of the United States against the continuing threat posed by Iraq" and "enforce all relevant United Nations Security Council resolutions against Iraq").

In that context, *Rumsfeld* reviewed the constitutionality of the Solomon Amendment, which "specifies that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." 547 U.S. at 51. So Congress was acting not merely through its spending powers, but its "'broad and sweeping'" authority "to 'provide for the common Defence,' 'to raise and support Armies,' and 'to provide and maintain a Navy.'" *Rumsfeld*, 547 U.S. at 58 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968) and U.S. Const., art. I, § 8) (brackets omitted). No matter how important Medicare may be, it pales against a Congressional invocation of its core national security powers. "[J]udicial deference is at its apogee when Congress legislates under its authority to raise and support armies"—but not when the government compels domestic speech for plainly peacetime purposes. *Id.* (internal punctuation and citation omitted).

Yet the court of appeals gave *Rumsfeld* deference to just such a speech mandate. The question below was not about whether "the means chosen by Congress add to the effectiveness of military recruitment." *Id.* at 67. Far from it—it was about whether the Secretary could force private companies to say his uncompensated taking of property was free and fair. Treating that question as "a judgment for

Congress," or the Center for Medicare and Medicaid Services, "not the courts" was a gross error. *Id*. We look to the courts, not Congress (let alone CMS), to vindicate constitutional rights. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("[T]he political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text"); The Federalist, No. 78 ("Without [the judicial power], all the reservations of particular rights or privileges would amount to nothing").

Whether it did so knowingly or unknowingly, the Third Circuit's application of *Rumsfeld* deference in a non-national security context cries out for correction. *Rumsfeld* must be confined to cases where Congress is invoking its enormous powers to provide for the common defense, not treated as a breakthrough precedent that silently reversed longstanding, cornerstone First Amendment caselaw against domestic coercion. *E.g.*, *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley*, 430 U.S. at 714; *Cent. Hudson*, 447 U.S. at 565–66. The Court should grant the writ so it may do so.

CONCLUSION

The Program violates three enumerated rights. That's three too many. The Court should grant the writ so it can set things right.

Respectfully submitted,

Cory L. Andrews
Zac Morgan
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
zmorgan@wlf.org

January 22, 2026