

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MERCK & CO., INC., and
MERCK SHARP & DOHME LLC,

Plaintiffs,

v.

XAVIER BECERRA, U.S. Secretary of Health &
Human Services, *et al.*

Defendants.

Civ. No. 1:23-01615 (CKK)

**Plaintiffs' Response to Notice of
Supplemental Authority**

Defendants are correct that the District of New Jersey, in an unpublished decision earlier this week, rejected the same constitutional challenges to the Program that Plaintiffs have advanced here. Dkt. 68. Bristol Myers Squibb Co. and Janssen Pharmaceuticals, Inc. have already noticed appeals from that final judgment. For all of the reasons already laid out in Plaintiffs' briefing, the District of New Jersey's decision is legally erroneous, and this Court should not follow it.

Whether this Court agrees or disagrees with the District of New Jersey, however, Plaintiffs respectfully reiterate their request for a ruling on the pending cross-motions as soon as practicable. As the Court is aware, this case presents serious constitutional challenges to a major, novel federal program. It is a certainty that the non-prevailing party will appeal to the D.C. Circuit, and review by the Supreme Court may well be warranted too. To ensure adequate time for the appellate courts to consider these issues before January 2026, when the Program's regime of forced sales at HHS-dictated discounts is scheduled to take effect for the first set of covered drugs, Plaintiffs ask the Court to give priority consideration to resolving this case—just as the Southern District of Ohio, District of Delaware, and District of New Jersey have done for the related cases that were filed in those courts (and all of which were filed after this case).

Dated: May 3, 2024

Respectfully submitted,

/s/ Yaakov M. Roth

Yaakov M. Roth (D.C. Bar 995090)

Megan Lacy Owen (D.C. Bar 1007688)

Brinton Lucas (D.C. Bar 1015185)

John Henry Thompson (D.C. Bar 90013831)

Louis J. Capozzi III (D.C. Bar 90018764)

JONES DAY

51 Louisiana Avenue N.W.

Washington, DC 20012

(202) 879-3939

Counsel for Plaintiffs