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August 13, 2025

VIA CM/ECF

Patricia S. Dodszuweit
Clerk of Court
U.S. Court of Appeals for the Third Circuit
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *Bristol Myers Squibb Co. v. Kennedy, et al.*, No. 24-1820 (3d Cir.) – Appellant Bristol Myers Squibb Co.'s Response to Government's August 8, 2025 letter concerning *Boehringer Ingelheim Pharmaceuticals, Inc. v. HHS*, No. 24-2092 (2d Cir. Aug. 7, 2025)

Dear Ms. Dodszuweit:

This Court should not repeat the errors of *Boehringer*. There, the Second Circuit held that *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993), dictated that the Program is "voluntary" and, in turn, the rejection of Boehringer's constitutional claims. Op.24-28, 31, 39. But this Court—unlike the Second Circuit—is not bound by *Garelick* (or any similar decision). And under Supreme Court precedent, Program participation is *not* "voluntary." ECF 27 at 42-49; ECF 172 at 6-16. The "choice" between surrendering *one* product at the government's "final word" price (Op.15), or withdrawing *all* products from half the domestic market is "illusory." *United States v. Butler*, 297 U.S. 1, 71 (1936). It exists "in theory" alone. *NFIB v. Sebelius*, 567 U.S. 519 (2012). In dismissing *NFIB* as irrelevant to "private parties," Op.29-30, the Second Circuit both misread *NFIB* and ignored the Supreme Court's recent and repeated admonition that its "spending-power" doctrine applies "similar principles to state and private recipients of federal aid," *E.g.*, *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2233 n.4 (2025); *see* ECF 27 at 40-42; ECF 172 at 12-16.

The Second Circuit further erred in applying the unconstitutional-conditions doctrine. Op.42-46. On the First Amendment side, it overlooked that requiring a funding recipient to express "the Government's view on an issue" is *never* permitted, regardless of the issue's relationship to the funding program. *USAID v. All. for Open Soc'y Int'l*, 570 U.S. 205, 218 (2013); ECF 27 at 45; ECF 172 at 21-22. On the Takings side, it suggested the Program's exaction is permissible merely because it operates "within the four corners of Medicare." Op.46. But courts must examine "nexus and proportionality," *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 275 (2024)—not nexus alone—lest Congress exact property through "coerci[on]," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Far from some special feature of "land use permitting" (Op.46

n.15), a proportionality requirement reflects "the unconstitutional conditions doctrine" more broadly. *Sheetz*, 601 U.S. at 275. In suggesting that even grossly disproportionate conditions are freely allowed within Medicare's "four corners," *Boehringer* errs.

Respectfully submitted,

/s/ *Noel J. Francisco*
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cc: All Counsel of Record

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the body of this letter is 350 words. I relied on my word processor, Microsoft Word, to obtain the count.

I hereby certify that on August 13, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Noel J. Francisco*
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